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DIANE S. DOUGLAS, APPELLANT, V. MARK A. DOUGLAS, APPELLEE.

466 N.W.2d 521

Filed March 8, 1991. No. 89-011.

Appeal from the District Court for Lancaster County, PAUL D. MERRITT, JR., Judge, upon the recommendation of the Appellate Division of the District Court, BUCKLEY, DAVIS, and ILLINGWORTH, District Judges. Reversed and dismissed.

Sandra Hernandez Frantz for appellant.

Paul E. Galter, of Bauer, Galter & O'Brien, for appellee.

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

PER CURIAM.

Having considered the briefs and the recommendation of the Appellate Division of the District Court and upon a de novo review of the record, we find that there is insufficient evidence in the record to sustain the district court's modification of the decree, and its judgment is reversed and the application for modification is dismissed. Appellant is awarded the sum of $300 to be applied to her attorney fees, to be paid by the appellee.

REVERSED AND DISMISSED.

DEBBIE MCCAMISH, APPELLANT, V. DOUGLAS COUNTY HOSPITAL, APPELLEE.

466 N.W.2d 521

Filed March 8, 1991. No. 89-099.

1. **Equal Opportunity: Pleadings: Time: Appeal and Error.** The standard of review applied by the Supreme Court when reviewing a district court's review of an order of the Nebraska Equal Opportunity Commission involving a petition filed prior to July 1, 1989, is de novo on the record.
2. **Fair Employment Practices: Discrimination.** Generally, it is unlawful for an employer to fail or refuse to hire or to discharge any individual with respect to employment because of such individual's disability. Neb. Rev. Stat. § 48-1104 (Reissue 1988).

3. **Fair Employment Practices: Discrimination: Proof.** A complaining employee has the burden of proving a prima facie case of discrimination, and once the employee has succeeded in that respect, the burden shifts to the employer to articulate some legitimate, nondiscriminatory reason for rejection or discharge of the employee. Should the employer carry the burden, the employee must then have an opportunity to 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.
4. _____: _____: _____. In order to establish a prima facie case of discrimination, the employee must show that she or he is a member of a protected class, that she or he is qualified for the position of employment sought, that she or he applied for and was rejected or discharged from that position, and that after she or he was rejected or discharged the job remained open.
5. **Fair Employment Practices.** If an employer desires unequivocal answers to a preemployment health questionnaire, it must ask unequivocal questions.

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

Thomas F. Dowd and Terry L. Inserra, of Thomas F. Dowd & Associates, for appellant.

Ronald L. Staskiewicz, Douglas County Attorney, and Thomas E. Brown for appellee.

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

HASTINGS, C.J.

This is an appeal from the order of the district court which affirmed the decision of the Nebraska Equal Opportunity Commission (NEOC). NEOC found that Debbie McCamish, the plaintiff, had failed to prove that her disability (epilepsy) was unrelated to her ability to engage in her particular occupation. Thus, she failed to prove she was a member of a protected class under Neb. Rev. Stat. § 48-1102(8) (Reissue 1988). Furthermore, the NEOC held that her dismissal by the hospital was justified by a nondiscriminatory reason. We reverse, and remand the cause with directions.

On June 30, 1986, McCamish, then 18 years of age, applied for a position of employment as a food service worker at Douglas County Hospital. She was hired by the defendant, and

began her employment on August 22, 1986. Her duties included filling patients' orders when operating in one of about seven service positions. A separate position is assigned to the type of order being filled, e.g., bread, meat and potatoes, beverages, etc. McCamish places the items on trays. The trays are then placed on carts and taken to the patients. McCamish does not directly serve the patients.

McCamish was dismissed from her position on January 22, 1987, by the director of dietary services, Norma Drake. Drake indicated that McCamish's employment was terminated because McCamish failed to indicate on her preemployment health questionnaire that she had experienced any prior problems with headaches or loss of consciousness. McCamish asserts that she was dismissed simply because she had recently been diagnosed as having epilepsy.

To apply for a job with Douglas County Hospital, an applicant must fill out a health questionnaire. The questionnaire provides that if the applicant falsifies or fails to disclose health problems, the applicant, once hired, will be dismissed from the job. Among the questions asked are whether the applicant has or has had fainting or dizzy spells, balance problems, epilepsy, convulsions or seizures, frequent or severe headaches, and head injuries or loss of consciousness; whether one has consulted or been treated by clinics, physicians, chiropractors, or practitioners in the last 5 years; and whether one has been hospitalized. McCamish responded negatively to all the above questions.

Contrary to her answers on the questionnaire, McCamish had experienced prior episodes of loss of consciousness. The first such occasion occurred in June 1984. At that time McCamish spent roughly 2 to 3 hours in the hospital. The treating physician indicated that she had experienced a seizure. However, Lela Taylor, McCamish's mother, testified that neither the physician nor the hospital staff informed her that her daughter had a convulsion or seizure. The record indicates that no further medical inquiry was made at this time to determine the cause of the alleged seizure. The second period of a loss of consciousness also occurred in the summer of 1984. Again, no medical inquiry was performed to determine the

cause of the "blackouts." McCamish and her mother attributed the incidents to the stress of recently giving her newborn child up for adoption, a lack of proper diet, and fatigue.

During the next 2 years, McCamish did not experience any notable health problems. Hence, prior to filling out the health questionnaire, she did not know or believe that she had a health problem.

In her testimony, McCamish further explained that she answered negatively to ever having experienced a loss of consciousness by stating that she did not consider herself unconscious.

During the period between the time McCamish filled out the health questionnaire and her first day of employment, she experienced a third episode of loss of consciousness, while riding on the back of a motorcycle. McCamish was instructed to take 300 milligrams of Dilantin a day. Dilantin is the trademark preparation of phenytoin. Phenytoin is "[a]n anticonvulsant and cardiac depressant . . . used in the treatment of all forms of epilepsy except petit mal and as an antiarrhythmic." The Sloane-Dorland Annotated Medical-Legal Dictionary 548 (1987).

In a followup visit, McCamish was examined by Dr. Erich W. Streib, a neurologist, on August 4, 1986. Dr. Streib concluded that McCamish had a convulsive disorder and had had an epileptic seizure. A CAT scan was ordered. The scan, taken in November, revealed a large right temporal fossa arachnoidal cyst. The medical opinion was that the seizures could be controlled through medication. However, if the cyst continued to enlarge, it might become increasingly difficult to control the seizures without surgery.

Upon learning of McCamish's condition, Dr. John A. Ursick, medical director at Douglas County Hospital, recommended, on January 20, 1987, that McCamish's employment with the hospital be terminated. Although not exactly sure of McCamish's job duties, Dr. Ursick believed that since McCamish's position as a food service worker entailed the handling of hot foods and hot liquids, her medical condition might jeopardize her safety and the safety of other employees. However, in his testimony before the NEOC, Dr. Ursick

admitted that if McCamish took her medication regularly, she would be able to work without hazard to herself or to other personnel.

Dr. Streib believes that McCamish can safely perform her job duties. He gave as his opinion that if McCamish is going to have a seizure, she will be able to recognize the warning signs which will enable her to avoid kitchen accidents. Furthermore, Dr. Streib contends that the seizures can be "easily controlled" by continued medication.

On February 2, 1987, McCamish was examined by Dr. Daniel L. McKinney. Dr. McKinney agreed with Dr. Streib's assessment of McCamish's convulsion disorder. Dr. McKinney felt that if McCamish continued to take her medication, she would be able to work without hazard to herself or to other employees.

Even Drake admitted that McCamish could work as a food service worker as long as her epileptic condition was controlled. However, Drake terminated McCamish's position at the hospital.

The NEOC ruled that McCamish did not demonstrate by persuasive evidence that her handicap was unrelated to her ability to engage in a particular occupation and, further, that the hospital had a legitimate nondiscriminatory reason for termination which was not rebutted as a pretext for discrimination. The district court affirmed the NEOC's order.

McCamish assigns as error (1) the district court's finding that McCamish was not a member of a protected class because she could not perform the duties of a food service worker due to her handicap of epilepsy and (2) the district court's finding that even if McCamish was a member of a protected class, her discharge was for the nondiscriminatory reason of falsification of a preemployment questionnaire.

The standard of review to be applied by the Supreme Court when reviewing a district court's review of an order by the NEOC involving a petition filed before July 1, 1989, is de novo on the record. *Father Flanagan's Boys' Home v. Goerke*, 224 Neb. 731, 401 N.W.2d 461 (1987); *Harris v. Misty Lounge, Inc.*, 220 Neb. 678, 371 N.W.2d 688 (1985); Neb. Rev. Stat. § 84-918(2) (Cum. Supp. 1990).

The Nebraska Fair Employment Practice Act establishes the state policy on employment and how this policy should be fostered. "It is the policy of this state to foster the employment of all employable persons in the state on the basis of merit regardless of their race, color, religion, sex, disability, or national origin, and to safeguard their right to obtain and hold employment without discrimination . . . ." Neb. Rev. Stat. § 48-1101 (Reissue 1988). To carry forth this policy the Legislature has made it unlawful for an employer to "fail or refuse to hire or to discharge any individual . . . with respect to . . . employment, because of such individual's . . . disability . . . ." Neb. Rev. Stat. § 48-1104 (Reissue 1988).

Under this act, epilepsy and other seizure disorders are characterized as disabilities. However, the epilepsy or seizure disorder must be "unrelated to such person's ability to engage in a particular occupation." § 48-1102(8); *Goerke, supra*. In other words, McCamish's disability must be unrelated to her ability to engage in her particular occupation. Thus, the key inquiry in this case is whether McCamish's condition inhibits her ability to perform her job safely and efficiently. The NEOC and district court concluded that McCamish's disability was related to her ability to perform her job, and therefore, she failed to meet the first element of establishing a prima facie case.

That is to say, a complainant has the burden of proving a prima facie case of discrimination, and once the complainant has succeeded in that respect, the burden shifts to the employer to articulate some legitimate, nondiscriminatory reason for rejection or discharge of the employee. Should the employer carry the burden, the employee must then have an opportunity to 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. *Goerke, supra*.

In order to establish a prima facie case, the employee must show that she or he is a member of a protected class, that she or he is qualified for the position of employment sought, that she or he applied for and was rejected or discharged from that position, and that after she or he was rejected or discharged the job remained open. *Goerke, supra*.

In *Goerke*, the plaintiff was an epileptic, and although he

had a valid driver's license and his job included the driving of boys to various functions and locations, this court concluded that the act did not require the employer to risk the safety of the boys who were to be under his care. This court then held that since the employee's epilepsy was related to his employment duties, he "failed to prove that he is within a protected class and thus has failed to prove a prima facie case of discrimination." *Goerke, supra* at 738, 401 N.W.2d at 465.

McCamish's duties as a food service worker encompass the handling of hot liquids and hot foods. While handling the hot items, McCamish does not have contact with the patients. She simply places the food items on trays. The trays are then placed on carts to be taken to the patients. Thus, unlike the plaintiff in *Goerke*, McCamish does not pose a significant safety threat to those around her. Accordingly, she was qualified for the position of food handler in spite of her disability. See, *Jansen v. Food Circus Supermarkets, Inc.*, 110 N.J. 363, 541 A.2d 682 (1988) (termination of an epileptic employee who was a meatcutter violated New Jersey's law against discrimination); *Rose v. Hanna Mining Company*, 94 Wash. 2d 307, 616 P.2d 1229 (1980) (summary judgment of no discrimination reversed in action by job applicant alleging discrimination because of epilepsy, even though the position involved working above molten metal); *Chicago & N. W. R.R. v. Labor & Ind. Rev. Comm.*, 98 Wis. 2d 592, 297 N.W.2d 819 (1980) (discharging of epileptic employee whose duties included welding on railroad tracks and operating a motor vehicle was unlawful in light of facts that he had not suffered a seizure in 6 months and medication controlled his epilepsy); *Davidson v. Shoney's Big Boy Restaurant*, 380 S.E.2d 232 (W. Va. 1989) (termination of an epileptic restaurant employee violated the employee's rights where the employer did not base the termination on individualized evaluation of the employee's condition and work history).

McCamish has not experienced a seizure during her employment with the hospital. There was testimony that on two occasions McCamish had experienced warning signs of a possible seizure; however, no seizure occurred. Furthermore, aware of the warning signs, McCamish removed herself from

the work environment. Thus, McCamish's work history indicates that she did not pose a threat of creating a risk of substantial harm to herself or to other employees.

It is necessary for us to consider the other reason given by Douglas County Hospital for McCamish's termination, i.e., she falsified her preemployment questionnaire. Douglas County Hospital points particularly to the fact that she answered "no" to the questions, Do you have or have you had "[f]ainting/dizzy spells," "[e]pilepsy, [c]onvulsions or seizures," and "[h]ead injuries/loss of consciousness"?

There is no evidence in the record that McCamish had suffered fainting or dizzy spells. She knew nothing about her having epileptic seizures until she had been diagnosed after she had filled out the employment questionnaire. Have you ever had "[h]ead injuries/loss of consciousness" is a meaningless question. McCamish knew that she had been hospitalized for loss of consciousness, but she had not suffered a head injury. If an employer desires unequivocal answers to a questionnaire, it must ask unequivocal questions. There is no indication of any fraud or deliberate falsification on the part of McCamish.

The judgment of the district court is reversed, and the cause is remanded with directions to enter an order reversing the order of the NEOC in accordance with the mandates of this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

RANDY COLEMAN, APPELLANT, V. CHADRON STATE COLLEGE, APPELLEE.

466 N.W.2d 526

Filed March 8, 1991. No. 89-110.

1. **Summary Judgment.** Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record show that no genuine issue exists as to any material fact or as to the ultimate inferences that may be drawn from any material fact and that, as a matter of law, the moving party is entitled to judgment.

2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, the Supreme Court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Tort Claims Act: Public Officers and Employees: Negligence.** Any claim against the State of Nebraska for money only on account of personal injury caused by the negligent or wrongful act or omission of any state employee while acting within the scope of his or her office or employment must be filed with the Risk Manager of the State Claims Board.
4. **Tort Claims Act: Insurance.** A decision concerning a claim by the state's insurance carrier is not a final disposition of the claim on the part of the State Claims Board.
5. **Tort Claims Act: Notice: Time.** No suit shall be permitted under the State Tort Claims Act unless the State Claims Board has made final disposition of the claim, except that if the board does not make final disposition of a claim within 6 months after the claim is made in writing to the board, the claimant may, by notice in writing, withdraw the claim from consideration of the board and begin suit under such act. Neb. Rev. Stat. § 81-8,213 (Cum. Supp. 1990).
6. **Tort Claims Act: Notice: Limitations of Actions.** Every tort claim permitted under the State Tort Claims Act shall be forever barred unless within 2 years after such claim accrued the claim is made in writing to the State Claims Board in the manner provided by such act. The time to begin suit under such act shall be extended for a period of 6 months from the date of mailing of notice to the claimant by the board as to the final disposition of the claim or from the date of withdrawal of the claim from the board under Neb. Rev. Stat. § 81-8,213 (Cum. Supp. 1990) if the time to begin suit would otherwise expire before the end of such period. Neb. Rev. Stat. § 81-8,227 (Cum. Supp. 1990).
7. **Tort Claims Act: Limitations of Actions: Words and Phrases.** If a person entitled to bring any action under the State Tort Claims Act is, at the time the cause of action accrued, within the age of 20 years, every such person shall be entitled to bring such action within the respective times limited by chapter 25 after such disability is removed. Neb. Rev. Stat. § 25-213 (Reissue 1989). For purposes of § 25-213, one is within the age of 20 years until he or she becomes 21 years old.
8. **Summary Judgment: Pleadings: Appeal and Error.** In reviewing the sustaining of a summary judgment motion, admissions of fact in a pleading are to be treated as established.
9. **Statutes: Legislature: Intent.** When statutory language is ambiguous and must be construed, recourse should be had to the legislative history for the purpose of discovering the lawmakers' intent.
10. **Statutes.** A statute is open to construction when the language used requires interpretation or may reasonably be considered ambiguous.
11. **Tort Claims Act: Legislature: Intent: Limitations of Actions.** The Legislature intended that the period of limitation for filing an action in court pursuant to the State Tort Claims Act should be 2 years.
12. **Tort Claims Act: Limitations of Actions: Notice.** Under the State Tort Claims

Act, the 2-year period of limitation to begin suit is extended for a period of 6 months from the date of mailing of notice to the claimant by the board as to the final disposition of the claim or from the date of withdrawal of the claim from the board under Neb. Rev. Stat. § 81-8,213 (Cum. Supp. 1990) if the 2-year period would otherwise expire before the end of the 6-month period.

13. **Tort Claims Act: Time.** Before suit may be filed in court, a claim may not be withdrawn from the State Claims Board for at least 6 months.
14. **Statutes: Legislature: Intent.** When considering a series or collections of statutes pertaining to a certain subject matter which are in pari materia, they may be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions of the act are consistent and sensible.
15. **Statutes: Appeal and Error.** This court will, if possible, try to avoid a construction of a statute which leads to absurd, unjust, or unconscionable results.
16. **Statutes: Presumptions: Legislature: Intent.** In construing a statute, it is presumed that the Legislature intended a sensible rather than an absurd result. In the exposition of statutes, the reason and intention of the lawgiver will control the strict letter of the law when the latter would lead to palpable injustice or absurdity.
17. **Tort Claims Act: Limitations of Actions.** A claimant who files a tort claim with the Risk Manager of the State Claims Board 18 months or more after his or her claim has accrued, but within the 2-year statute of limitations, has 6 months from the first day on which the claim may be withdrawn from the claims board in which to begin suit.

Appeal from the District Court for Dawes County: PAUL D. EMPSON, Judge. Reversed and remanded for further proceedings.

Scott Ortiz, of Atkins Ferguson Zimmerman Carney, P.C., for appellant.

Raymond E. Walden, of Kennedy, Holland, DeLacy & Svoboda, for appellee.

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

FAHRNBRUCH, J.

Randy Coleman appeals from the summary judgment entered by the district court for Dawes County holding that Coleman's personal injury action against Chadron State College (Chadron) is barred by the State Tort Claims Act's statute of limitations. We reverse, and remand the cause for further proceedings.

In his two assignments of error, Coleman contends that the trial court erred in granting Chadron's motion for summary judgment (1) on the basis that the statute of limitations had run and (2) because there was a genuine issue of material fact as to whether Chadron should be estopped from asserting the statute of limitations.

> Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record show that no genuine issue exists as to any material fact or as to the ultimate inferences that may be drawn from any material fact and that, as a matter of law, the moving party is entitled to judgment. [Citations omitted.]

Joseph Heiting & Sons v. Jacks Bean Co., 236 Neb. 765, 766, 463 N.W.2d 817, 820 (1990). In reviewing a summary judgment, the Supreme Court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Id.*

In his petition, Coleman alleged the following: On April 2, 1984, Coleman was a 19-year-old student at Chadron. While working on a project in the power and energy systems classroom area on that date, Coleman injured his hand. The accident occurred when Coleman, who was carrying a block engine head to a project area storeroom, fell over a dashboard which was lying across the walkway into the storage area. As Coleman fell forward, the engine head came down upon his left hand. The accident resulted in Coleman's suffering a "transection of the flexor digitorum profundus to the long, ring, and middle fingers, and of the flexor digitorum subliminus to the ring finger and a fracture of the proximal phalanx of the ring finger." Coleman underwent an operation in which multiple tenorrhaphies were performed. He further alleged that the injury was permanent, that he had lost physical function in his left hand, that he had incurred medical expenses and would continue to do so, that he had lost his ability to earn, and that he had and would continue to suffer physical and emotional pain and suffering.

On September 8, 1987, Coleman submitted his claim to the Risk Manager of the State Claims Board. Any claim against the

State of Nebraska for money only on account of personal injury caused by the negligent or wrongful act or omission of any state employee while acting within the scope of his or her office or employment must be filed with the Risk Manager of the State Claims Board. Neb. Rev. Stat. §§ 81-8,210 and 81-8,212 (Cum. Supp. 1990). Because the claim was not submitted on a proper form, Coleman resubmitted his claim on a proper form. Notice of receipt of the claim was sent to Coleman's attorney on October 15, 1987. Coleman was advised that a hearing would be scheduled.

Coleman, on March 11, 1988, received a letter from a claims examiner for Argonaut Insurance Company (Argonaut), Chadron's liability insurance carrier. The claims examiner stated that formal documents were being requested, including medical reports and bills and loss wage forms, and that as soon as the documentation was received, the claim would be evaluated and Coleman would be advised of the decision.

In April and May 1988, Coleman submitted the requested documentation to the claims examiner. On June 14, 1988, Argonaut wrote Coleman's attorney, stating, "[W]e are at this time formally denying your client's claim . . . on the premise that your client has failed to either notify the state of the pending claim against them [sic] and/or file a Complaint within the statutory time requirements." A decision concerning a claim by the state's insurance carrier is not a final disposition of the claim on the part of the State Claims Board. See *Davis v. Town of Clatonia*, 231 Neb. 814, 438 N.W.2d 479 (1989).

Coleman's counsel notified the claims board by a letter dated July 5, 1988, that Coleman's claim was being withdrawn from the claims board. In a letter of July 11, 1988, the claims board informed Coleman's attorney that Coleman's claim was withdrawn and that the file was closed.

Coleman filed this action in the district court for Dawes County on August 18, 1988. See Neb. Rev. Stat. § 81-8,214 (Cum. Supp. 1990) (suits may only be brought in the district court). In its answer, Chadron alleged as one of its affirmative defenses that Coleman's action was barred by the applicable statutes of limitations. On December 1, 1988, Chadron moved for summary judgment on the ground that Coleman's claim

was barred by the limitation of action provision contained in Neb. Rev. Stat. § 81-8,227(1) (Cum. Supp. 1990). The court granted Chadron's motion on January 23, 1989, finding that Coleman's lawsuit was not filed within the time required by the State Tort Claims Act and that Chadron was not estopped from asserting the bar of the statute of limitations. Coleman timely appealed that order to this court.

Resolution of this case turns on the interplay of two statutes. While the statutes at issue have been amended since Coleman filed his claim with the Risk Manager of the State Claims Board, the amendments have no effect on the determination of this case. That being true, the most recent codification of those statutes will be cited in this opinion.

> No suit shall be permitted under the State Tort Claims Act unless the State Claims Board has made final disposition of the claim, except that if the board does not make final disposition of a claim within six months after the claim is made in writing to the board, the claimant may, by notice in writing, withdraw the claim from consideration of the board and begin suit under such act.

Neb. Rev. Stat. § 81-8,213 (Cum. Supp. 1990).

The other statute, § 81-8,227, provides in relevant part:

> Every tort claim permitted under the State Tort Claims Act shall be forever barred unless within two years after such claim accrued the claim is made in writing to the State Claims Board in the manner provided by such act. The time to begin suit under such act shall be extended for a period of six months from the date of mailing of notice to the claimant by the board as to the final disposition of the claim or from the date of withdrawal of the claim from the board under section 81-8,213 if the time to begin suit would otherwise expire before the end of such period.

As a threshold matter, the date on which the statute of limitations began to run must be determined. As pertains to this case, Neb. Rev. Stat. § 25-213 (Reissue 1989) provides that

> if a person entitled to bring any action [under] the State Tort Claims Act . . . is, at the time the cause of action accrued, within the age of twenty years . . . every such person shall be entitled to bring such action within the

respective times limited by this chapter after such disability is removed.

For purposes of § 25-213, one is "within the age of twenty years" until he or she becomes 21 years old. *Lawson v. Ford Motor Co.*, 225 Neb. 725, 408 N.W.2d 256 (1987).

Coleman alleged in his petition, and Chadron admitted in its answer, that he was born on December 14, 1964. Coleman was, therefore, under the age of 21 years on April 2, 1984, the date of the accident. He alleged in his petition that the statute of limitations began to run on the date of his 21st birthday, which was December 14, 1985. Accordingly, December 14, 1985, is the date which triggered the running of the statute of limitations. See *Bulger v. McCourt*, 179 Neb. 316, 138 N.W.2d 18 (1965) (in reviewing the sustaining of a summary judgment motion, admissions of fact in a pleading are to be treated as established). Cf. *Miller v. Radtke*, 230 Neb. 561, 432 N.W.2d 542 (1988) (a party may at any time invoke the language of his opponent's pleadings on an issue being tried as rendering certain facts indisputable).

Since we have resolved when the statute of limitations began to run, the question then becomes, What is the period of time in which suit must be commenced? Section 81-8,227 provides that a claim must be filed with the State Claims Board within 2 years after the claim accrued. In several instances in § 81-8,227, reference is made to the "time to begin suit." However, nowhere in § 81-8,227, or for that matter in the entire State Tort Claims Act, is it explicitly provided when a lawsuit must be commenced. Coleman argues that there is no limitation on the time to begin suit under the State Tort Claims Act except that a suit cannot be filed until the State Claims Board has made a final disposition of the claim or the claim is withdrawn after reposing with the claims board for 6 months. Not only is this reading of the statute unwise in light of the policies served by statutes of limitations, it does not conform to the language of the statute. If the Legislature had intended that there be no time limit on the commencement of lawsuits, it would not have provided in § 81-8,227 that "[t]he time to begin suit under such act shall be extended for a period of six months . . . if the time to begin suit would otherwise expire before the end of such

period." As Chadron correctly asserts, "If there is no limit on filing suit, then it would make no sense to provide for extension of the time to begin suit." Brief for appellee at 8. Since the only limitation alluded to in § 81-8,227 is 2 years, it is logical to presume that the Legislature intended that the 2-year limitation also apply to the filing of lawsuits.

"When statutory language is ambiguous and must be construed, recourse should be had to the legislative history for the purpose of discovering the lawmakers' intent. [Citation omitted.]" *Holdrege Co-op Assn. v. Wilson*, 236 Neb. 541, 547, 463 N.W.2d 312, 316 (1990). In this case, the ambiguity is created by the Legislature's reference to the time to begin suit without stating what that time might be. See *Iske v. Papio Nat. Resources Dist.*, 218 Neb. 39, 352 N.W.2d 172 (1984) (a statute is open to construction when the language used requires interpretation or may reasonably be considered ambiguous). In the introducer's statement to the Committee on Judiciary, Senator Luedtke reported that "LB 154 [State Tort Claims Act] provides for a two-year statute of limitations on such tort claim *actions* against the state." (Emphasis supplied.) Statement of Purpose, L.B. 154, 80th Leg. (Feb. 3, 1969). During floor debate on the bill, Senator Luedtke, the principal introducer of the bill, explained:

> [T]here is a two year statute of limitations to bring this lawsuit . . . . The reason I bring this to your attention is, that for torts, by private citizens against private citizens, there is a four year statute of limitations and this will cut that in half . . . and there will only be two years in which you can bring these claims against the State or file suit against the State.

Floor Debate, L.B. 154, 80th Leg. 842 (Mar. 26, 1969).

In view of the statutory language and the clear legislative history, we conclude that the Legislature intended that the period of limitation for filing an action in court pursuant to the State Tort Claims Act should be 2 years. "Legislative intent is the cardinal rule in statutory construction." *Iske, supra* at 41, 352 N.W.2d at 174.

We now reach the crux of this appeal. Under what circumstances, if any, is the time to begin suit under the State

Tort Claims Act extended?

Section 81-8,227 provides that under the State Tort Claims Act, the 2-year period of limitation to begin suit is extended for a period of 6 months "from the date of mailing of notice to the claimant by the board as to the final disposition of the claim or from the date of withdrawal of the claim from the board under section 81-8,213" if the 2-year period would otherwise expire before the end of the 6-month period. Because the State Claims Board never made final disposition of Coleman's claim, arguably only the withdrawal of claim exception is applicable to this case.

If, for example, one filed his or her claim in the 17th month after the claim accrued and withdrew the claim in the 23rd month after it accrued, § 81-8,227 provides that he or she is given an additional 6 months in which to file the suit, as the 2-year period of limitation would otherwise expire during the ensuing 6 months. In this case, Coleman filed his claim approximately 22 months after it accrued and withdrew his claim about 31 months after it accrued. Chadron argues that the time to begin suit is not extended by 6 months because the 2-year statute of limitations would not otherwise expire before the end of the 6-month period. Chadron also argues that the 2-year period in which to begin suit expired before Coleman ever withdrew his claim from the board.

The source of Coleman's predicament is § 81-8,213. As stated, that section mandates that before suit may be filed in court, a claim may not be withdrawn from the State Claims Board for at least 6 months. In order to comply with § 81-8,213, Coleman, who filed his claim with the board in the 22d month after his claim accrued, was prevented from filing his lawsuit in the district court before the 24-month statute of limitations ran. In essence, one statute prevents filing of a claim in court and another section requires filing of that same claim in court. This appears to be a classic example of the "right hand not knowing what the left hand is doing."

In effect, Chadron argues so be it! It asserts, "These fourth-quarter claimants [those who file their claim with the claims board in the final quarter of the 2-year period after the claim accrues] still have a chance of recovery if the State Claims

Board recognizes the merit of their claim, but by waiting so long to start the process, they foreclose themselves from pursuing the claim in court." Brief for appellee at 24. In light of the dilemma posed by §§ 81-8,213 and 81-8,227 under the facts of this case, Chadron's contention fails to comport with common sense.

As an alternative, Chadron advances what it terms "the constructive denial approach." Under this theory, if the State Claims Board fails to act before the time the statute of limitations runs, the claim is constructively treated as if it had been denied, thereby triggering the 6-month extension prescribed in § 81-8,227. Applied to the facts at hand, Chadron argues, "the constructive denial approach" would extend the time to begin suit to June 14, 1988, which is 2 months before suit was filed. However, this approach circumvents the policy of § 81-8,213. The Legislature has dictated that the claims board be given at least 6 months to consider a claim. There can be any number of reasons justifying this legislative choice. For instance, resolution of cases by the claims board may preserve judicial resources and in turn save the state the expense of litigation. That policy would be frustrated if the claims board was completely bypassed.

The issue at hand is one of statutory construction. In resolving that question, we are bound by the following well-established rules. " 'When considering a series or collections of statutes pertaining to a certain subject matter which are in pari materia, they may be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions of the act are consistent and sensible.' [Citation omitted.]" *Pump & Pantry, Inc. v. City of Grand Island*, 233 Neb. 191, 195-96, 444 N.W.2d 312, 316 (1989). This court will, if possible, try to avoid a construction of a statute which leads to absurd, unjust, or unconscionable results. See *In re Boundaries of McCook P.P. Dist.*, 217 Neb. 11, 347 N.W.2d 554 (1984). Accord *Commerce Sav. Scottsbluff v. F.H. Schafer Elev.*, 231 Neb. 288, 436 N.W.2d 151 (1989) (in construing a statute, it is presumed that the Legislature intended a sensible rather than an absurd result). " ' "In the exposition of statutes, the reason and intention of the lawgiver will control the strict

letter of the law when the latter would lead to palpable injustice or absurdity." [Citation omitted.]' " *Rebman v. School Dist. No. 1*, 178 Neb. 313, 318, 133 N.W.2d 384, 387 (1965).

A statutory scheme which precludes one from withdrawing a claim from the State Claims Board and thereby prevents that person from filing suit before the statute of limitations runs leads to absurd, unjust, or unconscionable results. We, therefore, hold that a claimant who files a tort claim with the Risk Manager of the State Claims Board 18 months or more after his or her claim has accrued, but within the 2-year statute of limitations, has 6 months from the first day on which the claim may be withdrawn from the claims board in which to begin suit. This interpretation ensures that effect is given to the legislative intent embodied in §§ 81-8,213 and 81-8,227 and that both are applied in a consistent and commonsense fashion. Furthermore, fourth-quarter claimants are given the same opportunity as those who file earlier to withdraw their claim and file suit within 6 months thereafter.

In applying the foregoing rule to this case, it is clear that Coleman timely filed his claim in the district court for Dawes County. As stated, Coleman's claim accrued on December 14, 1985, his 21st birthday. It is assumed for purposes of argument, but not decided, that Coleman filed his claim on September 8, 1987, when he first submitted his claim to the claims board on the incorrect form. To this is added the 6-month period under § 81-8,213 during which the claims board is given the opportunity to make final disposition of the claim. Thereafter, Coleman had 6 months from the first date on which the claim could have been withdrawn from the claims board to begin suit. Since Coleman's suit was filed in the district court on August 18, 1988, this action was filed well within the 6-month extension in which to begin suit.

We have also examined *Ragland v. Norris P. P. Dist.*, 208 Neb. 492, 304 N.W.2d 55 (1981), and find it distinguishable from this case. In *Ragland*, the defendant political subdivision allegedly caused damage to the plaintiffs' trees in October 1976. It was assumed for purposes of analysis that the plaintiffs filed their claim with the defendant on June 10, 1977. Suit was not filed until June 13, 1979.

At issue was Neb. Rev. Stat. § 13-919 (Reissue 1987), formerly codified as Neb. Rev. Stat. § 23-2416 (Reissue 1977), which provides that claims must be filed with the local governing body within 1 year after they accrue and that suit must be commenced within 2 years after the claim accrues. Like § 81-8,227, § 13-919 permits the statute of limitations to be extended by 6 months from the mailing of notice to the claimant or the withdrawal of the claim, if the time to begin suit would otherwise expire before the end of the 6-month period. This court decided that the *Ragland* claim was time barred, holding that when the governmental subdivision does not act on a claim within 2 years after the claim accrued and the claimant does not withdraw the claim within 2 years after the claim accrued, all suits permitted by the Political Subdivisions Tort Claims Act are barred and the additional 6-month period granted under particular circumstances does not apply.

Although both Neb. Rev. Stat. § 13-906 (Reissue 1987) and § 81-8,213 require that the claim repose for 6 months with a local governing body or the State Claims Board, as the case may be, before it can be withdrawn, the Political Subdivisions Tort Claims Act does not prevent the claimant from filing suit before the statute of limitations to do so runs. This is so because the Political Subdivisions Tort Claims Act permits an additional year after the claim has been filed with the local governing body for suit to be filed. For that reason, *Ragland, supra*, is inapplicable to the facts of this case.

Our decision regarding Coleman's initial assignment of error renders it unnecessary to reach his second assignment of error. The trial court's summary judgment is reversed and the cause remanded to the district court for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V. CHRIS LOHMAN, APPELLANT.

466 N.W.2d 534

Filed March 8, 1991. No. 89-1357.

1. **Convictions: Appeal and Error.** When reviewing the sufficiency of the evidence to support a conviction in a criminal prosecution, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of the witnesses, determine the plausibility of explanations, or weigh the evidence. These are all matters for the jury, and a conviction must be sustained if, viewing the evidence in the light most favorable to the State, there is sufficient evidence to support the conviction.
2. **Jury Instructions: Appeal and Error.** Failure to object to an instruction after it has been submitted to counsel for review will preclude raising an objection on appeal absent plain error indicative of a probable miscarriage of justice.
3. **Sentences: Appeal and Error.** A criminal sentence imposed within the limits prescribed by statute will not be set aside absent an abuse of discretion by the sentencing judge.

Appeal from the District Court for Box Butte County: ROBERT R. MORAN, Judge. Affirmed.

Dean S. Forney, Box Butte County Public Defender, for appellant.

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

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

GRANT, J.

After a jury trial, defendant, Chris Lohman, was convicted of conspiracy to commit theft by deception. His trial was consolidated with that of Michelle Bisby, codefendant and alleged coconspirator. She was also convicted of the same crime. Defendant timely appealed to this court, assigning three errors. Defendant contends that the trial court erred (1) in determining there was sufficient evidence "to find the Defendant guilty beyond a reasonable doubt," (2) in giving instruction No. 4, and (3) in imposing an excessive sentence. We affirm.

The record shows that on January 21, 1989, defendant examined a VCR for possible purchase at the K Mart store in Alliance, Nebraska. On January 22, 1989, at approximately 11

a.m., defendant returned to the K Mart store and purchased the VCR, giving in payment his check in the amount of $449.84.

On the same day, at approximately 3:10 p.m., Bisby, defendant's girl friend and the mother of defendant's child, returned the VCR in the unopened box to the K Mart store and received $449.84 in cash from the store.

Approximately 1 week later, defendant's check was returned to K Mart by the bank. The check was marked by the bank as "Signature Irregular." Other testimony showed the check was insufficient, in that defendant had $38.37 in his bank account on the day of the purchase.

Much of the foregoing was uncontradicted, but defendant did testify that he had not purchased the VCR. Defendant's brother, who was brought to the courthouse from Lincoln, where the brother was serving time in the Nebraska Penal Complex for an unrelated crime, testified that he, not defendant, had purchased the VCR with a check stolen from defendant. Defendant testified he knew nothing about the purchase. Bisby testified that she had indeed returned the VCR and obtained the money, but that she knew nothing about any conspiracy, that she could not remember whether defendant or his brother asked her to return the merchandise, and that she could not remember whether she gave the money she obtained from K Mart to defendant or to defendant's brother.

In considering defendant's first assignment of error, the law is clear. When reviewing the sufficiency of the evidence to support a conviction in a criminal prosecution, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of the witnesses, determine the plausibility of explanations, or weigh the evidence. These are all matters for the jury, and a conviction must be sustained if, viewing the evidence in the light most favorable to the State, there is sufficient evidence to support the conviction. *State v. Johnson*, 236 Neb. 831, 464 N.W.2d 167 (1991); *State v. Thomas*, 236 Neb. 568, 462 N.W.2d 618 (1990).

In this case, the evidence is more than sufficient to support defendant's conviction. Defendant's first assignment is without merit.

Defendant next contends that the trial court erred when

instruction No. 4 was given to the jury. We first note that no objection was made to the instruction, and the law is clear that failure to object to an instruction after it has been submitted to counsel for review will preclude raising an objection on appeal absent plain error indicative of a probable miscarriage of justice. *State v. Lenz*, 227 Neb. 692, 419 N.W.2d 670 (1988); *State v. Ryan*, 226 Neb. 59, 409 N.W.2d 579 (1987). Defendant did not request the court to clarify the instruction, and there was no objection made. On that ground, there was no error in giving the instruction.

Defendant correctly states, however, that a trial court, whether requested or not, must instruct the jury on the law of the case, and the failure to do so constitutes reversible error. *State v. Pierce*, 231 Neb. 966, 439 N.W.2d 435 (1989); *State v. Lenz, supra*. Consequently, we have examined the instruction. The pertinent part of instruction No. 4 states:

> (1) That Chris Lohman and Michelle L. Bisby, with intent to facilitate the commission of the felony crime of theft by deception did, on or about January 22, 1989, in Box Butte County, Nebraska, agree with each other to cause the crime of theft by deception of $449.84 to be committed....

Defendant contends that this instruction is erroneous because the Nebraska proposed criminal jury instructions state that to be guilty of conspiracy, a defendant must agree "with at least one other person to cause" the crime. NJI2d Crim. 3.4 (proposed May 1989). Defendant has assumed the far out position that because the court's instruction required the jury to find that the two conspirators agreed "with each other," the instruction was erroneous. Defendant's position is without merit. The court's instruction may have placed a greater burden on the State than defendant's suggested instruction might require, but how defendant concludes that is unfair to defendant is not understandable. The instruction clearly and precisely sets out the law of the case in question and properly reflects the information filed. Defendant's second assignment is without merit.

Defendant's third assignment—that the sentence is excessive—is similarly without merit. Defendant was charged

with a Class IV felony, for which the penalty is 0 to 5 years' imprisonment, plus a possible fine. Defendant was sentenced to 18 months' imprisonment in the penal complex, with credit for 2 days spent in custody. A criminal sentence imposed within the limits prescribed by statute will not be set aside absent an abuse of discretion by the sentencing judge. *State v. Boppre*, 234 Neb. 922, 453 N.W.2d 406 (1990). The trial court did not abuse its discretion in this case.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. COLUMBIAN M. RODGERS, APPELLANT.

466 N.W.2d 537

Filed March 8, 1991. No. 90-072.

1. **Criminal Law: Pretrial Procedure: Motions to Suppress: Appeal and Error.** In a criminal trial, after a pretrial hearing and order overruling a defendant's motion to suppress evidence, the defendant must perform the additional procedural step of objecting at trial to the admission of the evidence which was the subject of the suppression motion in order to preserve the question of admissibility for appeal.
2. **Trial: Evidence: Waiver: Appeal and Error.** If a party fails to make a timely objection to evidence, the party waives the right to assert on appeal prejudicial error concerning the evidence received without objection.
3. **Trial: Evidence.** Objection to the admission of evidence is not timely unless it is made at the earliest opportunity after the ground for the objection becomes apparent.
4. **Sentences: Appeal and Error.** An order imposing a sentence within the statutorily prescribed limits will not be disturbed on appeal absent an abuse of discretion.
5. **Criminal Law: Controlled Substances.** Possession with intent to deliver a controlled substance is not a victimless crime.
6. **Sentences.** In considering a proper sentence, the trial court is not limited in its discretion to any mathematically applied set of factors. It is necessarily a subjective judgment and includes the observations of the sentencing court as to the demeanor, attitude, and all facts and circumstances surrounding the life of the defendant.

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

Thomas M. Kenney, Douglas County Public Defender, and Cheryl M. Kessell for appellant.

Robert M. Spire, Attorney General, and Denise E. Frost for appellee.

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

FAHRNBRUCH, J.

Columbian M. Rodgers, claiming that the trial court erred in failing to suppress certain evidence and in receiving that evidence at the defendant's trial, appeals his conviction for possession with intent to deliver cocaine.

Rodgers also complains that his sentence of not less than 2 nor more than 5 years' imprisonment is excessive. Rodgers was given 212 days' credit on the sentence for time served while he was awaiting disposition of his case. We affirm.

On October 31, 1989, Rodgers, after waiving a jury trial, was tried before the district court for Douglas County on a charge of possession with intent to deliver a controlled substance (cocaine), a Class II felony, in violation of Neb. Rev. Stat. § 28-416(1)(a) (Cum. Supp. 1988), carrying a penalty of not less than 1 nor more than 50 years' imprisonment. Neb. Rev. Stat. § 28-105 (Reissue 1985).

The State's evidence at trial consisted of a seven-page exhibit of police and laboratory reports, which was received without a timely objection. That exhibit reflected that on June 12, 1989, Daniel L. Clark, an Omaha Police Division officer, was in the area of the Logan Fontenelle housing project, which was known for a high rate of drug trafficking. The officer had made numerous drug arrests there. While patrolling in his cruiser, Clark observed four people, two of whom were sitting on a porch of a unit at the east end of a complex. A third, the defendant, was leaning over the porch with his hands extended. The two people seated on the porch were looking closely at something in Rodgers' hands. Clark suspected that a narcotics transaction was taking place. A fourth person was located 15 feet to the east of the defendant.

When Officer Clark drove his cruiser to the south side of the

project, the fourth person, appearing startled, turned in the direction of Rodgers and shouted "one time." According to Clark, shouting "one time" is used to alert drug dealers that a police officer is near. At that alert, Rodgers turned, looked at Clark, quickly straightened his stance, placed whatever he was holding into his right hand, clenched his right hand into a fist, and quickly walked away from Clark. Rodgers walked toward the north and around a corner of the project unit. As Rodgers rounded the corner of the housing unit, Clark observed the defendant reaching both hands toward the zipper in the front of his pants. Clark left his cruiser and began to approach the defendant. Rodgers was then out of the sight of the officer for 5 seconds. When Rodgers reappeared from around the corner of the housing unit, he walked directly toward Clark and said, "There[']s not any work over here Red." According to Clark, "There[']s not any work" means in street language "There[']s nobody selling crack" cocaine. At that point, Clark observed that the front zipper of Rodgers' pants, where Rodgers had earlier been reaching, was opened wide and that the defendant's pants were spread apart in the zipper area. Clark suspected that Rodgers had hidden contraband in the front of his underwear. Clark patted Rodgers for weapons, but found none. During the pat-down, Clark felt bulges in both front pockets of Rodgers' pants, which bulges Rodgers said were cash. These "wads" of money consisted of several $20, $10, and $5 bills.

Clark directed Rodgers to walk around the corner of the complex, where no one was present. At a suppression hearing, Clark testified he placed Rodgers under arrest for suspicion of possession of a controlled substance with intent to deliver when he took the defendant around the corner of the housing unit. There Clark instructed Rodgers to pull the front of his pants and underwear away from his body. Rodgers complied with Clark's instruction and the officer observed two plastic bags, one containing marijuana and the other crack cocaine, in Rodgers' underwear. Clark then placed Rodgers in handcuffs. Officer Mike Stewart arrived as backup, and both officers began walking Rodgers toward Clark's cruiser. While walking to the cruiser, Rodgers pulled out the bag of marijuana and discarded it. The marijuana was retrieved by Stewart, who gave

it to Clark. Rodgers was then taken to police headquarters, where 35 "rocks" of crack cocaine were confiscated from the underwear Rodgers was wearing.

At police headquarters, Clark informed Rodgers of each of his *Miranda* rights, which the defendant waived. The defendant agreed to talk to the officer and stated that he had been selling cocaine to pay a debt. Rodgers admitted to selling cocaine three times at a ballfield, selling cocaine after his release from the Youth Development Center-Kearney in the summer of 1988, intending to give marijuana to the two people on the porch, and putting the bag of marijuana in his underwear when he went around the corner of the housing unit. The laboratory report confirmed that the items seized were marijuana and 35 rocks of crack cocaine.

After Rodgers was charged with possession of cocaine with intent to deliver, the defendant filed a motion to suppress "any and all evidence obtained" from him because it was obtained subsequent to what he alleged was an "unlawful arrest." After an evidentiary hearing, the trial court overruled Rodgers' motion to suppress. At that hearing, Clark testified that drug dealers in the Logan Fontenelle area hide drugs in their underwear and that he had previously found contraband down the front of dealers' pants on "numerous occasions."

In his first assignment of error, Rodgers claims that the trial court erred in overruling his motion to suppress evidence and in allowing the evidence to be received at the defendant's bench trial over objection. However, the bill of exceptions reveals that no timely objection was made to the State's offer of the police and laboratory reports before they were received in evidence.

In a criminal trial, after a pretrial hearing and order overruling a defendant's motion to suppress evidence, the defendant must perform the additional procedural step of objecting at trial to the admission of the evidence which was the subject of the suppression motion in order to preserve the question of admissibility for appeal. *State v. Cole*, 236 Neb. 269, 460 N.W.2d 665 (1990); *State v. DiBaise*, 232 Neb. 217, 440 N.W.2d 223 (1989).

In Rodgers' case, the trial consisted of the State's offering into evidence exhibit 1, consisting of seven pages of police and

laboratory reports. When the State made its offer, the court asked Rodgers' counsel whether there was any objection to exhibit 1, to which the defense counsel responded, "No, Your Honor." The exhibit was received in evidence. At that point the State rested. The court then asked, "Does the defendant wish to present evidence?" Defense counsel replied,

> No, the defendant does not wish to present evidence, but would object to — renew our motion to suppress that was filed and heard by the Court in September of this year, would renew that motion, and object to the Court's consideration of any evidence regarding drugs found on the defendant as being fruits of an illegal search and seizure.

The defendant's renewed motion to suppress and his objection were subsequently overruled, and the court found the defendant guilty as charged.

If a party fails to make a timely objection to evidence, the party waives the right to assert on appeal prejudicial error concerning the evidence received without objection. *State v. Cole, supra*; *State v. Chapman*, 234 Neb. 369, 451 N.W.2d 263 (1990); Neb. Rev. Stat. § 27-103(1)(a) (Reissue 1989). Objection to the admission of evidence is not timely unless it is made at the earliest opportunity after the ground for the objection becomes apparent. *State v. Giessinger*, 235 Neb. 140, 454 N.W.2d 289 (1990). Clearly, the defendant failed to timely object to the State's evidence. The defendant's motion and objection came after the evidence was received by the trial court. Any issue of an improper search and seizure was not preserved for appeal, and therefore Rodgers' first assignment of error has no merit.

In his second assignment of error, Rodgers claims that his sentence is excessive. An order imposing a sentence within the statutorily prescribed limits will not be disturbed on appeal absent an abuse of discretion. *State v. Hall, ante* p. 169, 465 N.W.2d 150 (1991). Rodgers' sentence was well within the statutory limits and in fact was at the lower end of the prescribed statutory penalty.

Rodgers claims the court abused its discretion in sentencing him. Specifically, Rodgers argues that the court did not

consider in its decision his age, the type of crime, or the crime's lack of violence. See *State v. True*, 236 Neb. 274, 460 N.W.2d 668 (1990). The record does not support Rodgers' contention that these factors were not considered. There is no question that the sentencing judge considered Rodgers' age when he remarked, "All I can do is take into consideration that he is only 16, is salvageable, has got a long life ahead of him." At the time of sentence, Rodgers was within 37 days of being 17 years old. The court also considered the type of crime Rodgers committed, when the court referred to community frustration with the drug epidemic. Finally, the court remarked about the violence and theft associated with the drug epidemic. Rodgers claims that the crime he committed was not an act of violence. While ostensibly true, this court has recognized that possession with intent to deliver a controlled substance is not a victimless crime. *State v. Eary*, 235 Neb. 254, 454 N.W.2d 685 (1990). Additional factors to consider include past criminal conduct. Rodgers' presentence report reflects that the defendant had committed four previous felonies. As a result of his illegal activities, Rodgers had previously been removed from his home on three different occasions.

The factors listed by the defendant are *among* those to be considered in the imposition of a sentence, see *State v. Turner*, 221 Neb. 852, 381 N.W.2d 149 (1986), but there is no mandatory list.

> "[I]n considering a proper sentence, the trial court is not limited in its discretion to any mathematically applied set of factors. It is necessarily a subjective judgment and includes the observations of the sentencing judge as to the demeanor, attitude, and all facts and circumstances surrounding the life of the defendant. . . ."

State v. Dean, ante p. 65, 76, 464 N.W.2d 782, 790 (1991), quoting *State v. Stranghoener*, 208 Neb. 598, 304 N.W.2d 679 (1981). Based on the foregoing standard, we cannot say that the sentence imposed upon Rodgers was an abuse of discretion. Rodgers' second assignment of error is also without merit. The judgment and sentence of the district court are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DANIEL M. HARNEY, APPELLANT.

466 N.W.2d 540

Filed March 8, 1991. No. 90-131.

1. **Jury Instructions: Proof: Appeal and Error.** In an appeal based on the claim of an erroneous instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.
2. **Constitutional Law: Criminal Law: Due Process: Trial: Presumptions.** The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice.
3. **Criminal Law: Due Process: Proof.** Due process in a criminal case requires that the prosecution prove, beyond a reasonable doubt, every factual element necessary to constitute the crime charged against a defendant.
4. **Controlled Substances: Intent.** A defendant possesses a controlled substance when the defendant knows of the nature or character of the substance and its presence and has dominion or control over the substance.
5. **Constitutional Law: Criminal Law: Due Process: Proof: Presumptions: Directed Verdict.** As a result of the constitutional guarantee of due process, including the presumption of innocence and the State's burden of proof beyond a reasonable doubt, a verdict cannot be directed against the defendant in a criminal case.
6. **Motions to Suppress: Juries.** A suppression motion, and a court's disposition of that motion, are irrelevant information in a jury's factfinding function.
7. **Police Officers and Sheriffs.** A certificate for satisfactory completion of a training program relative to Neb. Rev. Stat. § 81-1414 (Reissue 1987) is not a condition precedent to a police officer's execution of official duties as a law enforcement officer.

Appeal from the District Court for Otoe County: RAYMOND J. CASE, Judge. Reversed and remanded for a new trial.

William B. Zastera, Otoe County Public Defender, for appellant.

Robert M. Spire, Attorney General, and Donald E. Hyde for appellee.

HASTINGS, C.J., WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ., and COLWELL, D.J., Retired.

SHANAHAN, J.

Before trial, Daniel M. Harney moved to suppress physical evidence because, as Harney contended, the officers' search of

and obtaining evidence from a vehicle driven by Harney were unreasonable, since the search was not incident to a lawful arrest. After Harney's suppression motion was overruled, a jury in the district court for Otoe County convicted Harney of possessing a controlled substance, lysergic acid diethylamide (LSD), a violation of Neb. Rev. Stat. § 28-416(3) (Cum. Supp. 1988), which provides in part: "A person knowingly or intentionally possessing a controlled substance [e.g., LSD] shall be guilty of a Class IV felony."

On July 28, 1989, Brian Torrence, an officer in the police department for the city of Syracuse, Nebraska, was working the night shift. Around midnight, on patrol in his cruiser, Torrence observed a van being driven erratically; stopped the van; and asked that the van's driver, later identified as Harney, display an operator's license and registration for the van. During this episode, Torrence detected the odor of alcohol on Harney's breath and noticed that Harney's eyes were "glassy and watery." Torrence requested that Harney get out of the van for field sobriety tests. Harney's movement was "in kind of a staggered manner." In response to Torrence's radio call for assistance, two deputies of the Otoe County Sheriff's Department arrived and assisted in administration of Harney's field sobriety tests, which resulted in Torrence's arresting Harney for drunk driving. Torrence then transported Harney to a local hospital to determine the concentration of alcohol in Harney's urine. See Neb. Rev. Stat. § 39-669.07(4) (Reissue 1988).

While Torrence was at the hospital with Harney, the sheriff's deputies inventoried the contents of Harney's van and found a silver container and an unlabeled "pill bottle," both of which contained a substance later determined to be LSD.

In Harney's jury trial, and over his objection, the court gave instruction No. 9: "Possession of a controlled substance or contraband materials can be shown by evidence of a controlled substance or contraband materials being found in an automobile possessed and operated by the defendant, in the absence of any other reasonable explanation for its presence." Additionally, the court instructed that Harney was presumed innocent until proved guilty beyond a reasonable doubt and that the burden of proof concerning all elements of the crime,

including possession of the LSD, remained with the State and never shifted to Harney. The jury found Harney guilty of possessing LSD.

JURY INSTRUCTIONS

As one of his assignments of error, Harney claims that instruction No. 9 placed on him the burden to explain the presence of LSD in the van and, therefore, shifted the burden of proof by requiring Harney to disprove the "possession" element of the crime charged.

"In an appeal based on the claim of an erroneous instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant." *Rose v. City of Lincoln*, 234 Neb. 67, 74, 449 N.W.2d 522, 528 (1989). Accord *Jensen v. Archbishop Bergan Mercy Hosp.*, 236 Neb. 1, 459 N.W.2d 178 (1990). See, also, *State v. Juhl*, 234 Neb. 33, 45-46, 449 N.W.2d 202, 211 (1989):

> With the exception of an erroneous admission or exclusion of evidence, a defendant, as the appellant claiming reversible error in a criminal case, must demonstrate that a trial court's conduct, whether action or inaction during the proceeding against the defendant, prejudiced or otherwise adversely affected a substantial right of the defendant.

"The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice." *Estelle v. Williams*, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976). "The presumption of innocence in favor of the accused is a fundamental component of the due process right to a fair and impartial trial." *U.S. v. Apodaca*, 843 F.2d 421, 430 (10th Cir. 1988). Due process in a criminal case requires that the prosecution prove, beyond a reasonable doubt, every factual element necessary to constitute the crime charged against a defendant. *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); *State v. Kipf*, 234 Neb. 227, 450 N.W.2d 397 (1990).

Under instruction No. 9, Harney's possession of a controlled substance was established by presence of LSD in the van

operated by Harney "in the absence of any other reasonable explanation for [the LSD's] presence." Thus, the instruction informed the jury that Harney's possession of LSD was factually established by mere presence of the controlled substance within the van operated by Harney unless he supplied a "reasonable" explanation for the LSD's presence in the vehicle. Moreover, pursuant to instruction No. 9, unless Harney provided a plausible explanation concerning the LSD within the van, the jury could properly conclude that the State had proved that Harney criminally possessed the controlled substance. "A defendant possesses a controlled substance when the defendant knows of the nature or character of the substance and its presence and has dominion or control over the substance." *State v. Lonnecker, ante* p. 207, 213, 465 N.W.2d 737, 742 (1991). According to instruction No. 9, the jury was authorized to disregard the presumption of Harney's innocence in the crime charged and, further, was warranted in concluding that Harney's criminal possession of LSD was established beyond a reasonable doubt, notwithstanding that the State had the burden throughout Harney's trial to show that Harney knew the nature or character of the substance found in the van, knew about the presence of the LSD within the van, and had dominion or control over the LSD. While a controlled substance's presence in a vehicle operated by a defendant may be a circumstance tending to prove the defendant's knowledge concerning presence of a controlled substance and dominion or control over the substance, cf. *State v. Oldfield*, 236 Neb. 433, 461 N.W.2d 554 (1990), the absence of a defendant's reasonable or plausible explanation for the presence of a controlled substance does not establish the defendant's illegal possession of the substance. Instruction No. 9 not only permitted disregard for the presumption of Harney's innocence in the crime charged, but also effectively shifted the burden to Harney for an explanation to disprove possession and relieved the State from its burden to prove, beyond a reasonable doubt, that Harney knew about the LSD and controlled that illegal substance.

Although the State may suggest that instruction No. 9, read with the instructions on the presumption of innocence and the

State's burden of proof, is not prejudicial, we have stated: "All instructions, read conjunctively, must correctly state the law, adequately state the issues, and not mislead the jury." *State v. Pierce*, 231 Neb. 966, 975, 439 N.W.2d 435, 443 (1989). In Harney's case, to give lip service to the State's burden of proof and require that a defendant disprove, or at least explain, some of the State's evidence is misleading to a jury and would undoubtedly be a source of confusion to the jury, namely, a fact proved through the absence of proof from the defendant.

In light of instruction No. 9, the unexplained presence of LSD factually established Harney's possession of the controlled substance. In sum and substance, by instruction No. 9, the court directed a verdict for the State, namely, Harney's lack of an explanation for the LSD established possession of that controlled substance. As a result of the constitutional guarantee of due process, including the presumption of innocence and the State's burden of proof beyond a reasonable doubt, a verdict cannot be directed against the defendant in a criminal case. *Sandstrom v. Montana*, 442 U.S. 510, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979); *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 97 S. Ct. 1349, 51 L. Ed. 2d 642 (1977); *Brotherhood of Carpenters v. U.S.*, 330 U.S. 395, 67 S. Ct. 775, 91 L. Ed. 973 (1947); *State v. Kipf*, 234 Neb. 227, 450 N.W.2d 397 (1990).

Instruction No. 9 is inconsistent with the presumption of innocence which may be overcome by evidence of guilt beyond a reasonable doubt. Also, instruction No. 9 substitutes a lack or absence of an explanation by a defendant as proof in place of the State's requisite proof on the element of possession in the crime charged. Therefore, instruction No. 9 deprived Harney of a fair trial required under the constitutional guarantee of due process in the trial of a criminal case.

The phrase "in the absence of any other reasonable explanation for its presence," contained in instruction No. 9, was initially expressed in *State v. Rys*, 186 Neb. 341, 346, 183 N.W.2d 253, 256 (1971), a case involving a defendant minor's possession of alcohol found in the automobile driven by the defendant, when this court stated:

> Defendant has offered no explanation of the presence of the bottle of whiskey in his automobile. . . . Ordinarily,

> when liquor, narcotics, or contraband materials are found on a defendant's premises or in an automobile possessed and operated by him, the evidence of unlawful possession is deemed sufficient to sustain a conviction in the absence of any other reasonable explanation for its presence.

The State points out that the preceding language "in the absence of any other reasonable explanation for its presence" was approved in several Nebraska decisions after *Rys*, for example, *State v. Torrence*, 192 Neb. 720, 224 N.W.2d 177 (1974); *State v. Britt*, 200 Neb. 601, 264 N.W.2d 670 (1978); *State v. Harris*, 218 Neb. 75, 352 N.W.2d 581 (1984); *State v. Masur*, 230 Neb. 620, 432 N.W.2d 815 (1988); and *State v. Friend*, 230 Neb. 765, 433 N.W.2d 512 (1988). Error, inveterate and persistently recurrent, is, nonetheless, error. We cannot constitutionally approve or sustain an instruction which requires that a defendant prove innocence by a plausible or reasonable explanation for the presence of a controlled substance or other contraband in relation to the defendant or which relieves the State from its burden to prove possession in a possessory crime charged against a defendant. Consequently, we now explicitly disapprove of "the absence of any other reasonable explanation for [a substance's or contraband's] presence" in an instruction pertaining to a possessory crime or as a circumstance tending to establish a defendant's unlawful possession of a substance or contraband in a possessory crime charged against the defendant.

Since instruction No. 9 prevented a fair trial in Harney's case, we reverse and set aside Harney's conviction.

However, there are other aspects of Harney's case which may recur if Harney is retried. For that reason, we consider some of Harney's other assignments of error.

PROSECUTORIAL MISCONDUCT

During a verbal exchange involving the court and counsel, in the jury's hearing, the prosecutor remarked that Harney had filed a motion to suppress physical evidence. After the jury was excused, Harney's lawyer requested a mistrial, which was refused. A suppression motion, and a court's disposition of that motion, are irrelevant information in a jury's factfinding

function. Since we have already set aside Harney's conviction, we are not obliged to consider whether the prosecutor's conduct justified a mistrial, and we are reasonably confident that in the event of Harney's retrial, there will be no reference in the jury's hearing regarding Harney's suppression motion.

MOTION TO SUPPRESS PHYSICAL EVIDENCE

Officer Torrence became a member of the Syracuse Police Department in March 1989 and, therefore, had been a Syracuse police officer for 4 1/2 months when he stopped Harney's van. Torrence was scheduled to enter the Nebraska Law Enforcement Training Center in January 1990 for the training program available to Nebraska law enforcement officers. Consequently, at the time of the encounter with Harney, Torrence did not hold a certificate evidencing satisfactory completion of a course for law enforcement officers, namely, a certificate issued by the Nebraska Law Enforcement Training Center. See Neb. Rev. Stat. §§ 81-1401 et seq. (Reissue 1987).

Harney argues that while the deputy sheriffs' search of the van may be characterized as a permissible warrantless search incident to an arrest, see *New York v. Belton*, 453 U.S. 454, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981), or an inventory search, see *Colorado v. Bertine*, 479 U.S. 367, 107 S. Ct. 738, 93 L. Ed. 2d 739 (1987), Torrence's lack of a certificate under § 81-1414 disqualified Torrence from status as a law enforcement officer and thereby rendered Harney's arrest unlawful, resulting in an unreasonable search pursuant to Harney's unlawful arrest.

Section 81-1414 provides in relevant part:

> On and after January 1, 1972, no person shall receive appointment as a law enforcement officer unless he has been awarded a certificate by the commission attesting to his satisfactory completion of the minimum curriculum of the training center as established by the commission or has been awarded a certificate attesting to his satisfactory completion of a training program which the commission finds equivalent thereto. Any person who has not been awarded such a certificate may receive an appointment conditioned on his satisfactory completion of such training within one year from the date of his appointment.

If such training is not completed within one year, his employment shall not be renewed by appointment or otherwise.

Whatever else may be the objectives, effects, and ramifications of the statute, in the context of Harney's case, a certificate for satisfactory completion of a training program relative to § 81-1414 is not a condition precedent to a police officer's execution of official duties as a law enforcement officer. Hence, § 81-1414 is inapplicable to Harney's case and did not serve as a proper basis for a suppression motion.

CONCLUSION

Since the district court erroneously instructed the jury, Harney's conviction is reversed, and this matter is remanded for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

BELL FEDERAL CREDIT UNION, APPELLANT, V. KATHLEEN CHRISTIANSON ET AL., APPELLEES.

466 N.W.2d 546

Filed March 8, 1991. No. 90-291.

1. **Administrative Law: Pleadings: Time: Appeal and Error.** When the petition instituting proceedings for review under the Administrative Procedure Act is filed in the district court on or after July 1, 1989, the review shall be conducted by the court, without a jury, de novo on the record of the agency.
2. **Jurisdiction: Appeal and Error.** After an appeal has been perfected in this court, the trial court or any other lower tribunal is without jurisdiction to hear a case involving the same matter between the same parties.
3. **Administrative Law: Pleadings: Time: Judgments: Final Orders: Appeal and Error.** When the petition instituting proceedings for review under the Administrative Procedure Act is filed in the district court on or after July 1, 1989, the judgment rendered or final order made by the district court may be reversed, vacated, or modified by the Supreme Court for errors appearing on the record.
4. **Employment Security: Labor and Labor Relations.** An individual shall be disqualified for unemployment benefits for any week with respect to which the Commissioner of Labor finds that his or her total unemployment is due to a stoppage of work which exists because of a labor dispute at the factory,

establishment, or other premises at which he or she was last employed.

5. **Employment Security: Labor and Labor Relations: Proof.** An employer contesting unemployment benefits has the burden of proving that it suffered a stoppage of work because of a labor dispute.
6. **Employment Security: Labor and Labor Relations: Words and Phrases.** The phrase "stoppage of work" refers to an employer's operations, rather than the employee's labor.
7. **Employment Security: Labor and Labor Relations: Words and Phrases: Proof.** A work stoppage exists when it is proven that there has been a substantial curtailment of work produced by a labor dispute in an employing establishment.
8. **Employment Security: Labor and Labor Relations.** Depending on the facts of the case, various factors become relevant as to the determination of a work stoppage.
9. _____: _____. A work stoppage cannot be determined solely on the basis of the proportionate number of employees affected.

Appeal from the District Court for Douglas County: JERRY M. GITNICK, Judge. Reversed and remanded for further proceedings.

Soren S. Jensen and J Russell Derr, of Erickson & Sederstrom, P.C., for appellant.

Laureen Van Norman and John F. Sheaff for appellee Commissioner of Labor.

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

FAHRNBRUCH, J.

Bell Federal Credit Union (Bell) appeals a district court holding that Bell's striking employees were eligible for unemployment benefits because Bell did not suffer a "stoppage of work" as that phrase is used in the Employment Security Law.

We reverse the holding and remand this cause for further proceedings because the district court for Douglas County used the wrong standard of review and because this court has concluded that as a matter of law, it cannot be said that a work stoppage did or did not occur.

Bell's three assignments of error in substance allege that the district court erred in (1) applying the wrong standard in reviewing the Nebraska Appeal Tribunal's decision, (2) entering an order applying the proper standard of review after an appeal

had already been docketed with this court, and (3) finding that there was competent and substantial evidence to support the appeal tribunal's decision to award unemployment benefits to Bell's striking employees.

Bell is a federally chartered credit union serving 32,000 members. Membership is restricted to individuals who are employed by companies within Bell's field of membership and to relatives of individuals who have an account at Bell. At the time of the strike, Bell had five offices in Omaha, one office in Grand Island, and one office in North Platte.

Before the subject labor dispute, Bell employed 115 people. Twenty-three of those employees were management and support personnel. The remaining 92 Bell employees were members of a bargaining unit which was represented by the Communication Workers of America (CWA).

On May 31, 1989, the contract expired between Bell and its employees represented by the CWA. Fifty-three of the bargaining unit employees struck Bell. The parties stipulated that the workers were unemployed during the period of time from June 12 through June 23, 1989, and that a labor dispute existed during that period of time. The striking employees returned to work on Monday, June 26, 1989.

A number of the striking employees filed applications for unemployment benefits with the Nebraska Department of Labor. Although the record does not state the exact period of time for which the striking employees sought unemployment compensation benefits, it is assumed that the benefits were sought for the period during which the workers were on strike. Benefits were denied by the Deputy Commissioner of Labor on July 14, 1989. On July 31, 1989, that determination was appealed to the Nebraska Appeal Tribunal. A hearing was held before the tribunal on August 28, 1989. The appeal tribunal reversed the deputy commissioner's decision and awarded unemployment compensation benefits to those employees who had applied for them. The decision was served on the parties on October 17, 1989.

On November 13, 1989, Bell filed an appeal from the tribunal's decision in the district court for Douglas County. The district court, on March 2, 1990, affirmed the decision of the

appeal tribunal. However, in affirming the appeal tribunal's decision, the district court asserted, "The standard for review on appeal of such an issue requires that the decision of the appeal tribunal should be affirmed unless it is unsupported by competent and substantial evidence, or is arbitrary or capricious, or the result of an error of law." On March 27, 1990, Bell filed a notice of appeal to this court, along with a docket fee, in the district court.

When the petition instituting proceedings for review under the Administrative Procedure Act is filed in the district court on or after July 1, 1989, the review shall be conducted by the court, without a jury, de novo on the record of the agency. Neb. Rev. Stat. § 84-917(5)(a) (Cum. Supp. 1990). As stated, the petition was filed in district court after July 1, 1989, and the court failed to apply the correct standard of review.

The parties allege that after this appeal was docketed in this court, the district court, on its own motion, set aside its order of March 2, 1990, reconsidered the matter applying the proper standard of review, and entered an order on May 17, 1990, again affirming the appeal tribunal. The district court's docket sheet reflects that the only action taken by the district court after this appeal was docketed was a notice of show cause hearing entered on March 26, 1990. Nonetheless, as correctly pointed out by Bell, any action taken by the district court in this case after this appeal was docketed was void because the district court was divested of jurisdiction. See *Tracy v. United Telephone Co.*, 218 Neb. 331, 353 N.W.2d 273 (1984) (after an appeal has been perfected in this court, the trial court or any other lower tribunal is without jurisdiction to hear a case involving the same matter between the same parties.)

When the petition instituting proceedings for review under the Administrative Procedure Act is filed in the district court on or after July 1, 1989, the judgment rendered or final order made by the district court may be reversed, vacated, or modified by the Supreme Court for errors appearing on the record. Neb. Rev. Stat. § 84-918(3) (Cum. Supp. 1990). It is a logical impossibility for this court to review the district court judgment for errors appearing on the record if the district court incorrectly limited its review and, thus, failed to make factual

determinations, as it must under a de novo on the record review. The district court's and this court's standards of review are interdependent. However, if as a matter of law the evidence was insufficient to demonstrate a stoppage of work, it would not matter that the district court used an improper standard of review because under any standard, a stoppage of work could not be shown. Cf. *Gray v. Fuel Economy Contracting Co.*, 236 Neb. 937, 464 N.W.2d 366 (1991) (although an enhanced burden of proof was imposed by the compensation court panel, this court affirmed the judgment because the evidence was insufficient as a matter of law even under the proper burden of proof).

This court may, therefore, review the record to determine if as a matter of law the evidence was insufficient to demonstrate a stoppage of work.

> An individual shall be disqualified for [unemployment] benefits:
>
> . . . .
>
> (d) For any week with respect to which the commissioner finds that his or her total unemployment is due to a stoppage of work which exists because of a labor dispute at the factory, establishment, or other premises at which he or she was last employed . . . .

Neb. Rev. Stat. § 48-628 (Cum. Supp. 1990).

The parties stipulated that there was a "labor dispute" within the meaning of § 48-628(d). The entire focus of this appeal is on whether Bell suffered a "stoppage of work" as used in § 48-628(d). An employer contesting unemployment benefits has the burden of proving that it suffered a stoppage of work because of a labor dispute. See *IBP, inc. v. Aanenson*, 234 Neb. 603, 452 N.W.2d 59 (1990).

The phrase "stoppage of work" refers to an employer's operations, rather than the employee's labor. *George A. Hormel & Co. v. Hair*, 229 Neb. 284, 426 N.W.2d 281 (1988). "[A] work stoppage exists when it is proven that there has been a substantial curtailment of work produced by a labor dispute in an employing establishment. [Citations omitted.]" *IBP, inc., supra* at 610-11, 452 N.W.2d at 64. In *George A. Hormel & Co., supra* at 289, 426 N.W.2d at 284, this court stated:

> "Substantial" has been defined to mean "material," "important," "massive," or "considerable in amount." [Citation omitted.] Accordingly, it becomes difficult to fix any definitive standard by which to gauge when a stoppage of work starts or stops.
>
> In adopting this approach, its effect was to require a case-by-case review of the particular facts and circumstances unique to each case, because we adopted a fluid test to determine when a *substantial* curtailment of work commences, and we remain convinced that this commonsense approach is both logical and reasonable and is the interpretation and application under similar statutes of other jurisdictions. [Citation omitted.]

(Emphasis in original.) See, also, *IBP, inc., supra* (declining to adopt a rigid rule that when a certain percentage decrease in an employer's operations is shown, there is a per se work stoppage). Depending on the facts of the case, various factors become relevant as to the determination of a work stoppage. For example, in *IBP, inc., supra*, which involved a beef slaughtering and processing plant, this court looked to the levels of production, the number of workers employed at the plant, and the number of hours they worked while the dispute was in progress. See, also, *O.C.A.W. UN., Loc. 1-1978 v. Emp. Sec. Div.*, 659 P.2d 583 (Alaska 1983) (citing factors of decreased production, business revenue, service, number of employees, payroll, or man-hours). In other situations where a tangible good is not produced, additional and/or different factors are germane. See, e.g., *Westinghouse Broadcasting Co., Inc. v. Director of the Div. of Employment Security*, 378 Mass. 51, 389 N.E.2d 410 (1979) (broadcasting); *Gas Co. v. Hatcher, Clerk*, 147 W. Va. 630, 130 S.E.2d 115 (1963) (natural gas), *overruled on other grounds*, *Lee-Norse Co. v. Rutledge*, 291 S.E.2d 477 (W. Va. 1982). In the final analysis, the considerations relevant to the determination of a stoppage of work will depend on the unique business involved in a particular case.

As recalled, Bell was composed of seven offices. The first question is whether the offices are to be treated separately or as one unit in determining whether Bell suffered a stoppage of

work. In *IBP, inc., supra*, it was argued that although work ceased at the plant at issue, a work stoppage did not occur because substantially all of the plant's production was absorbed by other IBP plants which operated functionally interdependently. That argument was rejected, and this court construed "establishment," under the facts of the case, to mean the single plant at which operations ceased.

Karen Buche, Bell's vice president of personnel, testified that the North Platte office was not affected by the labor dispute, but that the location at Grand Island was affected by the dispute. No explanation was given as to what was meant by "affected," and no other evidence was offered regarding operations at the Grand Island location.

Two of Bell's Omaha branch offices were closed. A total of five persons were employed by Bell at the two locations. Of the five employees, only one went on strike. Buche testified that the offices were closed to enable the employees to be shifted for work at another facility. All of Bell's facilities were affected by the transfer of employees. Moreover, the closed branch offices were located in telephone company facilities at which members of the same union which struck Bell were employed. From this, the district court, as the fact finder, could reasonably infer that the two branch offices were closed to avoid causing labor strife at the facilities in which they were located. It is for the district court to determine as a factual matter whether the closed branch offices suffered work stoppages because of a labor dispute localized at those establishments.

Out of 115 people employed by Bell, 53 persons went on strike. Buche testified that three temporary workers were hired during the period of the strike. Buche further testified that 14 persons were hired for temporary work in the period of time after April 1 but before the onset of the strike, and that a total of 16 temporary workers were employed during the strike period. The record is silent as to the discrepancy in the number of temporary workers employed during the strike. While Buche denied that the workers were hired to take the place of striking workers, she stated that none of the temporary workers who were providing services during the strike were permanently hired by Bell and that the temporary personnel attempted to do

the work normally performed by the bargaining unit employees.

A work stoppage cannot be determined solely on the basis of the proportionate number of employees affected. As the court in *Gas Co., supra* at 639-40, 130 S.E.2d at 121, explained:

> It is conceivable that in some situations a strike or lockout affecting relatively few employees would produce a stoppage of work if such men were employed in the performance of duties of such vital nature that their unemployment would result in a substantial curtailment of the normal overall activities or operations of the employer. On the other hand, in other situations the unemployment of a proportionately greater number of employees might have no substantial effect on the normal activities of the employer.

We, therefore, do not view the evidence regarding the number of Bell workers separated from employment during the strike as decisive. It is the effect on Bell's operations which is more telling. Bell was composed of the following departments: teller, customer service (Instafacts), accounting, loans, marketing, collections, personnel, real estate loans, and student loans. Bell continued operations in its teller, Instafacts, and loan departments. In the process of staffing those departments by shifting employees, Bell discontinued operations in other departments. Those areas of operation which were continued were the areas in which Bell had contact with its members (customers). There was evidence that a credit union primarily profits through its teller and loan areas. The personnel, collection, and marketing departments terminated their operations entirely.

Buche testified that any credit union member who sought a loan was able to make an application during the strike. A small number of loan applications were processed. Loan records were not filed at any Bell location during the time in question. An exhibit showing total approved loans for January through June 1989 in one of Bell's major branch offices reflects that in terms of the number of loans approved, June was the third highest month and that June had the second highest monthly total for approved loans in terms of dollar amounts.

Buche testified that Bell did not have a full staff in the teller area at any location and that teller transactions were reduced by 15 to 20 percent. Buche was unable to state if any of Bell's members were denied an opportunity to make a deposit or withdrawal because of the decreased teller staff. She testified that deposits and withdrawals could be made by means of an automated teller machine or by mail. Kathleen Christianson, the chief steward on the union executive board representing Bell's employees, testified that it was suggested to members of her union and other unions to boycott the tellers by using their automated teller machine cards. Christianson also testified that this practice would decrease teller transactions.

The Instafacts department provides various services to Bell's members, such as providing general and account information, transferring funds, placing "stop payment" orders on checks, and estimating loan payments. The Instafacts department was closed for 2 1/2 days at one of the Omaha branches. Buche did not have any personal knowledge that any Bell member who made an inquiry to the Instafacts department was denied information.

Buche testified regarding a number of areas in which work ceased or was substantially decreased during the strike period. There was no building maintenance performed. Monitoring of overdrawn accounts ceased. No invoices were paid. Bell was unable to provide new or replacement automated teller machine cards. Tracking changes to Bell's members' accounts was limited to stop payment orders on checks. There was evidence that sales of accident and health insurance, travelers checks, and money orders were limited. Bell was unable to perform any work with respect to bad checks.

Buche testified that Bell could not have continued operations and that the National Credit Union Administration, which is Bell's governing agency, expressed concern to Bell about its efficient and proper operation during the strike. However, in a June 20, 1989, letter to Christianson, Bell's president-treasurer, while acknowledging that Bell could not operate indefinitely with temporary employees, wrote Christianson that Bell "is operating at a reduced but satisfactory level."

In view of the fluid test which this court has adopted and the

issues of material fact present in this case, this court cannot determine as a matter of law whether a work stoppage occurred. Therefore, the cause must be remanded to the district court for Douglas County for a de novo review of the record.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

ASA LEE DALE, APPELLANT, V. THOMAS FUNERAL HOME, INC., APPELLEE.

466 N.W.2d 805

Filed March 15, 1991. No. 88-912.

1. **Trial: Evidence: Directed Verdict: Motions to Dismiss: Words and Phrases.** A "prima facie case" means that evidence sufficiently establishes elements of a cause of action and, notwithstanding a motion for a directed verdict in a jury trial or a motion to dismiss in a nonjury trial, allows submission of the case to the fact finder for disposition.
2. **Actions: Mental Distress.** The elements of a cause of action for intentional infliction of emotional distress are (1) the defendant's intentional or reckless conduct (2) which is so outrageous and so extreme that the conduct goes beyond all possible bounds of decency and is regarded as atrocious and utterly intolerable in a civilized community and (3) which causes emotional distress so severe that no reasonable person is expected to endure that severe emotional distress.

Appeal from the District Court for Douglas County: THEODORE L. CARLSON, Judge. Affirmed.

Robert E. O'Connor, Jr., of Robert E. O'Connor & Associates, for appellant.

David M. Woodke and Lynn A. Mitchell, of Gross & Welch, for appellee.

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

SHANAHAN, J.

Asa Lee Dale sued Thomas Funeral Home, Inc., for intentional infliction of emotional distress resulting from a

refusal to release the corpse of Dale's husband until an embalming bill was paid. The district court directed a verdict for Thomas. Dale appeals, and we affirm.

STANDARD OF REVIEW

> A party against whom a motion to dismiss is directed is entitled to have all relevant evidence accepted or treated as true, every controverted fact as favorably resolved, and every beneficial inference reasonably deducible from the evidence. [Citation omitted.]
>
> "A court cannot decide an issue as a matter of law unless the facts adduced on an issue are such that reasonable minds can draw but one conclusion from the evidence. [Citation omitted.] In a jury trial, when evidence compels but one reasonable conclusion regarding an issue or question in the litigation, a court can properly direct a verdict on such issue or question."

Burns v. Veterans of Foreign Wars, 231 Neb. 844, 850, 438 N.W.2d 485, 489-90 (1989). Accord, *Anderson v. Union Pacific RR. Co.*, 229 Neb. 321, 426 N.W.2d 518 (1988); *Rahmig v. Mosley Machinery Co.*, 226 Neb. 423, 412 N.W.2d 56 (1987).

A "prima facie case" means that evidence sufficiently establishes elements of a cause of action and, notwithstanding a motion for a directed verdict in a jury trial or a motion to dismiss in a nonjury trial, allows submission of the case to the fact finder for disposition. See, *State v. Copple*, 224 Neb. 672, 401 N.W.2d 141 (1987); *White v. Abrams*, 495 F.2d 724 (9th Cir. 1974).

BACKGROUND

On June 11, 1985, Dale's husband died. After the Dale family contacted Thomas for burial arrangements, Thomas obtained the corpse and permission to embalm. On June 12, Dale and members of her family met with Janet Caston, the funeral director at Thomas, to discuss funeral options and costs. Dale's only funeral funds were proceeds from two $500 life insurance policies on Dale's husband. Those policies were delivered to Thomas. When Thomas indicated that the cost of the funeral would be $2,800, Dale realized that she was unable to afford Thomas and decided to seek another funeral home

which might provide less expensive arrangements.

On June 14 or 15, Dale telephoned Caston, asked how much she owed Thomas, and told Caston that another funeral home would handle the burial arrangements. Caston replied that Dale owed $490 for embalming the corpse of Dale's husband and that the debt must be paid in cash, not by check, before Thomas would release the embalmed corpse. Dale offered to allow Thomas to retain one of the $500 insurance policies in exchange for release of the corpse, but Caston refused. When the embalming bill was paid, Thomas released the corpse, which was buried on June 24.

Dale testified regarding her conversation with Caston and the refusal to release the corpse:

> Q. How did that make you feel, Mrs. Dale?
>
> A. . . . I felt terrible, awful. I didn't even know which way to go. I couldn't sleep. I couldn't eat or nothing. Just made me so nervous and everything.
>
> . . . .
>
> Q. Did you try to get help from others?
>
> A. Well, no. I started once to ask my brother but I wouldn't because I didn't want to, you know, ask nobody to help us get him put away.
>
> . . . .
>
> Q. Did it all embarrass you?
>
> A. Yes, it did, terrible.
>
> . . . .
>
> Q. Mrs. Dale, could you describe for the Court and jury what type of emotional problems you had as a result of the actions of the Thomas Funeral Home?
>
> A. Well, I don't — exactly, I had been, you know, worried about, you know, his death and then I couldn't get his body put away.
>
> Q. Did it bother you tremendously that you couldn't get his body put away?
>
> A. Yeah, because he — I wanted my sisters and brothers, she was here, they left their jobs to come here for the funeral and they wasn't able to stay, they had to go back.

Dale never sought medical or psychological treatment or

assistance on account of the Thomas incident.

In view of the evidence, Thomas moved for a directed verdict, which was granted, resulting in dismissal of Dale's action.

ASSIGNMENTS OF ERROR

Dale contends that the district court committed reversible error in granting a directed verdict for Thomas and dismissing Dale's action.

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

The elements of a cause of action for intentional infliction of emotional distress are (1) the defendant's intentional or reckless conduct (2) which is so outrageous and so extreme that the conduct goes beyond all possible bounds of decency and is regarded as atrocious and utterly intolerable in a civilized community and (3) which causes emotional distress so severe that no reasonable person is expected to endure that severe emotional distress. *Pick v. Fordyce Co-op Credit Assn.*, 225 Neb. 714, 408 N.W.2d 248 (1987); *Gall v. Great Western Sugar Co.*, 219 Neb. 354, 363 N.W.2d 373 (1985). See, also, *Hassing v. Wortman*, 214 Neb. 154, 333 N.W.2d 765 (1983) (plaintiff must show that the distress caused by the defendant's conduct is more than mere worry, anxiety, vexation, or anger); *Davis v. Texaco, Inc.*, 210 Neb. 67, 313 N.W.2d 221 (1981) (plaintiff must show extreme emotional response to the defendant's conduct). Cf., *Pick v. Fordyce Co-op Credit Assn., supra* (a sleepless night and humiliation, by themselves, do not establish severe emotional distress); *Mindt v. Shavers*, 214 Neb. 786, 337 N.W.2d 97 (1983) (plaintiff suffered a personality disorder as a result of distress caused by the defendant's conduct).

Accepting the truth of all relevant evidence and construing the evidence most favorably to Dale, we conclude that Dale failed to prove a prima facie case of intentional infliction of emotional distress.

Under the circumstances, Thomas' conduct may be characterized as the nadir of crass commercialism and intentional or reckless conduct which was so outrageous and extreme that the conduct exceeded the bounds of decency and

toleration in a civilized community.

However, one of the elements in the cause of action for intentional infliction of emotional distress is distress so severe that no reasonable person is expected to endure that severe emotional distress. Although Dale was understandably and unquestionably perturbed, worried, and upset, the only reasonable conclusion deducible from the evidence is that Dale failed to establish that her emotional distress was so severe that no reasonable person could be expected to endure that severe emotional distress. Hence, Dale failed to prove a prima facie case based on intentional infliction of emotional distress and, therefore, was not entitled to have her case submitted to the jury. For that reason, the district court properly directed a verdict for Thomas. Accordingly, we affirm the district court's judgment and dismissal of Dale's action.

AFFIRMED.

DONALD LAIRD, APPELLEE, V. THE SCRIBNER COOP, INC., APPELLANT.

466 N.W.2d 798

Filed March 15, 1991. No. 88-992.

1. **Judgments: Appeal and Error.** In reviewing the trial court's judgment in an action at law, the Supreme Court does not reweigh the evidence but, instead, considers the evidence in the light most favorable to the successful party, with conflicts resolved in favor of the successful party, who is entitled to the benefit of every inference which can reasonably be deduced from the evidence.
2. _____: _____. The conclusion of the trial court in an action at law will not be set aside unless clearly wrong.
3. **Uniform Commercial Code: Words and Phrases.** Corn is a commodity which is included under the definition of goods under the Uniform Commercial Code.
4. **Uniform Commercial Code: Sales: Vendor and Vendee: Warranty.** When a seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is, unless excluded or modified under Neb. U.C.C. § 2-316 (Reissue 1980), an implied warranty that the goods shall be fit for such purpose. Neb. U.C.C. § 2-315 (Reissue 1980).
5. **Uniform Commercial Code: Sales: Vendor and Vendee: Breach of Warranty:**

Proof. In order to recover under a warranty of fitness for a particular purpose a buyer must show that (1) the seller had reason to know of the buyer's particular purpose in buying the goods, (2) the seller had reason to know that the buyer was relying on the seller's skill or judgment to furnish appropriate goods, and (3) the buyer, in fact, relied upon the seller's skill or judgment.

6. **Uniform Commercial Code: Sales: Contracts: Warranty.** Unless excluded or modified under Neb. U.C.C. § 2-316 (Reissue 1980), a warranty that goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Neb. U.C.C. § 2-314(1) (Reissue 1980).
7. _____: _____: _____: _____. Goods, to be merchantable, must be at least such as (1) those which pass without objection in the trade under the contract description; (2) in the case of fungible goods, are of fair average quality with the description; (3) are fit for the ordinary purposes for which such goods are used; and (4) run, within the variations permitted by the agreement, of even kind, quality, and quantity with each unit and among all units involved. Neb. U.C.C. § 2-314(2) (Reissue 1980).
8. **Uniform Commercial Code: Sales: Vendor and Vendee: Breach of Warranty.** For a buyer to have a claim under Neb. U.C.C. § 2-314 (Reissue 1980) the seller must be a merchant.
9. **Uniform Commercial Code: Words and Phrases.** A "merchant" is a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill. Neb. U.C.C. § 2-104(1) (Reissue 1980).
10. **Uniform Commercial Code: Sales: Vendor and Vendee: Breach of Warranty: Proof.** After goods are accepted, the buyer has the burden of establishing any breach with respect to those goods. Neb. U.C.C. § 2-607(4) (Reissue 1980).
11. _____: _____: _____: _____: _____. In order to prove that goods are unmerchantable, generally, the buyer must first establish the standard of merchantability in the trade.
12. **Uniform Commercial Code: Sales: Vendor and Vendee: Breach of Warranty: Proof: Expert Witnesses.** When a defect in merchantability is obvious to a layperson, it may not be necessary for the buyer to provide expert testimony as to the standard of performance of a product.
13. **Uniform Commercial Code: Sales: Vendor and Vendee: Tender: Breach of Warranty: Notice.** When a tender of goods has been accepted, the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of the breach or be barred from recovery. Neb. U.C.C. § 2-607(3) (Reissue 1980).
14. **Uniform Commercial Code: Sales: Vendor and Vendee: Breach of Warranty: Damages.** Consequential damages resulting from a seller's breach include any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise. Neb. U.C.C. § 2-715(2)(a)

(Reissue 1980).

15. **Uniform Commercial Code: Damages.** The foreseeability of consequential damages, as a general rule, is an issue of fact to be determined by the fact finder.

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

Scott J. Norby, of Crosby, Guenzel, Davis, Kessner & Kuester, for appellant.

Steven M. Lathrop, of Hauptman, O'Brien, Wolf & Hadley, P.C., for appellee.

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

HASTINGS, C.J.

The Scribner Coop, Inc. (Coop), the defendant, has appealed a judgment in the amount of $52,330.85 entered in favor of Donald Laird, the plaintiff, arising out of a lawsuit for breach of warranties of merchantability and of fitness for a particular purpose.

Laird operates his own hog breeding operation, which he described as a "farrow to finish" program. Laird has a bachelor of science degree in animal science from the University of Nebraska. He had been employed at the university's swine research center, had managed a feed mill in North Platte, had been employed as a herdsman for Hog Breeders Incorporated for a short time, had worked for 5 years for Armour & Company at its feeder pig operations, and was employed as branch manager of defendant's Winslow, Nebraska, facility for 14 years, until February 1986.

In March 1986, Laird went to Coop to purchase some feed ingredients for his hogs. While at Coop, Laird spoke with his former assistant, now the Coop's branch manager, Gary Ruwe. He was told by Ruwe about a problem with grain storage at Coop. Ruwe informed Laird that a grain bin had a "peak" that was "heating." A "peak" refers to the conelike formation of the corn at the top of the bin that is caused by filling the bin from the top. If a peak is not watched closely, moisture will collect in the peak. If the moisture is allowed to congregate at the peak, it will prevent heat from escaping the bin. This process is called

heating. With the combination of the heat and moisture, the corn collects mold and insects. Additionally, due to the heating the corn beneath the peak will discolor. If the heating is not stopped, the corn will eventually turn black or a fire may erupt.

Laird testified that he told Ruwe that "if he would pull out the center and pull out all the damaged corn and get the fines out of the center, [he] would take four loads," or approximately 1,300 bushels, of corn. Coop discounted the corn for the moisture, not for damaged corn or fines. The corn was delivered to Laird in four deliveries. The first delivery was made in early April 1986. Laird inspected the corn after it was delivered to his farm. Upon inspection, Laird noticed damaged corn and a silage odor. Silage odor occurs from a fermentation process started by the heating. Silage odor usually indicates that the corn may have mold. Laird expressed some dissatisfaction to Coop, but did not reject the corn. The second shipment also contained some damaged corn and had a silage odor. With the exception of one occasion 8 or 10 years earlier, Laird had purchased all of his corn for feed from Coop.

About a week after delivery of the first load, Laird began to feed his hogs with the corn from Coop. At this time the boars developed "pneumonia" or "flu-like symptoms." Laird stated that the hogs would vomit and would not eat regularly. When it was time for the sows to farrow, Laird noticed an abnormally high number of miscarriages, "mummies" (pigs that were not fully developed that had died in the uterus), stillborns, and cases of "fading pig syndrome." ("Fading pig syndrome" refers to pigs that are born normal, but lie down and die after the first nursing.)

After numerous attempts by veterinarians to diagnose the problem, including the submission of tissue samples from the livestock, it was concluded that the problem might be in the corn. Upon submission of a sample of the corn to the University of Nebraska on October 31, 1986, it was determined that the corn contained vomitoxin, a type of mycotoxin. The test results were received on approximately November 14. Immediately, Laird ceased incorporating the corn into his feed, informed Coop of this fact, and returned the unused corn. Coop replaced the corn. Laird's hogs started to produce normal

litters.

Although it could be inferred that it was Laird's responsibility to dry corn which he purchased from Coop with knowledge that it was moist, there was no evidence that the mycotoxin developed in the corn because of Laird's failure to properly care for the corn. There was evidence that Laird followed his customary grain-drying procedure and aerated the corn and that six of Coop's nine grain bins tested positive for mycotoxin as of May 1987. In the opinion of Dr. Busch, one of the veterinarians attending to Laird's swine herd, the production problems Laird was having were the proximate result of the animals' having been fed corn that contained vomitoxins. Ruwe agreed that corn which contained a toxic substance would not be marketable. He said that he would not knowingly sell such corn to a customer. Laird stated that he had had no experience with mycotoxins and that he knew nothing about them prior to this incident.

Evidence was introduced relating to the damages sustained by Laird. Following trial and submission to the court without a jury, a judgment was entered in favor of Laird for $52,330.85, together with costs. Coop has appealed, and we affirm.

Coop assigns as error that (1) the court failed to apply the standards of implied warranties under Neb. U.C.C. §§ 2-314 and 2-315 (Reissue 1980), (2) the court erred in finding that Laird met his burden of proof in establishing a breach of an implied warranty of merchantability, (3) the court erred in finding that Laird's notification of the alleged breach to Coop was timely, (4) the court erred in failing to apply properly the standards of consequential damages under Neb. U.C.C. § 2-715 (Reissue 1980), and (5) the court erred in finding that Laird's consequential damages were reasonably foreseeable at the time of the sale.

In reviewing the trial court's judgment in an action at law, the Supreme Court does not reweigh the evidence but, instead, considers the evidence in the light most favorable to the successful party, with conflicts resolved in favor of the successful party, who is entitled to the benefit of every inference which can reasonably be deduced from the evidence. *Metropolitan Utilities Dist. v. Pelton*, 236 Neb. 66, 459 N.W.2d

193 (1990). Additionally, the conclusion of the trial court will not be set aside unless clearly wrong. *Osmond State Bank v. Uecker Grain*, 227 Neb. 636, 419 N.W.2d 518 (1988).

This case is governed by the provisions set forth in article 2 of the Uniform Commercial Code. Article 2 covers the sale of goods. Goods are defined as "all things . . . which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid . . . ." Neb. U.C.C. § 2-105(1) (Reissue 1980). This case involves the sale of corn, a commodity which is included within the definition of goods under the U.C.C. See *Dotts v. Bennett*, 382 N.W.2d 85 (Iowa 1986).

In his petition, Laird alleges that Coop breached the implied warranty of fitness for a particular purpose, see § 2-315, and the implied warranty of merchantability, see § 2-314.

> Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

§ 2-315; *O'Keefe Elevator v. Second Ave. Properties*, 216 Neb. 170, 343 N.W.2d 54 (1984).

In order to recover under a warranty of fitness for a particular purpose Laird must show that (1) Coop had reason to know of Laird's particular purpose in buying the corn, (2) Coop had reason to know that Laird was relying on Coop's skill or judgment to furnish appropriate goods, and (3) Laird, in fact, relied upon Coop's skill or judgment. See *O'Keefe Elevator v. Second Ave. Properties, supra.*

The testimony indicated that Laird was a sophisticated buyer. He had had considerable experience with grain and hogs. He had in fact been the man responsible for the training of Ruwe, Coop's present manager. There is no credible evidence upon which one could conclude that Laird relied on Coop's skill and knowledge to select this particular feed corn.

We turn then to the question of the implied warranty of merchantability. Section 2-314 states:

> (1) Unless excluded or modified (Section 2-316), a warranty that goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. . . .
>
> (2) Goods to be merchantable must be at least such as
>
> (a) pass without objection in the trade under the contract description; and
>
> (b) in the case of fungible goods, are of fair average quality with the description; and
>
> (c) are fit for the ordinary purposes for which such goods are used; and
>
> (d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
>
> (e) are adequately contained, packaged, and labeled as the agreement may require; and
>
> (f) conform to the promises or affirmations of fact made on the container or label if any.
>
> (3) Unless excluded or modified (Section 2-316) other implied warranties may arise from course of dealing or usage of trade.

For a buyer to have a claim under § 2-314 the seller must be a merchant. A "merchant" is a

> person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.

Neb. U.C.C. § 2-104(1) (Reissue 1980). Coop engages in the business of purchasing and selling corn; therefore, Coop qualifies as a merchant under § 2-104(1).

After goods are accepted, which they were in this instance, Laird, the buyer, has the burden of establishing any breach with respect to those goods. See Neb. U.C.C. § 2-607(4) (Reissue 1980).

Coop argues that in order for Laird to prove that the corn was unmerchantable (unfit for its ordinary purpose), Laird

must first establish the standard of merchantability in the trade. Coop relies on *Durrett v. Baxter Chrysler-Plymouth, Inc.*, 198 Neb. 392, 253 N.W.2d 37 (1977). In *Durrett*, the plaintiff's only evidence as to defectiveness of a steering column was the testimony of lay witnesses. This court affirmed the trial court's ruling sustaining the defendants' motion to dismiss on the grounds that the plaintiff failed to prove an industrial standard. The court stated: "The reliance on eyewitnesses alone is not fatal when the defect is *obvious to a layman*, but when standards of performance of the product are not generally known, other evidence, usually expert testimony, is necessary to prove proper or acceptable standards of performance." (Emphasis supplied.) *Durrett, supra* at 396, 253 N.W.2d at 39-40.

The testing done by the University of Nebraska revealed the presence of trace amounts of vomitoxin in the corn. Dr. Busch testified that in his opinion the corn contained vomitoxin and that the problems Laird was having with his swine herd were proximately caused by the vomitoxin. Additionally, Dr. Busch testified that the presence of vomitoxin in the feed will reduce pigs' immune systems. Pigs then will develop "parvo." The presence of parvo in pigs will lead to reproductive problems such as the problems experienced by Laird's pigs. It would seem quite apparent, even to a layperson, that a substance present in corn which would cause production problems such as mummies, stillborns, and postbirth death in hogs would be unfit for its ordinary purpose. Additionally, Coop's own branch manager conceded that corn with a toxic substance in it would not be merchantable.

The fact remains that Coop offered for sale corn which its customers should be able to assume was merchantable, but which contained toxic substances. There was sufficient competent evidence to support the trial court's finding that Coop breached the implied warranty of merchantability.

We deal next with the reasonableness of Laird's notice to Coop. Section 2-607(3) provides: "Where a tender has been accepted (a) the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy . . . ."

It would appear from the evidence that Laird did accept delivery. The corn was delivered to Laird in April 1986. Although symptoms appeared shortly after he began to feed this corn, Laird did not know that his problems were caused by the corn. It was not until October that the veterinarian even suspected the corn, and it was not until November that these suspicions were confirmed. Laird, upon receiving this information from his veterinarian, immediately gave notice to Coop and returned the unused corn. It is beyond argument in this case that the notice was given within a reasonable time.

Although Coop does not contest the amount of consequential damages or the method by which they were proved, it does contend that Laird's consequential damages were not reasonably foreseeable at the time of the sale. Section 2-715(2)(a) states that consequential damages resulting from a seller's breach include "any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise. . . ."

Coop knew that Laird conducted a pig breeding and feeding operation and that he bought the corn to feed to pigs. Coop also acknowledged that it itself would not buy corn if the corn had mycotoxins in it. Additionally, it was aware of the fact that corn which is peaked is apt to heat, which in turn will cause mold, and indicated that it would not knowingly sell corn that contained a toxic substance to a customer.

The foreseeability of consequential damages, as a general rule, is an issue of fact for determination by the fact finder. "There was sufficient evidence from which the [court] could conclude the [seller] could reasonably have forseen [sic] the [buyer] would sustain consequential damages by [seller's] breach of the contract." *National Farmers Organization, Inc. v. McCook Feed & Supply Co.*, 196 Neb. 424, 432, 243 N.W.2d 335, 340 (1976). Such was the case here. See, also, *Shotkoski v. Standard Chemical Manuf. Co.*, 195 Neb. 22, 237 N.W.2d 92 (1975).

The judgment of the district court is affirmed.

AFFIRMED.

NEIL C. COOL, APPELLANT, V. SAHLING TRUCKS, INC., APPELLEE.
466 N.W.2d 796

Filed March 15, 1991. No. 88-1008.

Contracts: Liens: Time. An artisan's lien attaches if the necessary documents are filed within 60 days of the furnishing of any labor or materials that are part of a single contract or undertaking.

Appeal from the District Court for Buffalo County: DEWAYNE WOLF, Judge. Affirmed.

David W. Jorgensen, of Nye, Hervert, Jorgensen & Watson, P.C., for appellant.

Steven R. Voigt, of Butler, Voigt & Brewster, for appellee.

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

WHITE, J.

In this third chapter of the Cool-Nelson-Sahling Trucks, Inc., saga, we are called on to interpret the automobile charging lien statute, Neb. Rev. Stat. § 52-202 (Reissue 1984).

A brief history of this misbegotten vehicle and its journey through the courts of the state is set forth in *Nelson v. Cool*, 230 Neb. 859, 434 N.W.2d 32 (1989), and a later recitation in *Cool v. Sahling Trucks, Inc., ante* p. 312, 466 N.W.2d 71 (1991), in which we sent back for trial the issue of ownership of the vehicle.

Interestingly enough, Norris Cool is in the position of asserting in the courts of this state absolute ownership of the 1980 Kenworth tractor, vehicle identification number (VIN) 176891S (see *Cool v. Sahling Trucks, Inc., supra*), and at the same time, Neil Cool asserts an equitable lien interest in the same vehicle, title presumably in another (this appeal). However, this apparent inconsistency is not called to our attention by appellee, nor do the parties suggest how the misdescription (F for S) in the VIN at various stages of the previous litigation is to be resolved. Since we are not asked to untie the Gordian knot, we refrain from volunteering.

For the purposes of this opinion, the following facts are relevant: Just prior to the filing of the appeal in *Nelson v. Cool,*

supra, appellant Cool, on April 8, 1987, filed an artisan's lien in the office of the county clerk of Custer County, Nebraska, alleging that parts and labor to the value of $22,065.34 were furnished for the Kenworth tractor for the period beginning August 23, 1985, and ending when the last item was furnished, February 17, 1987, less than 60 days from the filing.

The appellee acquired title to the tractor from Don Nelson, who was somehow able to obtain an order for delivery from the district court for Hall County. Possession passed to Nelson and title was transferred to Sahling in 1987 after the filing of the lien.

The trial court found that the appellant was entitled to a lien for only the value of materials and parts furnished in the immediate past 60 days prior to the filing in the amount of $64.53, for which sum and costs appellant was awarded judgment.

It is obvious that the major repairs necessitated by the accident mentioned in *Nelson v. Cool, supra*, had been completed a considerable time before the 60-day period prior to the filing of the lien. The truck was returned for service, and from time to time thereafter, materials and labor were furnished. We note, for example, the entry of November 1, 1986, "2 front tires 400.00"; the next entry, of January 13, 1987, "repaint hood 60.00"; and three entries of February 17, 1987, totaling the amount of the court's award. There was no evidence that the services were performed as part of one continuous contract, but, rather, they appear to have been a periodic as-needed series of repair orders, unconnected one to the other.

Section 52-202 provided:

> Any person who makes, alters, repairs or in any way enhances the value of any vehicle, automobile, machinery, farm implement or tool, or shoes a horse or horses, or mule or mules at the request of or with the consent of the owner or owners thereof shall have a lien upon such vehicle, automobile, machinery, farm implement or tool, horse or horses, mule or mules, in cases where he has parted with the possession thereof, for his reasonable or agreed charges, for work done or material furnished;

> *Provided*, the person making such repairs or furnishing such material or performing such work shall file in the office of the clerk of the county in which such work was done, or material furnished, or in which such property is kept, within sixty days after performing such work or furnishing such material, a verified statement....

We affirm, though we reject the trial court's narrow construction of § 52-202. It seems to us that by analogy the construction placed on our previous mechanic's lien statutes, Neb. Rev. Stat. §§ 52-101 et seq. (Reissue 1978) (repealed in part, 1981 Neb. Laws, L.B. 512), is a more reasonable interpretation, and thus, the artisan's lien attaches if the necessary documents are filed within 60 days of the furnishing of an item of labor or material which is part of a single contract or undertaking. This is the construction our court has uniformly placed on materialmen's and laborers' contracts pursuant to §§ 52-101 et seq. See, *Chicago Lumber Co. v. Horner*, 210 Neb. 833, 317 N.W.2d 87 (1982); *LaPuzza v. Prom Town House Motor Inn, Inc.*, 191 Neb. 687, 217 N.W.2d 472 (1974); *Occidental S. & L. Assn. v. Cannon*, 184 Neb. 659, 171 N.W.2d 166 (1969). In this case it is clear that the labor and/or materials furnished by Cool were not part of a single contract, but were furnished separately as the vehicle needed servicing.

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. SASSON JAHAN-SHAHI, APPELLANT.

466 N.W.2d 795

Filed March 15, 1991. No. 89-1327.

1. **Criminal Law: Appeal and Error.** 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.
2. **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 the

decision, considered only the evidence that was competent and relevant. This court will not overturn such a decision where there is sufficient material, competent, and relevant evidence to sustain the judgment.

3. **Criminal Law: Verdicts: Appeal and Error.** We will not interfere with a guilty verdict based on the evidence in a criminal case unless that evidence is so lacking in probative force that it can be said that, as a matter of law, the evidence is insufficient to support a verdict beyond a reasonable doubt.

Appeal from the District Court for Douglas County, PAUL J. HICKMAN, Judge, on appeal thereto from the County Court for Douglas County, SAMUEL V. COOPER, Judge. Judgment of District Court affirmed.

Kirk E. Naylor, Jr., for appellant.

Herbert M. Fitle, Omaha City Attorney, and Gary P. Bucchino, Omaha City Prosecutor, and J. Michael Tesar for appellee.

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

WHITE, J.

Sasson Jahan-Shahi appeals his conviction for assault and battery under Omaha city ordinance 20-61(d). Jahan-Shahi was found guilty by the Douglas County Court, fined $500, and sentenced to 6 months' confinement in jail. The district court affirmed. He appeals to this court.

The facts in this case are simple. Jahan-Shahi was employed at Bergan Mercy Hospital in Omaha as an orderly, or nursing assistant. In the early morning hours of June 1, 1989, during one of his work shifts, Jahan-Shahi entered the hospital room of the victim and proceeded to give her a back and leg massage. The victim had been admitted to the hospital for back pain. According to the victim, Jahan-Shahi massaged her lower back and buttocks as she was lying on her left side. She then informed Jahan-Shahi that she was uncomfortable and turned over on her back. He then proceeded to massage her calves and thighs. During the entire massage, the door to the victim's room remained open. According to the victim, during the massage of her calves and thighs, Jahan-Shahi inserted his fingers into her vagina. The victim became nervous and tried to put her legs

together. Jahan-Shahi then left the room. Later that day, the victim reported the incident to her physical therapist, and on June 4, the victim made a report to the Omaha police.

According to the testimony of a nurse on duty that night, as well as the testimony of Jahan-Shahi, back massage is a regular practice for a nursing assistant. Jahan-Shahi also testified that during the course of the massage, it was possible that he touched the victim's genital area, but if he did so, he would not have noticed.

Jahan-Shahi assigns as error the decision of the district court affirming the judgment of the county court.

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. Trackwell*, 235 Neb. 845, 458 N.W.2d 181 (1990); *State v. Foster*, 230 Neb. 607, 433 N.W.2d 167 (1988). In a case tried to the court without a jury, there is a presumption that the trial court, in reaching the decision, considered only the evidence that was 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. Methe*, 228 Neb. 468, 422 N.W.2d 803 (1988); *State v. Blair*, 230 Neb. 775, 433 N.W.2d 518 (1988). We will not interfere with a guilty verdict based on the evidence in a criminal case unless that evidence is so lacking in probative force that it can be said that, as a matter of law, the evidence is insufficient to support a verdict beyond a reasonable doubt. *State v. Willett*, 233 Neb. 243, 444 N.W.2d 672 (1989); *State v. Foster, supra*.

The evidence reflects that according to Omaha city ordinance 20-61(d), it shall be unlawful for any person to purposely or knowingly touch the sexual or intimate parts of another person without that person's consent for the purpose of arousing or gratifying the sexual desire of either party. Both the county court and the district court held there was sufficient evidence to satisfy the requirements of ordinance 20-61(d). The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. FERNANDO SALAS, APPELLANT.

466 N.W.2d 790

Filed March 15, 1991. No. 90-088.

1. **Postconviction: Appeal and Error.** In an appeal from a denial of a motion for postconviction relief, the findings of the district court will not be disturbed unless they are clearly wrong.
2. **Postconviction: Constitutional Law: Effectiveness of Counsel: Proof.** In a postconviction relief action, to sustain a claim of ineffective assistance of counsel as a violation of the sixth amendment to the U.S. Constitution or article I, § 11, of the Nebraska Constitution, and thereby obtain reversal of a defendant's conviction, the defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defense, that is, a demonstration of reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different.
3. **Effectiveness of Counsel: Words and Phrases.** A reasonable probability is a probability sufficient to undermine confidence in the outcome.
4. **Effectiveness of Counsel: Proof.** A criminal defendant must demonstrate prejudice was suffered from ineffectiveness of counsel.
5. _____: _____. The defendant has the burden of demonstrating ineffective assistance of counsel, and the record must affirmatively support the claim.
6. **Search and Seizure: Search Warrants: Police Officers and Sheriffs.** A lawful search of fixed premises generally extends to the entire area in which the object of the search may be found and is not limited by the possibility that separate acts of entry or opening may be required to complete the search. Thus, a warrant that authorizes an officer to search a home for specified contraband also provides authority to open closets, chests, drawers, and containers in which the object of the search might be found.

Appeal from the District Court for Sarpy County: GEORGE A. THOMPSON, Judge. Affirmed.

Fernando Salas, pro se.

Robert M. Spire, Attorney General, and Barry Waid for appellee.

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

HASTINGS, C.J.

Defendant appeals from an order of the district court dismissing his motion for postconviction relief based on ineffective assistance of counsel. We affirm.

In an appeal from a denial of a motion for postconviction

relief, the findings of the district court will not be disturbed unless they are clearly wrong. *State v. Otey*, 236 Neb. 915, 464 N.W.2d 352 (1991).

On May 31, 1988, following a jury-waived trial, the defendant was convicted of possession of marijuana with intent to deliver, possession of cocaine with intent to deliver, and delivery of cocaine. The judgment was affirmed on his direct appeal, and the underlying facts are discussed in our opinion on that appeal. See *State v. Salas*, 231 Neb. 471, 436 N.W.2d 547 (1989).

On August 21, 1989, the defendant moved for postconviction relief pursuant to Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1989). The motion alleged (1) ineffective assistance of his trial counsel in failing to disqualify himself due to his inability to speak Spanish, which was allegedly defendant's primary language; and (2) inadequate representation during the motion to suppress hearing, including (a) failing to adequately question the opening of a locked box during the search, (b) failing to question why the warrant was signed with whiteout corrections in it, (c) failing to file a motion in limine as to police statements, and (d) failing to question the reliability of a State's witness. At the hearing on his motion for postconviction relief, defendant was represented by appointed counsel. Although no additional evidence was presented at the hearing, judicial notice was taken of the entire record and trial proceedings.

The district court found that defendant's trial counsel was not deficient in his representation. In his motion, defendant alleged other errors, arising from a December 4, 1987, drug transaction, including complaints that the identification of the defendant was questionable, that only one of two bags of cocaine was tested, that no questions were asked of the backup officer, and that no pictures of the drug transaction were taken. As to these latter alleged errors, the court found that they related to matters which could have been raised in defendant's direct appeal.

The burden of proof in a postconviction action was recently summarized in *State v. Carter*, 236 Neb. 656, 662, 463 N.W.2d 332, 337-38 (1990), as follows:

> In a postconviction relief action, to sustain a claim of ineffective assistance of counsel as a violation of the sixth amendment to the U.S. Constitution or article I, § 11, of the Nebraska Constitution, and thereby obtain reversal of a defendant's conviction, the defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defense, that is, a demonstration of reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *State v. Schneckloth*, 235 Neb. 853, 458 N.W.2d 185 (1990). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* A criminal defendant must demonstrate prejudice was suffered from ineffectiveness of counsel. *Id.* The defendant has the burden of demonstrating ineffective assistance of counsel, and the record must affirmatively support the claim. *State v. Domingus*, 234 Neb. 267, 450 N.W.2d 668 (1990).

Defendant contends that he was born and received a high school education in Calie, Colombia, and that his counsel should have disqualified himself due to his inability to speak Spanish. Before accepting defendant's not guilty pleas, the trial judge explained the charges and the defendant's constitutional rights. The defendant responded affirmatively when asked if he understood the nature of the proceedings. A police officer noted during the motion to suppress hearing that although defendant had an accent, he was not difficult to understand. Prior to testifying at trial, defendant said that he understood English much better than he pronounced it and that if he did not understand any questions, he would make counsel explain. There is no evidence that defendant did not understand any part of the proceedings or that his counsel should have withdrawn because of his inability to speak Spanish.

Defendant was described in the search warrant as a Hispanic male. In the affidavit and application for issuance of a search warrant, the defendant was described as a Hispanic male with a Hawaiian accent. Defendant alleges that the warrant was voidable because his primary language is Spanish, and thus the reference in the "warrant" to a Hawaiian accent was incorrect.

He also contends that the search warrant was altered after defendant's Hawaii driver's license was seized by police officers during the search and that his counsel was ineffective in failing to subpoena a witness to question the officers' ability to differentiate between Spanish and Hawaiian accents. Defendant failed to specify which witness he believed should have been subpoenaed or how he was prejudiced by the failure to question such witness.

It is claimed by defendant that his counsel was ineffective in failing to subpoena the judge who issued the warrant. Apparently, he thought it should be shown whether the judge in fact authorized the warrant, when it was typed on a Douglas County form, marked to reflect Sarpy County, and contained whiteout corrections. No allegation was made as to how defendant felt that he was prejudiced. Defense counsel did question police officers regarding the whiteout corrections. The officers who applied for the warrant testified that the corrections were on the warrant when it was presented to the issuing judge and that they believed the typist made an error and corrected it accordingly.

Defendant claims that counsel was ineffective for failing to "force" the issue of the opening of a locked box which was not specifically listed in the warrant. Counsel did question the opening of the box. It was admitted that there was not a search warrant to open the box and that the box was not specified in the warrant.

The lawful scope of a search has been described as follows in *United States v. Ross*, 456 U.S. 798, 820-21, 102 S. Ct. 2157, 72 L. Ed. 2d 572 (1982):

> A lawful search of fixed premises generally extends to the entire area in which the object of the search may be found and is not limited by the possibility that separate acts of entry or opening may be required to complete the search. Thus, a warrant that authorizes an officer to search a home for illegal weapons also provides authority to open closets, chests, drawers, and containers in which the weapon might be found. . . . When a legitimate search is under way, and when its purpose and its limits have been precisely defined, nice distinctions between closets,

> drawers, and containers, in the case of a home . . . must give way to the interest in the prompt and efficient completion of the task at hand.

The Court in *Ross* also quoted Professor LaFave in a footnote, where LaFave explained:

> "Places within the described premises are not excluded merely because some additional act of entry or opening may be required. 'In countless cases in which warrants described only the land and the buildings, a search of desks, cabinets, closets and similar items has been permitted.' " 2 W. LaFave, Search and Seizure 152 (1978) (quoting *Massey v. Commonwealth*, 305 S. W. 2d 755, 756 (Ky. 1957)).

456 U.S. at 821 n.27. Nebraska has adopted the *Ross* rule, according to *State v. Hansen*, 221 Neb. 103, 375 N.W.2d 605 (1985).

The search warrant specified a search of the premises for narcotics and money pertaining to an illegal narcotics operation, and the locked box represented an area within the lawfully searched premises. It was therefore not ineffective assistance of counsel for counsel not to question further the failure to obtain a subsequent warrant for the locked box, as the necessity for such a subsequent warrant is not supported by law.

It is contended by defendant that his counsel was ineffective in failing to move to disqualify a police report and related testimony about the December 4, 1987, drug transaction. No police reports were admitted into evidence, and thus defendant's counsel was not ineffective in this regard.

Defendant also alleges that his counsel was ineffective in failing to question the reliability of his ex-wife, Sharon Ferguson. Ferguson testified that the marijuana and cocaine found in her home belonged to the defendant. She also testified that the defendant occasionally supplied marijuana and cocaine to her for her to sell and that the money found in the locked box belonged to her and the defendant from their sale of drugs. Although defendant's counsel did not question if Ferguson and the prosecution had made any agreements in exchange for her testimony, Ferguson was a hostile witness, and it is obvious

from the record that the trial judge reminded her that she had been granted immunity and that her failure to testify could result in contempt charges being brought against her.

Defendant fails to specify what would have been a more effective theory on which to cross-examine his ex-wife and how he was prejudiced by the manner in which her testimony was presented. Defendant's failure to specify the manner in which he was prejudiced by his counsel's cross-examination of Ferguson is magnified by the fact that her testimony concerning the December 4, 1987, drug transaction was corroborated by the undercover police officer involved in the transaction.

Defendant has failed to show that his trial attorney failed to perform as well as lawyers with ordinary training and skill in criminal law in the area, that he was prejudiced in the defense of his case as a result of any of his attorney's actions or inactions, or that his rights under the U.S. or Nebraska Constitution were denied or infringed upon so as to render his convictions void or voidable.

The judgment of the district court in denying postconviction relief is correct and is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ROBERT D. STEPHENS, APPELLANT.

466 N.W.2d 781

Filed March 15, 1991. No. 90-198.

1. **Rules of Evidence: Other Acts.** Neb. Rev. Stat. § 27-404(2) (Reissue 1989) is a rule of inclusion, rather than exclusion; the list of acceptable uses recited in the statute is illustrative and not intended to be exclusive.
2. _____: _____. Neb. Rev. Stat. § 27-404(2) (Reissue 1989) prohibits the use of evidence of other crimes, wrongs, or acts to establish a character trait or proclivity to act in a certain way for the purpose of proving that the party against whom the evidence is offered acted in conformity with that trait.
3. **Trial: Evidence: Other Acts.** The admissibility of evidence of other crimes or wrongful acts is generally within the discretion of the trial court.

4. **Rules of Evidence: Other Acts.** Evidence of other crimes, wrongs, or acts admissible under the provisions of Neb. Rev. Stat. § 27-404(2) (Reissue 1989) is subject to the overriding protection of Neb. Rev. Stat. § 27-403 (Reissue 1989), which provides for the exclusion of relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.
5. **Sexual Assault: Evidence: Other Acts.** Sexual crimes are offenses in which evidence of other similar sexual conduct is recognized as having independent relevancy, and such evidence may be admissible whether that conduct involved the complaining witness or third parties.
6. **Trial: Evidence.** Balancing the probative value of evidence against the danger of unfair prejudice is within the discretion of the trial court.
7. **Rules of Evidence: Words and Phrases.** Most, if not all, of the evidence a party offers is calculated to be prejudicial to the opposing party, and so it is only unfair prejudice, that is, the tendency to suggest a decision on an improper basis, which is the concern of Neb. Rev. Stat. § 27-403 (Reissue 1989).
8. **Trial: Evidence: Presumptions.** In a case tried without a jury, it is presumed that in reaching its decision the trial court, as the finder of fact, considered only competent and relevant evidence and that it considered such evidence only for a proper purpose.
9. **Sentences: Appeal and Error.** A sentence that is within the statutory limits will not be disturbed upon appeal absent an abuse of discretion.
10. **Sentences.** As a practical matter, it is the minimum portion of an indeterminate sentence which measures its severity.

Appeal from the District Court for Lancaster County: BERNARD J. MCGINN, Judge. Affirmed.

Richard Scott for appellant.

Robert M. Spire, Attorney General, and Denise E. Frost for appellee.

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

CAPORALE, J.

Defendant-appellant, Robert D. Stephens, was convicted after a bench trial of first degree sexual assault on his own not quite 1-month-old granddaughter, in violation of Neb. Rev. Stat. § 28-319 (Reissue 1989), and sentenced to imprisonment for a period of not less than 15 nor more than 50 years. Stephens asserts that the trial court erred in (1) admitting certain evidence and (2) imposing an excessive sentence. We affirm.

On the evening of June 19, 1989, the then 53-year-old Stephens was at home with his daughter, her 15-month-old son, and her daughter, the infant victim. At around 9:30 p.m., Stephens, who had been drinking, asked his daughter to go down to a neighborhood shop and get him a newspaper. The daughter had just put the infant to sleep in a baby swing after bathing, feeding, and changing her. While bathing the infant, the daughter washed the infant's vaginal area and noted nothing abnormal about her at that time.

The daughter took her son with her to fetch the paper, leaving the sleeping infant alone with Stephens. At the shop the daughter happened upon a friend she had not seen for some time. After they had chatted for a while, the daughter invited the friend home to see her infant.

When they arrived back at the house after having been gone about 45 minutes to an hour, the infant was not in the swing where she had been left. The daughter and her friend then went into the front room of the house and found Stephens lying on the couch, with the infant at his feet. The infant was wearing one of her 15-month-old brother's diapers, which was inside out and unfastened. Stephens acted surprised at his daughter's return.

When the daughter picked up the infant, who had had her eyes closed, the infant began to scream. The daughter took the infant into another room to change her diaper and noticed that the diaper was bloody. Upon noticing that the infant's vaginal area was puffy, red, and looked sore, the daughter decided to take the infant to the hospital, suspecting at this point that her father had "done something" to the infant. When she confronted her father, Stephens stated that he had not done anything to the infant and that the infant's formula was somehow to blame. Stephens tried to dissuade his daughter from taking the infant to the hospital; at one point he grabbed her wrist with enough force to leave bruises.

The daughter took the infant to a hospital, where she was examined for evidence of sexual assault. The examining physician testified that the infant had a 1-centimeter laceration in the posterior fourchette, approximately 5 millimeters deep, extending from the inside of the innermost portion of the

external genitalia into the skin toward the anus. The physician further testified that there were irregular tears through the hymenal ring. It was the physician's medical opinion that this was not a normal vaginal opening for an infant of this age and that the injury was caused by a blunt instrument, either manmade or natural, such as a finger or a penis. The physician stated that he "thought it was an obvious case of sexual abuse" and that the injuries were fresh, no more than 12 hours old.

At trial, Stephens' 32-year-old stepdaughter testified that Stephens had had sexual contact with her repeatedly over a substantial period of time, starting when she was a child between the ages of 4 and 5. In these contacts, which began in California about a year after Stephens and her mother were married, Stephens would fondle and digitally penetrate his stepdaughter. This conduct usually occurred on a couch after Stephens had been drinking and while the stepdaughter's mother was absent. When the stepdaughter reached about 14 years of age, Stephens began having intercourse with her. The latter practice continued for an unspecified period of time, but at least until the stepdaughter was 15 years old.

Stephens' first assignment of error involves the admission of his stepdaughter's testimony. Neb. Rev. Stat. § 27-404(2) (Reissue 1989) 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.

Contrary to Stephens' assertions, this provision is a rule of inclusion, rather than exclusion; the list of acceptable uses recited in the statute is illustrative and not intended to be exclusive. *State v. Yager*, 236 Neb. 481, 461 N.W.2d 741 (1990); *State v. Boppre*, 234 Neb. 922, 453 N.W.2d 406 (1990); *State v. Schaaf*, 234 Neb. 144, 449 N.W.2d 762 (1989); *State v. Craig*, 219 Neb. 70, 361 N.W.2d 206 (1985).

Section 27-404(2) prohibits the use of evidence of other crimes, wrongs, or acts to establish a character trait or proclivity to act in a certain way for the purpose of proving that

the party against whom the evidence is offered acted in conformity with that trait. This use is prohibited because of the risk that a trier of fact may base its decision upon a determination that a party is a bad person, rather than upon the specific facts relevant to the charge or controversy which is the subject of the trial.

The admissibility of evidence of other crimes or wrongful acts is generally within the discretion of the trial court. *State v. Ryan*, 226 Neb. 59, 409 N.W.2d 579 (1987); *State v. Keithley*, 218 Neb. 707, 358 N.W.2d 761 (1984); *State v. Dandridge*, 209 Neb. 885, 312 N.W.2d 286 (1981). Like all evidence, it is subject to the overriding protection of Neb. Rev. Stat. § 27-403 (Reissue 1989), which provides for the exclusion of relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. *State v. Yager, supra*. In reviewing the admission of evidence of other acts under § 27-404(2), the appellate court considers (1) whether the evidence was relevant, (2) whether the evidence had a proper purpose, (3) whether the probative value of the evidence outweighed its potential for unfair prejudice, and (4) whether the trial court, if requested, instructed the jury to consider the evidence only for the purpose for which it was admitted. *State v. Yager, supra*.

Because Stephens elected a bench trial, there was no jury to instruct, and the fourth factor listed above is irrelevant to our review. Thus, we turn our attention to the remaining three factors.

Was the evidence that Stephens had recurring sexual contact with his stepdaughter relevant to the offense with which he was charged? The relevant portion of § 28-319 reads: "(1) Any person who subjects another person to sexual penetration and . . . (c) the actor is nineteen years of age or older and the victim is less than sixteen years of age is guilty of sexual assault in the first degree."

Sexual penetration is defined as

> sexual intercourse in its ordinary meaning, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight,

> of any part of the actor's or victim's body or any object manipulated by the actor into the genital or anal openings of the victim's body which can be reasonably construed as being for nonmedical or nonhealth purposes.

Neb. Rev. Stat. § 28-318(6) (Reissue 1989).

In *State v. Keithley, supra*, we stated that sexual crimes have consistently been classified as offenses in which evidence of other similar sexual conduct has been recognized as having independent relevancy and that such evidence may be admissible whether that conduct involved the complaining witness or third parties. Accord, *State v. Craig, supra*; *State v. Baker*, 218 Neb. 207, 352 N.W.2d 894 (1984); *State v. Hitt*, 207 Neb. 746, 301 N.W.2d 96 (1981). As we said in *State v. Craig, supra* at 76, 361 N.W.2d at 212:

> [E]vidence of repeated incidents may be especially relevant in proving sexual crimes committed against persons otherwise defenseless due to age—either the very young or the elderly. Without proof by other acts of a defendant, sexual offenses against the defenseless, except in cases of the fortuitous presence of an eyewitness, would likely go unpunished.

While *Craig* involved repeated incidents with the same victim, the proposition is applicable to the present situation as well.

At trial, Stephens attempted to raise the possibility that he did not sexually assault the victim, by questioning his daughter and other witnesses about whether the back door to the home was open or unlocked and by insinuating that the assault might be part of some sort of gang initiation aimed at his daughter or her husband. Stephens also questioned the victim's physician about the possibility that the victim's injury could accidentally have been caused by an inexperienced person such as Stephens changing the victim's diaper or cleaning her.

The evidence of Stephens' prior sexual contacts with a 4- or 5-year-old girl in his care is relevant to negate the inferences Stephens sought to raise. The evidence is relevant to show both the identity of the assailant as being Stephens and the absence of accident or mistake on his part. Both of these are proper purposes for the admission of the evidence. See, § 27-404(2); *State v. Yager*, 236 Neb. 481, 461 N.W.2d 741 (1990); *State v.*

Craig, 219 Neb. 70, 361 N.W.2d 206 (1985); *State v. Keithley, supra*; *State v. Hitt, supra*.

The final area of inquiry regarding the admission of this evidence is whether the evidence meets the criteria of § 27-403, which provides, as noted earlier, that evidence may be excluded if, among other things, its probative value is outweighed by the danger of its unfair prejudice. Balancing the probative value of evidence against the danger of unfair prejudice is within the discretion of the trial court. *State v. Jacobs*, 226 Neb. 184, 410 N.W.2d 468 (1987).

Stephens points out that the sexual contacts to which his stepdaughter testified began 27 years before the incident with his granddaughter. It is Stephens' position that these contacts are temporally too remote and untrustworthy to have been admitted. He appears to overlook, however, that they continued for over 10 years.

In *State v. Yager, supra* at 486, 461 N.W.2d at 745, we stated:

> The question of whether evidence of other conduct otherwise admissible under the provisions of § 27-402(2) is too remote in time is largely within the 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. *State v. Rincker*, 228 Neb. 522, 423 N.W.2d 434 (1988).

Yager was charged with the sexual assault of a child 14 years of age or younger by an actor 19 years old or older, in violation of Neb. Rev. Stat. § 28-320.01 (Reissue 1989), which prohibits sexual contact even without penetration between such persons. At trial, testimony was admitted regarding Yager's repeated sexual contacts with two young males other than the victim. These contacts took place over a period of time running from 20 to 6 or 7 years before the trial. This court held that the trial court did not err in admitting that challenged evidence.

Although the evidence at issue in the case before us involves acts more remote in time than those held to have been properly admitted in *Yager*, the acts here have a higher probative value. In *Yager*, one of the witnesses was only 4 years younger than Yager, and, thus, the sexual contacts between the two never fell within the statute under which he was charged. In the case

before us, all of the contacts testified to occurred while Stephens was over 19 years of age and his victim was under 16 years of age, thus falling within the statute under which he was charged. The earlier incidents recounted by Stephens' stepdaughter involved Stephens' fondling and digitally penetrating her when she was a very young child. These acts usually took place on a couch after Stephens had been drinking and had been left alone with the stepdaughter. On the night of the assault on his granddaughter, Stephens was left alone with the victim, he had been drinking, and when his daughter returned, she found Stephens and the victim on the couch. The high degree of similarity between the prior acts when his stepdaughter was between 4 and 5 years old and the circumstances surrounding the charged offense here counterbalances the remoteness of the events, leaving us with a solidly positive probative value.

The next question is whether the probative value of those contacts is substantially outweighed by the possibility of unfair prejudice. As we have stated on more than one occasion, most, if not all, of the evidence a party offers is calculated to be prejudicial to the opposing party, and so it is only unfair prejudice, that is, the tendency to suggest a decision on an improper basis, which is the concern of § 27-403. *Yager, supra*; *Lincoln Grain v. Coopers & Lybrand,* 216 Neb. 433, 345 N.W.2d 300 (1984). See, also, *State v. Lonnecker, ante* p. 207, 465 N.W.2d 737 (1991).

In a case tried without a jury, it is presumed that in reaching its decision the trial court, as the finder of fact, considered only competent and relevant evidence. *State v. Fellman*, 236 Neb. 850, 464 N.W.2d 181 (1991). A corollary of this rule is the presumption that a trial court, when acting as the fact finder, only considers competent and relevant evidence for a proper purpose.

Not only has Stephens failed to overcome this presumption, but the trial court expressly ruled that it was receiving the challenged evidence "not to prove the character of the defendant or that he acted in conformity therewith, but [on the issues] of motive, opportunity, intent, knowledge, identity or absence of mistake or accident . . . ." The trial court was well

aware of the permissible and impermissible uses of this evidence, and Stephens gives us no reason to doubt that the trial court was true to its word.

However, the evidence relating to the acts of intercourse Stephens had with his stepdaughter after she reached the age of 14 years does not establish sufficient similarity between those contacts and the event in question to have been relevant and therefore should not have been admitted. Nonetheless, the remaining evidence of Stephens' guilt is so overwhelming that the admission of the intercourse evidence was harmless beyond a reasonable doubt, no matter for what reason it may have been relied upon by the trial court. See, *State v. Lonnecker, supra*; *State v. Johnson*, 236 Neb. 831, 464 N.W.2d 167 (1991); *State v. Hankins*, 232 Neb. 608, 441 N.W.2d 854 (1989).

This leaves us with the question of whether Stephens' sentence was excessive. Violation of § 28-319(1) is a Class II felony, § 28-319(2), punishable by from 1 to 50 years' imprisonment, Neb. Rev. Stat. § 28-105(1) (Reissue 1985). Stephens' sentence falls within the statutory limits. We repeat yet again the eternally recurring rule: A sentence that is within the statutory limits will not be disturbed upon appeal absent an abuse of discretion. *State v. Rios, ante* p. 232, 465 N.W.2d 611 (1991); *State v. Lonnecker, supra*; *State v. Zitterkopf*, 236 Neb. 743, 463 N.W.2d 616 (1990); *State v. Nevels*, 235 Neb. 39, 453 N.W.2d 579 (1990); *State v. Nelson*, 235 Neb. 15, 453 N.W.2d 454 (1990); *State v. Boppre*, 234 Neb. 922, 453 N.W.2d 406 (1990); *State v. Blue Bird*, 232 Neb. 336, 440 N.W.2d 474 (1989); *State v. Kitt*, 232 Neb. 237, 440 N.W.2d 234 (1989). Moreover, as a practical matter, it is the minimum portion of an indeterminate sentence which measures its severity. *State v. Sianouthai*, 225 Neb. 62, 402 N.W.2d 316 (1987); *State v. King*, 196 Neb. 821, 246 N.W.2d 477 (1976).

This was an extremely serious assault upon one of the most defenseless members of society, a newborn baby. Stephens tore his infant granddaughter's vaginal opening; the tear was approximately one-fifth of an inch deep and almost two-fifths of an inch long on an opening which would normally be about one-fifth of an inch in diameter. The victim was hospitalized for 4 or 5 days. To claim, as Stephens does, that this crime was "not

of a violent nature" is to ignore reality; indeed, Stephens' contention reaches a new high in chutzpah. See *State v. Bonaparte*, 222 Neb. 469, 470, 384 N.W.2d 304, 305 (1986) (defining chutzpah as "colossal effrontery" or "brazen gall").

Stephens has a long and varied criminal record, which demonstrates his complete indifference toward the law. The State of California sentenced him to 3 years' probation for molesting his stepdaughter, but he did not modify his behavior and continued his actions unabated. But even ignoring that record, the reprehensible crime before us, without more, establishes that his sentence does not constitute an abuse of discretion.

AFFIRMED.

SHANAHAN, J., dissenting.

Once again, there is treatment of symptoms, not the illness, in this court's misperception and, therefore, misapplication of Neb. Evid. R. 404(2) concerning "other acts" evidence. Moreover, reiteration that "evidence of [a defendant's] other similar sexual conduct [is] recognized as having independent relevancy" has, unquestionably and unfortunately, come to mean that in a prosecution for a sexual crime, a defendant's other sexual conduct has relevancy independent of the Nebraska Evidence Rules.

To its credit, the district court indicated that if Stephens' case had been tried to a jury, evidence of Stephens' "other acts" would have been presented to the court, and admissibility determined, outside the jury's hearing. We have encouraged Nebraska trial courts to use Neb. Evid. R. 104 (preliminary questions of admissibility) to resolve certain admissibility questions outside the jury's hearing. For instance, in *State v. Olsan*, 231 Neb. 214, 436 N.W.2d 128 (1989), which involved admissibility of a prior conviction offered under Neb. Evid. R. 609 to impeach a defendant's credibility, we encouraged courts to employ a Rule 104 hearing for determination of admissibility questions such as whether more than 10 years had elapsed since the date of the conviction offered or whether the conviction was for a crime which "involved dishonesty or false statement." Neb. Evid. R. 609(1) and (2). In *Olsan*, we recognized that, "as a suggested procedure," a Rule 104 hearing

> is not a prerequisite to admissibility of evidence authorized by Neb. Evid. R. 609. Rather, the suggested procedure appears to be a practicable measure which may be an ounce of prevention at the trial level, obviating a pound of appellate cure and a ton of mistrials and retrials on account of improper impeachment from contravention of Neb. Evid. R. 609.

231 Neb. at 231, 436 N.W.2d at 138-39. What we have expressed in *Olsan* regarding a Rule 104 hearing for impeachment evidence through use of a prior conviction applies equally as well to avoid prejudicial error in a jury trial when "other acts" evidence is tendered under Rule 404(2).

At this point, however, I depart from approbation of the district court's procedure, namely, reception of evidence concerning Stephens' prior sexual conduct outside the act charged in the information.

Rule 404(2) 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.

Rule 404(2) prohibits evidence offered for the sole purpose of establishing a defendant's propensity to act in a particular manner and thereby supplying a basis for the inference that the defendant committed the crime charged. Thus, Rule 404(2) forbids a prosecutor's introducing evidence of a defendant's uncharged misconduct to support a general inference of bad character which increases the probability that the defendant committed the crime charged.

To approve admissibility of Stephens' "other acts," the majority intones what has become a Rule 404(2) litany, much akin to that traditional troika or inveterate and terrible trilogy "irrelevant, immaterial, and incompetent," when the majority, referring to the trial court's reasons expressed for admissibility of Stephens' prior conduct, invokes the "other purposes" mentioned in Rule 404(2).

Particularly to be deplored is what might be called the

> "smorgasbord" approach to analysis of other crimes evidence in which the court simply serves up a long list of permissible uses without any attempt to show how any of them are applicable to the case at hand. . . . What is to be avoided is the mere listing of possible uses in the hope that at least one will seem to the reader to be applicable to the facts of the instant case.

22 C. Wright & K. Graham, Federal Practice and Procedure § 5240 at 479 (1978).

In reference to "identity" under Rule 404(2), other acts may be used

> [t]o prove other crimes by the accused so nearly identical in method as to earmark them as the handiwork of the accused. Much more is demanded than the mere repeated commission of crimes of the same class, such as repeated murders, robberies or rapes. The pattern and characteristics of the crimes must be so unusual and distinctive as to be like a signature.

McCormick on Evidence § 190 at 559-60 (E. Cleary 3d ed. 1984). See, also, *People v. Alcala*, 36 Cal. 3d 604, 632, 685 P.2d 1126, 1141, 205 Cal. Rptr. 775, 790 (1984) (in "identity" cases, the "other acts" and the crime charged must be related by "common marks which, considered singly or in combination, support the strong inference that the current crime bears [the defendant's] signature"); *People v Golochowicz*, 413 Mich. 298, 311, 319 N.W.2d 518, 522 (1982) ("other acts" offered to prove a defendant's identity must include circumstances which forge a link between the "other acts" and the crime charged, that is, a "unique and uncommonly distinctive style employed by the defendant . . . . It will not suffice that the 'like act' be simply another crime of the same general category or even of the same specific character"); *United States v. Foutz*, 540 F.2d 733, 737 (4th Cir. 1976) (the relationship between "other acts" and the crime charged must show "a uniquely ingenious stroke of criminal artistry"); *United States v. Silva*, 580 F.2d 144, 148 (5th Cir. 1978) ("[a] prior or subsequent crime or other incident is not admissible for [showing the accused's identity] merely because it is similar, but only if it bears such a high degree of similarity as to mark it as the handiwork of the accused");

United States v. Myers, 550 F.2d 1036, 1045-46 (5th Cir. 1977) ("other acts" and the crime charged must " 'bear such peculiar, unique, or bizarre similarities as to mark them as the handiwork of the same individual' " (quoting from *United States v. Goodwin*, 492 F.2d 1141 (5th Cir. 1974)).

As some commentators have observed:

> The prosecution should only be permitted to introduce evidence of other crimes under the identity exception where the question of identity is in issue. Sometimes, for example, in sex crimes the victim and the accused are well-known to each other and there is not the slightest possibility of mistaken identity; the real issue in the case is whether the crime took place. To admit evidence of other crimes under the present exception in such a case is simply an evasion of the general rule that evidence of other crimes cannot be used to prove the conduct of the defendant through an inference as to his character.

22 C. Wright & K. Graham, *supra*, § 5246 at 514-15.

In Stephens' case, there was no real issue of identity; hence, the "other acts" evidence was inadmissible for that purpose. Clearly, the evidence was offered to show Stephens' character or propensity pertaining to sexual conduct and, therefore, is a violation of Rule 404(2), an error which necessitates a new trial for Stephens.

The majority refers to a "presumption" that a trial court, in a bench trial or nonjury case, considers only admissible and relevant evidence in resolving a factual dispute or question. That "rule" and its "corollary," however, do not involve a presumption, that is, a fact inferred from another known or proved fact or facts. The "rule" and "corollary" expressed by the majority is actually a principle of appellate procedure which requires that the defendant show that the trial court actually made a factual determination, or otherwise resolved an issue, through use of inadmissible evidence. This procedural principle differs from the rule for an appellate review of a jury trial involving inadmissible evidence: "In a jury trial of a criminal case, whether an error in admitting or excluding evidence reaches a constitutional dimension or not, an erroneous evidential ruling results in prejudice to a defendant unless the

State demonstrates that the error was harmless beyond a reasonable doubt." *State v. Cox,* 231 Neb. 495, 504, 437 N.W.2d 134, 140 (1989). Accord *State v. Lonnecker, ante* p. 207, 465 N.W.2d 737 (1991).

There is a reasonable foundation for a healthy skepticism that the trial court disregarded Stephens' previous sexual involvement with his teenage stepdaughter, for that very conduct was the basis of Stephens' California conviction for a sexual offense which the trial court expressly considered in determining the sentence imposed on Stephens. Ironically, a felony conviction based on Stephens' other acts and offered for the purpose of impeachment would have been excluded by the 10-year limitation for admissibility under Rule 609(2).

Stephens' case is not just a continuation of this court's misunderstanding concerning character or propensity evidence prohibited by Rule 404(2), a continuity of the majority's misperception of "other acts" evidence most recently reflected in *State v. Yager*, 236 Neb. 481, 500, 461 N.W.2d 741, 752 (1990) (Shanahan, J., dissenting): "The 'other acts' evidence was inadmissible in Yager's case. Today's decision has done nothing to rein a runaway rule which threatens to trample on a defendant's right to a fair trial." Rather, Stephens' case is still another indication that this court ignores time as a restrictive factor in admissibility of "other acts" evidence, since, irrespective of the time interval between a prior act and evidence of that act offered at trial, "other acts" evidence is admissible "within the discretion of the trial court." On a review of the Nebraska decisions where "remoteness" was raised as an issue for admissibility of "other acts" evidence under Rule 404(2), there appears to be no decision in which this court concluded that a trial court's ruling was an "abuse of discretion" relative to the span of time between a prior act and evidence of the prior act offered in a defendant's trial.

Better the majority should worry about its umfarshtendenish* of Rule 404(2), not Stephens' chutzpah.

As reflected by *Yager* issued 4 months ago, and until today, 20 years was the extreme in the timespan between a defendant's prior act and evidence of that prior act received at trial. Today, however, we have extended temporal acceptability in "other

acts" evidence to 28 years and probably have expanded a trial court's "discretion" into absolute latitude. If the trend continues in this court's construction and application of Rule 404(2) concerning "other acts" evidence, conduct throughout a defendant's lifetime will be admissible and, if reincarnation is a fact, will be admissible from another life.

*Yiddish for "misunderstanding"

HAROLD GIVENS AND OLGA GIVENS, PLAINTIFFS, V. ANCHOR PACKING, INC., ET AL., DEFENDANTS.

466 N.W.2d 771

Filed March 15, 1991. No. 90-697.

1. **Actions: Limitations of Actions: Statutes.** The amendment of a statute of repose cannot resurrect an action which a prior version of the statute extinguished.
2. **Constitutional Law: Due Process: Property.** Neb. Const. art. I, § 3, prevents persons from being deprived of their property without due process of law.
3. **Judgments: Statutes.** A judgment is a vested right which cannot be impaired by a subsequent legislative act.
4. **Limitations of Actions: Immunity: Statutes.** Immunity granted by a completed statutory bar is a vested right which cannot be impaired by a subsequent legislative act.
5. **Limitations of Actions: Legislature.** A completed bar is a substantive, vested right which the Legislature cannot abrogate.
6. **Supreme Court: Questions of Law: Courts.** Under the provisions of Neb. Rev. Stat. § 24-219 (Reissue 1989), the Nebraska Supreme Court is limited to answering questions of law certified to it by a federal court.

Certified Question from the U.S. District Court for the District of Nebraska. Judgment entered.

Michael Kelley and Geoffrey C. Hall, of Kelley, Kelley & Lehan, P.C., and Michael K. Mixson, of Middleton & Anderson, P.C., for plaintiffs.

Theodore J. Stouffer, of Cassem, Tierney, Adams, Gotch & Douglas; William J. Brennan, Jr., and Gerald Friedrichson, of Fitzgerald, Schorr, Barmettler & Brennan; Cathy J. Dean, of Polsinelli, White, Vardeman & Shalton; John P. Mullen, of

Gaines, Mullen, Pansing, Hogan & Cotton; Thomas A. Otepka, of Gross & Welch; and Joseph F. Gross, Jr., of Timmermier, Gross & Burns, for defendants.

HASTINGS, C.J., BOSLAUGH, CAPORALE, SHANAHAN, and FAHRNBRUCH, JJ., and RONIN and COLWELL, D. JJ., Retired.

CAPORALE, J.

Pursuant to the provisions of Neb. Rev. Stat. § 24-219 (Reissue 1989), this court accepted certification from the U.S. District Court for the District of Nebraska of the following question:

> Whether the 1981 amendment to Neb. Rev. Stat. § 25-224(2) and (5) can be retroactively applied to causes of action based upon injury allegedly resulting from exposure to asbestos products which were first sold for use or consumption more than ten years prior to August 30, 1981, which causes had earlier been extinguished by the provisions of the 1978 enactment of Neb. Rev. Stat. § 25-224(2).

We answer in the negative; that is, the amendment may not be applied retroactively.

In considering a motion for summary judgment filed by some of the defendants, the certifying court has found that there is no genuine issue as to the following material facts: Plaintiff Harold Givens was employed as a plumber in the construction industry from 1945 until he retired in 1984 at the age of 62; in the course of his employment he was exposed to asbestos products manufactured and sold for use or consumption by the defendants prior to August 30, 1971; these asbestos products contained at least some of the components mentioned in Neb. Rev. Stat. § 25-224(5) (Reissue 1989); in 1987, plaintiff discovered facts which led to a diagnosis of injury caused by his employment exposure to asbestos products; and he filed his lawsuit on June 17, 1988.

Prior to its amendment, § 25-224 (Reissue 1979) read, in pertinent part:

> (1) All product liability actions shall be commenced within four years next after the date on which the death, injury, or damage complained of occurs.

> (2) Notwithstanding subsection (1) of this section or any other statutory provision to the contrary, any product liability action . . . shall be commenced within ten years after the date when the product which allegedly caused the personal injury, death, or damage was first sold or leased for use or consumption.

Effective August 30, 1981, § 25-224 was amended to read, in pertinent part:

> (1) All product liability actions, except one governed by subsection (5) of this section, shall be commenced within four years next after the date on which the death, injury, or damage complained of occurs.
>
> (2) Notwithstanding subsection (1) of this section or any other statutory provision to the contrary, any product liability action, except one governed . . . by subsection (5) of this section, shall be commenced within ten years after the date when the product which allegedly caused the personal injury, death, or damage was first sold or leased for use or consumption.
>
> . . . .
>
> (5) Any action to recover damages based on injury allegedly resulting from exposure to asbestos composed of chrysotile, amosite, crocidolite, tremolite, anthrophyllite, actinolite, or any combination thereof, shall be commenced within four years after the injured person has been informed of discovery of the injury by competent medical authority and that such injury was caused by exposure to asbestos as described herein, or within four years after the discovery of facts which would reasonably lead to such discovery, whichever is earlier. No action commenced under this subsection based on the doctrine of strict liability in tort shall be commenced or maintained against any seller of a product which is alleged to contain or possess a defective condition unreasonably dangerous to the buyer, user, or consumer unless such seller is also the manufacturer of such product or the manufacturer of the part thereof claimed to be defective. Nothing in this subsection shall be construed to permit an action to be brought based on an injury described in this subsection

discovered more than two years prior to August 30, 1981.

Thus, the present statutory language purports to except from the 10-year period contained in § 25-224(2) damages based on injuries allegedly resulting from exposure to certain asbestos components. The question is whether this exception can be retroactively applied to lift a bar which had already been completed before the exception was adopted.

Plaintiffs argue that the postamendment text of the statute, being the edition in effect both at the time the cause of action accrued and when the claim was filed, is the version which is applicable to the suit. However, as we have said many times down through the years:

> " 'It is well settled that it is competent for the legislature to change statutes prescribing limitations to actions, and that the one in force at the time suit is brought is applicable to the cause of action. The only restriction on the exercise of this power is, that the legislature cannot remove a bar or limitation which has already become complete, and that no limitation shall be made to take effect on existing claims without allowing a reasonable time for parties to bring action before these claims are absolutely barred by a new enactment.'. . ."

Grand Island School Dist. #2 v. Celotex Corp., 203 Neb. 559, 563-64, 279 N.W.2d 603, 607 (1979), quoting *Educational Service Unit No. 3 v. Mammel, O., S., H. & S., Inc.*, 192 Neb. 431, 222 N.W.2d 125 (1974), quoting *Horbach v. Miller*, 4 Neb. 31 (1875), quoting *Bigelow v. Bemis*, 84 Mass. (2 Allen) 496 (1861), citing *Darling v. Wells*, 55 Mass. (1 Cush.) 508 (1848), *Brigham v. Bigelow*, 53 Mass. (12 Met.) 268 (1847), *Willard v. Clarke*, 48 Mass. (7 Met.) 435 (1844), *Wright v. Oakley & another*, 46 Mass. (5 Met.) 400 (1843), and *Battles v. Fobes*, 35 Mass. (18 Pick.) 532 (1836), *more fully reported* 36 Mass. (19 Pick.) 578 (1837). This maxim has been followed by this court for fivescore and 16 years.

While we have never applied to the statute and amendment in question the rule that the Legislature cannot remove a limitations bar which has become complete, the maxim states a broad principle on the limits of legislative power, clearly applicable to the question certified. Whether § 25-224(2) is

characterized as a statute of repose (as correctly advocated by defendants), or as a statute of limitations (as advocated by plaintiffs), it is a statute prescribing limitations on actions. As such, its amendment cannot resurrect an action which the prior version of the statute had already extinguished.

Although we have never fully articulated the rationale behind this rule, it is grounded upon the due process guarantee found in Neb. Const. art. I, § 3, which prevents persons from being deprived of their property without due process of law. The immunity afforded by a statute of repose is a right which is as valuable to a defendant as the right to recover on a judgment is to a plaintiff; the two are but different sides of the same coin. Just as a judgment is a vested right which cannot be impaired by a subsequent legislative act, *Karrer v. Karrer*, 190 Neb. 610, 211 N.W.2d 116 (1973), so, too, is immunity granted by a completed statutory bar. See *Denver Wood Products Co. v. Frye*, 202 Neb. 286, 275 N.W.2d 67 (1979) (a person has no vested right in the running of a statute of limitations unless it has completely run and barred the action before the new limitation becomes effective). These are substantive rights recognized by Nebraska law and protected by its Constitution.

Plaintiffs cite us to a number of cases from other jurisdictions in support of their argument against the vested right theory. Most of these cases are from jurisdictions which either had a history of viewing even a perfected bar as a mere procedural right or made no distinction between statutes of limitations and statutes of repose.

For example, plaintiffs point to the case of *Campbell v. Holt*, 115 U.S. 620, 6 S. Ct. 209, 29 L. Ed. 483 (1885), as authority against the vested right theory. In *Campbell*, the U.S. Supreme Court upheld the Texas Supreme Court's determination that the repeal of a statute of limitations removed an already completed bar on an action for debt and that this did not deprive the defendant of a constitutionally protected property right. Justices Bradley and Harlan dissented, quoting the same passage from *Bigelow v. Bemis, supra*, which we have been repeating these long years. While this might suggest a disapproval of *Bigelow v. Bemis* on the part of the *Campbell* majority, we observe that *Campbell* merely

affirmed a determination of the Texas Supreme Court that retroactive application did not offend the federal Constitution. Since the statute at issue in *Campbell* was suspended by a provision of the Texas Constitution, the Texas court did not need to address state law questions. Our determination, however, is controlled by state law. It is interesting to note that just 2 years after the U.S. Supreme Court decided *Campbell*, the Texas court, without criticizing *Campbell*, found that a statute preventing the assertion of a statute of limitations in tax cases was unconstitutional ex post facto legislation as applied to parties who already enjoyed a completed bar. See *Mellinger v. City of Houston*, 68 Tex. 37, 3 S.W. 249 (1887).

Plaintiffs also place particular emphasis on *Murphree v. Raybestos-Manhattan, Inc.*, 696 F.2d 459 (6th Cir. 1982), in which a three-judge panel of the U.S. Court of Appeals for the Sixth Circuit held that revival of a barred asbestos claim was not impermissible under Tennessee's vested rights doctrine, predicting that the Tennessee Supreme Court would overrule *Ford Motor Company v. Moulton*, 511 S.W.2d 690 (Tenn. 1974), *cert. denied* 419 U.S. 870, 95 S. Ct. 129, 42 L. Ed. 2d 109, which held that revival of a barred cause of action was impermissible under the state Constitution. The rationale for this prediction was language in *McCroskey v. Bryant Air Conditioning Company*, 524 S.W.2d 487 (Tenn. 1975), holding that a statute of limitations runs from discovery, quoting from the *Moulton* dissent. The language relied upon in *Murphree* was concerned with when a statute of limitations begins to run and not with whether rights vested after the period had expired. The *Murphree* court also ignored the effect of the completed bar of a statute of repose (as distinguished from one of limitations), that is, that a statute of repose eliminates the possibility of a cause of action accruing. See *Colton v. Dewey*, 212 Neb. 126, 321 N.W.2d 913 (1982) (a medical malpractice case citing *Rosenberg v. Town of North Bergen*, 61 N.J. 190, 293 A.2d 662 (1972)). Whatever the accuracy of the sixth circuit court's prediction may be as to the future conduct of the Tennessee Supreme Court, the prediction is not applicable to Nebraska.

While in *MacMillen v. A. H. Robins Co.*, 217 Neb. 338, 348

N.W.2d 869 (1984), we held one fraudulently concealing a product's dangers was estopped from asserting the product liability statute of repose, we have consistently stated that a completed bar is a substantive, vested right which the Legislature cannot abrogate. *Grand Island School Dist. #2 v. Celotex Corp.*, 203 Neb. 559, 279 N.W.2d 603 (1979); *Educational Service Unit No. 3 v. Mammel, O., S., H. & S., Inc.*, 192 Neb. 431, 222 N.W.2d 125 (1974); *Horbach v. Miller*, 4 Neb. 31 (1875); *Denver Wood Products Co. v. Frye*, 202 Neb. 286, 275 N.W.2d 67 (1979). In doing so, we have followed the path set forth in *Bigelow v. Bemis*, 84 Mass. (2 Allen) 496 (1861), and advocated by the *Campbell* dissent, and we have not been unaccompanied. See, e.g., *LeBlanc v. City of Lafayette*, 558 So. 2d 259 (La. App. 1990); *Dickens v. Southtrust Bank of Alabama*, 570 So. 2d 610 (Ala. 1990); *Waller v. Pittsburgh Corning Corp.*, 742 F. Supp. 581 (D. Kan. 1990); *Conoco, Inc. v. Phipps*, 789 P.2d 253 (Okla. App. 1989); *Whitt v. Roxboro Dyeing Co.*, 91 N.C. App. 636, 372 S.E.2d 731 (1988); *School Bd. of the City of Norfolk v. U.S. Gypsum*, 234 Va. 32, 360 S.E.2d 325 (1987); *Pait v. Ford Motor Co.*, 515 So. 2d 1278 (Fla. 1987); *Ayo v. Control Insulation Corp.*, 477 So. 2d 1258 (La. App. 1985), *cert. denied* 481 So. 2d 1349 (1986); *Cheswold Vol. Fire Co. v. Lambertson Const.*, 489 A.2d 413 (Del. 1984); *Matter of M. D. H.*, 437 N.E.2d 119 (Ind. App. 1982); *Dobson v. Quinn Freight Lines, Inc.*, 415 A.2d 814 (Me. 1980); *Del Monte Corp. v. Moore*, 580 P.2d 224 (Utah 1978); *D.Z.M. v. D.A.G.*, 41 Colo. App. 377, 592 P.2d 1 (1978); *Haase v. Sawicki*, 20 Wis. 2d 308, 121 N.W.2d 876 (1963); *Jackson v. Evans*, 284 Ky. 748, 145 S.W.2d 1061 (1940); *In re Swan's Estate*, 95 Utah 408, 79 P.2d 999 (1938); *Wasson v. State ex rel. Jackson*, 187 Ark. 537, 60 S.W.2d 1020 (1933); *Cathey v. Weaver*, 111 Tex. 515, 242 S.W. 447 (1922).

It is true that some states have recently departed from this "vested right" approach in order to accommodate those suffering from asbestos illnesses. See, e.g., *City of Boston v. Keene Corp.*, 406 Mass. 301, 547 N.E.2d 328 (1989). Such an approach, however, tramples upon the vested rights of others. An edict which is not applied uniformly and in accordance with preestablished principles to all who are subject to its provisions

cannot be characterized as a rule of law.

It is plaintiffs' further position that the Legislature intended the 1981 amendments to § 25-224 to have retroactive application. Even assuming, arguendo, that the Legislature did have such an intent, *Grand Island School Dist. #2, supra*, *Educational Service Unit No. 3, supra*, and *Horbach, supra*, all state that the Legislature does not have the power to remove a bar which has already become complete. If the bar was completed before passage of the amendment, then the Legislature's intent as to retroactive application is immaterial.

Plaintiffs next contend that application of the prior version of § 25-224 to asbestos cases violates the open courts doctrine of Neb. Const. art. I, § 13. Whatever the merits of this contention may be, it is not now properly before us. This is true for two reasons. First, the constitutionality of the prior variant of this provision is not a question certified to this court; the question certified is whether the 1981 amendments may be applied retroactively. Second, Neb. Ct. R. of Prac. 9E (rev. 1989) requires a party presenting a case involving a constitutional issue to file a copy of its brief with the Attorney General and proof of such service with the Clerk of the Supreme Court. This requirement is to allow the state the opportunity to defend the laws which it has enacted. The record does not evince compliance with rule 9E. If a party fails to observe rule 9E, this court will not consider the constitutionality of the statute under attack. *Holdrege Co-op Assn. v. Wilson*, 236 Neb. 541, 463 N.W.2d 312 (1990).

Plaintiffs further contend that "[t]he ten-year limitations period of Neb. Rev. Stat. § 25-224 [prior to the 1981 amendment] does not apply generally to causes of action for diseases caused by defective products which are preceded by long latency periods and specifically to such diseases caused by asbestos." Again, the question before us is the scope of § 25-224 after its amendment in 1981 and not the range of the statute prior to its amendment. Thus, this contention, whatever its merits, is outside the scope of the inquiry here, for we are limited to answering the question of law which was certified. § 24-219 ("[t]he Supreme Court may answer questions of law certified to it [by a federal court] when requested by the

certifying court"). The question certified presupposes that plaintiffs' action would be barred under the earlier version of § 25-224.

For the foregoing reasons, we answer the question certified to us in the negative.

JUDGMENT ENTERED.

SHANAHAN, J., dissenting.

"[I]f you poison us, do we not die?" That questions leads to another.

Whether Neb. Rev. Stat. § 25-224(2) (Reissue 1989) is constitutional is a question properly presented to this court, a question which must be answered for a correct disposition of the Givenses' claims under Nebraska law. As the majority has noted, "the question before us is the scope of § 25-224 after its amendment in 1981 . . . ." Givenses and all defendants in this case have briefed and argued the constitutional pros and cons concerning the applicable parts of § 25-224, which, except for the 1981 amendatory addition of the provision regarding injury from exposure to asbestos, has remained the same since enactment of the statute in 1978.

Although the majority refers to the absence of Givenses' serving a copy of their brief on the Nebraska Attorney General in compliance with Neb. Ct. R. of Prac. 9E (rev. 1989), in view of the peculiar nature of these proceedings, service of briefs is unnecessary under the circumstances. Whatever is the structure of Nebraska's appellate court system, now or in the future, none would suggest that the certified question by the U.S. District Court for the District of Nebraska, on its own motion, is an appeal from that court. Rather, as a result of the procedure authorized by Neb. Rev. Stat. § 24-219 (Reissue 1989) relative to a federal court's certified question, this court is not exercising appellate jurisdiction, but, as a practical matter, has become an adjunct of the federal trial court in which Givenses' lawsuit is pending. No Nebraska statute appears to require that a litigant notify the Nebraska Attorney General at the trial level regarding some aspect of possible unconstitutionality of a statute applicable to the trial of a tort action.

Notwithstanding Rule 9E, the constitutional question has been adequately presented by the parties. The times that the

state has appeared before this court, after notice concerning a constitutional question in an appeal to which the state is not a party, are so few that an appearance by the state under those circumstances, if in fact there has ever been such an appearance (I can recall none), would indeed be the rare exception, not the standard procedure. We need not pursue that aspect any further, for Givenses are not making a facial challenge to § 25-224(2), requesting that this court strike down the so-called statute of repose and wipe § 25-224(2) off the "maroon books." Rather, Givenses are asking that this court conclude that the statute of repose in § 25-224(2), when applied to Givenses in their particular circumstances, has an unconstitutional effect or result. Consequently, outside the restricted setting of the Givenses' action, even if Givenses' limited constitutional claim were sustained, § 25-224(2) and its "repose" would remain part of the law for a limitation of product liability actions in Nebraska. Thus, the real question is whether § 25-224(2) can be constitutionally applied to the Givenses' claims.

At the outset, it is good to recall what we have expressed as the definition or characterization of a "cause of action," namely, "[a] cause of action is judicial protection of one's recognized right or interest, when another, owing a corresponding duty not to invade or violate such right or interest, has caused a breach of that duty." *Sorensen v. Lower Niobrara Nat. Resources Dist.*, 221 Neb. 180, 193, 376 N.W.2d 539, 548 (1985). Accord, *Millman v. County of Butler*, 235 Neb. 915, 458 N.W.2d 207 (1990); *First Nat. Bank of Omaha v. State*, 230 Neb. 259, 430 N.W.2d 893 (1988). See *Suhr v. City of Scribner*, 207 Neb. 24, 295 N.W.2d 302 (1980).

Traditionally, in Nebraska, a cause of action accrues when an injury occurs and the aggrieved party, therefore, has a right to institute and maintain a suit for redress. See, *Rosnick v. Marks*, 218 Neb. 499, 357 N.W.2d 186 (1984); *Interholzinger v. Estate of Dent*, 214 Neb. 264, 333 N.W.2d 895 (1983); *Grand Island School Dist. #2 v. Celotex Corp.*, 203 Neb. 559, 279 N.W.2d 603 (1979).

In *Condon v. A. H. Robins Co.*, 217 Neb. 60, 349 N.W.2d 622 (1984), after acknowledging that actual damage is an essential element of a cause of action based on negligence, we

stated:

> It has long been recognized in this jurisdiction that a cause of action accrues and the statute of limitations begins to run when the aggrieved party has the right to institute and maintain a suit. [Citation omitted.] Nebraska has a statute specifically declaring that concept to be the law of this jurisdiction. Neb. Rev. Stat. § 25-201 (Reissue 1979) provides: "Civil actions can only be commenced within the time prescribed in this chapter, after the cause of action shall have accrued."

217 Neb. at 64-65, 349 N.W.2d at 625.

As one commentator has noted:

> Actual loss or damage resulting to the interests of another [is a necessary element of a negligence cause of action]. The threat of future harm, not yet realized, is not enough. Negligent conduct in itself is not such an interference with the interests of the world at large that there is any right to complain of it, or to be free from it, except in the case of some individual whose interests have suffered.

Prosser and Keeton on the Law of Torts, *Negligence: Standard of Conduct* § 30 at 165 (5th ed. 1984).

"A statute of repose is a type of a statute of limitations." *Witherspoon v. Sides Constr. Co.*, 219 Neb. 117, 124, 362 N.W.2d 35, 41 (1985). In a statute of limitations, "injury" has a legal meaning and denotes conduct which invades any legally protected interest of another. *Rosnick v. Marks, supra.*

Courts in other jurisdictions, examining accrual of a cause of action based on an asbestos-related injury, have concluded that manifestation of injury is a necessary element of an asbestos-related tort action and that a cause of action for such tortious injury does not exist or accrue until manifestation of the injury. *Schweitzer v. Consolidated Rail Corp. (Conrail)*, 758 F.2d 936 (1985); *Clutter v. Johns-Manville Sales Corp.*, 646 F.2d 1151 (1981); *Louisville Trust Co. v. Johns-Manville Products*, 580 S.W.2d 497 (Ky. 1979); *Harig v. Johns-Manville Products*, 284 Md. 70, 394 A.2d 299 (1978); *Raymond v. Eli Lilly & Co.*, 117 N.H. 164, 371 A.2d 170 (1977); *Nolan v. Johns-Manville Asbestos*, 85 Ill. 2d 161, 421 N.E.2d 864 (1981).

However, this court has elected to bypass the injury-damage

element, heretofore utilized in Nebraska to determine when a tort cause of action has come into existence, and has determined that a cause of action for an asbestos-related injury accrues at the date of a claimant's last exposure to the asbestos. Therein lies the constitutional question.

Whereas a statute of limitations runs from the date when a cause of action accrues, that is, on injury or a violation of a legal right, *Witherspoon v. Sides Constr. Co., supra*, a statute of repose prevents accrual of a cause of action after a definite time, specifically designated by statute and independent of any injurious occurrence or discovery of damage or injury. *Colton v. Dewey*, 212 Neb. 126, 321 N.W.2d 913 (1982). In relation to a product liability statute of repose, policy considerations include manufacturers' objections that current legal concepts, scientific knowledge, and improved technology are applied to products made several years ago and the notion that passage of time will result in improvement of product design and safety; hence, a time limit on liability for products. *Covalt v. Carey Canada, Inc.*, 543 N.E.2d 382 (Ind. 1989); *Knox v. AC & S, Inc.*, 690 F. Supp. 752 (S.D. Ind. 1988).

The Givenses' product liability claims are not the type based on a product's malfunction or final failure due to some mechanical, structural, or design deficiency which causes personal injury contemporaneous with the violence usually resulting from the product's failure, such as incineration of a driver in a defectively designed automobile or dismemberment by an unsafe appliance or machine. The Givenses' claims are based on an injury-producing substance, asbestos, which, as the result of Harold Givens' protracted exposure to the asbestos, caused physical debilitation without immediately noticeable or demonstrable symptoms of injury. Nothing indicates that Harold Givens was even remotely aware of his asbestos-related injury before 1987, when he obtained a medical diagnosis that he had a disease caused by certain asbestos products. Givenses filed suit in June 1988.

According to the rule which the majority has announced today concerning § 25-224(2) and a latent injury, the 10-year limit on a product liability cause of action is absolute and "extinguished" Givenses' claims before the 1981 amendment.

It is beyond question that, before and since enactment of § 25-224(2), Nebraska's common law recognizes a cause of action for product liability based on negligence and strict liability. None would reasonably and sincerely argue that Givenses do not have the right to be free from injury and damages caused by another's tortious conduct. Correspondingly, nobody would seriously contend that Givenses should not have a right to a remedy for damages from another's tortious conduct.

Neb. Const. art. I, § 13, provides: "All courts shall be open, and every person, for any injury done him in his lands, goods, person or reputation, shall have a remedy by due course of law, and justice administered without denial or delay." Thus, article I, § 13, is recognition that a right to redress for personal injury is a very important substantive right of constitutional stature and incorporates into the Nebraska Constitution a fundamental element of fairness, "a perhaps vaguely conceived but important notion of limitation on the power of government to infringe upon individual rights, and to act arbitrarily." See *Fireman's Fund Am. Ins. Co. v. Coleman*, 394 So. 2d 334, 351 (Ala. 1980) (Shores, J., concurring) (construction of the "open courts" guarantee, article I, § 13, of the Alabama Constitution). Accord *Lankford v. Sullivan, Long & Hagerty*, 416 So. 2d 996 (Ala. 1982). Neb. Const. art. I, § 13, "guarantees access to the courts and a judicial procedure that is based on fairness and equality [so that] an individual [cannot] be arbitrarily deprived of effective remedies designed to protect basic individual rights." See *Berry By and Through Berry v. Beech Aircraft*, 717 P.2d 670, 675 (Utah 1985) ("open courts" guarantee in the Utah Constitution). Consequently, the Legislature "has no power to make a remedy by due course of law contingent on an impossible condition." See *Nelson v. Krusen*, 678 S.W.2d 918, 921 (Tex. 1984) ("open courts" guarantee in the Texas Constitution).

As a result of article I, § 13, and its "open courts" guarantee, the Legislature cannot constitutionally, under guise of a limitation on an action, entirely abolish an existing remedy, since such elimination would amount to a denial of justice. As the U.S. Supreme Court expressed in *Wilson v. Iseminger*, 185

U.S. 55, 62, 22 S. Ct. 573, 46 L. Ed. 804 (1902):

> "Every government is under obligation to its citizens to afford them all needful legal remedies . . . ."
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> . . . .
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> . . . It may be properly conceded that all statutes of limitation[s] must proceed on the idea that the party has full opportunity afforded him to try his right in the courts. A statute could not bar the existing rights of claimants without affording this opportunity; if it should attempt to do so, it would not be a statute of limitations, but an unlawful attempt to extinguish rights arbitrarily, whatever might be the purport of its provisions.

As previously noted, a remedy is unavailable until a cause of action exists. A cause of action does not exist until conduct causes injury which, in turn, results in loss or damages. In Givenses' situation, their protectable legal interests or rights were not tortiously invaded until long after the asbestos was placed in contact with Harold Givens, an injury unknown and undetectable for many years after Harold Givens' exposure to asbestos. Missing from Givenses' case is any carelessness or lack of diligence in bringing their action. What is missing is manifestation of injury until more than 10 years had elapsed after Harold Givens was last exposed to asbestos.

For the Givenses and any claims for personal injuries which are unmanifested for years, the effect of an absolute and inflexible 10-year limitation on product liability claims is nullification of a cause of action before the cause even arises. Fundamental unfairness is the very essence of a statute of repose, especially as construed by this court's majority today, which eliminates or extinguishes a cause of action before an injury may reasonably be detected or discovered, quintessential unreasonableness in an inversionary approach to accrual of a tort cause of action by reversing time's linear dimension. Inversion and the backward movement of events might have fascinated Lewis Carroll to the extent that such phenomena coursed through "Alice's Adventures in Wonderland" and "Through the Looking-Glass and What Alice Found There," but the injustice and absurdity of barring a cause of action before its existence is summarized in the words of Judge Jerome

N. Frank, dissenting in *Dincher v. Marlin Firearms Co.*, 198 F.2d 821, 823 (2d Cir. 1952):

> Except in topsy-turvy land, you can't die before you are conceived, or be divorced before ever you marry, or harvest a crop never planted, or burn down a house never built, or miss a train running on a non-existent railroad. For substantially similar reasons, it has always heretofore been accepted, as a sort of legal "axiom," that a statute of limitations does not begin to run against a cause of action before that cause of action exists, *i e.*, before a judicial remedy is available to the plaintiff.

Although Neb. Const. art. I, § 13, does not prevent reasonable legislation which restricts bringing a claim, for example, a valid statute of limitations, the unfairness and harshness of an absolute date-of-the-exposure limitation destroys a cause of action for an injury which was latent and deteriorating beyond detection. To preclude a remedy before a manifested wrong is assuredly harshness and injustice antithetical to fundamental fairness required by Neb. Const. art. I, § 13. "To require a man to seek a remedy before he knows of his rights, is palpably unjust." *Wilkinson v. Harrington*, 104 R.I. 224, 238, 243 A.2d 745, 753 (1968). Accord *Kennedy v. Cumberland Engineering Co., Inc.*, 471 A.2d 195 (R.I. 1984). To provide against the manifest unfairness in foreclosing or eliminating an injured person's cause of action based on product liability, before that person has a reasonable opportunity to discover existence of the injury and, therefore, know that there is a cause of action, there must be some element of discovery in relation to a latent injury. Discovery of injury assures that a product liability claimant will be able to exercise the constitutional right of access to the courts within a reasonable time after discovery of an injury. Discovery may result from an appropriate medical diagnosis or other suitable information which supplies a reasonable basis for the conclusion that the claimant has sustained an injury, albeit previously latent and undetectable.

Without the element of reasonable discovery, the 10-year limitation, as an absolute and inflexible restriction on a cause of action involving a latent injury to a product liability claimant,

eliminates a cause of action before the cause of action even exists and, without provision for an alternative remedy regarding a latent injury, is a total denial of access to the courts, a violation of the "open courts" guarantee in Neb. Const. art. I, § 13. Other courts, construing the "open courts" guarantee in a state's constitution, have also reached that same conclusion in reference to a cause of action for product liability. See, *Berry By and Through Berry v. Beech Aircraft*, 717 P.2d 670 (Utah 1985); *Kennedy v. Cumberland Engineering Co., Inc., supra*; *Heath v. Sears, Roebuck & Co.*, 123 N.H. 512, 464 A.2d 288 (1983); *Lankford v. Sullivan, Long & Hagerty*, 416 So. 2d 996 (Ala. 1982); *Diamond v. E. R. Squibb and Sons, Inc.*, 397 So. 2d 671 (Fla. 1981); *Phillips v. ABC Builders, Inc.*, 611 P.2d 821 (Wyo. 1980); *Overland Const. Co., Inc. v. Sirmons*, 369 So. 2d 572 (Fla. 1979); *Saylor v. Hall*, 497 S.W.2d 218 (Ky. 1973). See, also, *Nelson v. Krusen*, 678 S.W.2d 918 (Tex. 1984) (medical malpractice statute of repose). Cf. *Covalt v. Carey Canada, Inc.*, 543 N.E.2d 382, 387 (Ind. 1989):

> [B]ecause of the long latency period with asbestos-related diseases, most plaintiffs' claims would be barred even before they knew or reasonably could have known of their injury or disease and they would be denied their day in court if the ten year statute of repose were applied. To require a claimant to bring his action in a limited period in which, even with due diligence, he could not be aware that a cause of action exists would be inconsistent with our system of jurisprudence.

Today's draconian dictate regarding the absolute 10-year limitation in § 25-224(2) has an impact far beyond injury from exposure to asbestos products.

What about other "toxic torts"—those situations involving toxic substances or other types of products which cause a deleterious condition in a human being or physical deterioration without immediately evident or discernible symptoms? The very real problem in those situations is an injury which is unmanifested until long after a person ceases to use or be exposed to a particular injury-producing substance. Latency of injury may be further complicated if there is a present-day absence of medical or scientific connection

between a substance and the illness or symptoms of the one who used or was exposed to what is eventually determined to be the injury-producing substance. Under those circumstances, evidence to establish a cause-and-effect relationship between the harmful substance and a person's injury is beyond the frontiers of medical knowledge and science. These considerations were likely in the Legislature's mind when it provided the 1981 "asbestos" amendment by § 25-224(5). Concerning that 1981 amendment, the "introducer's statement of intent" includes:

> This statute [§ 25-224(2)] creates an inequitable situation for people who contract cancer or respiratory problems as a result of exposure to asbestos. The debilitating effects of asbestos exposure have been well known for decades. The onset of illness can be more than 20 years removed from the victim's last exposure to the substance. Thus, a person who develops an illness clearly related to asbestos exposure is foreclosed from suit even though there is no real question that the substance caused the malady.

Statement of Intent, L.B. 29, 87th Leg., 1st Sess. In a hearing before the Legislature's Judiciary Committee, one of the cointroducers of the 1981 asbestos amendment succinctly expressed the problem of latent injury and a product liability statute of repose: "To retain that statute of repose is basically to say that a person is just flat out of luck, even though there is no possible way he could have known about his problem in time. That is the basic unfairness of it." Judiciary Committee Hearing, L.B. 29, 87th Leg., 1st Sess. 3 (Jan. 28, 1981). The Legislature passed the asbestos amendment, which expresses a "discovery rule," by a vote of 45 to 0. As attested by today's decision, that legislation, commendable as it is, was clearly too late and much, much too little in reference to "toxic torts."

Outside of asbestos-related injuries, there are other tragic illustrations of substances with long-range health hazards, including disease and death, which occur many years after exposure to or use of the substance. In fact, the deleterious consequences of some substances may be manifested in a subsequent generation. One such colossal catastrophe was the

pharmaceutical diethylstilbestrol (DES), a synthetic compound of the female hormone estrogen. DES was administered to prevent human miscarriage. However, as a consequence unknown at the time of its popularity, but later confirmed by testing, DES causes vaginal adenocarcinoma, a form of cancer, and adenosis, a precancerous vaginal or cervical growth, in daughters of women who ingested the drug during pregnancy. DES' harmful effects are unmanifested during a minimum latency of 10 or 12 years. The effects of DES necessitate surgery to prevent internal spreading of the disease and require biannual examinations with biopsies. "The history of the development of DES and its marketing in this country has been repeatedly chronicled." *Hymowitz v. Lilly & Co.*, 73 N.Y.2d 487, 502, 539 N.E.2d 1069, 1072, 541 N.Y.S.2d 941, 944 (1989). See, also, *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 (1980). There are undoubtedly various other pharmaceutical products now on the market which, notwithstanding current scientific investigation and testing, may eventually be determined to be carcinogenic or the cause of other serious injury to the user or the user's offspring.

What about polychlorinated biphenyl (PCB), which is strongly suspected, if not already proved, to be a carcinogen and a cause of birth defects? The countless pesticides and herbicides that are assimilated into the human food chain? Products which are the source of radon contamination? Urea formaldehyde insulation used in the homes of Nebraskans? Lead-based products such as some paint used on children's furniture, such as cribs? The harm and latent effects from some contraceptives, such as the "Dalkon Shield," have already been demonstrated. See *Condon v. A. H. Robins Co.*, 217 Neb. 60, 349 N.W.2d 622 (1984).

In toxic torts, the problem is not a batch of defective 10-year-old tired toasters which may be correctively remodeled for future sale to the public, but the extremely crucial problem of a harmful substance which is incorporated into a human being and frequently lies in wait to visit its devastation on some unsuspecting individual. In that latter circumstance, a product liability statute of repose has no constitutional or moral justification.

Moreover, in the absence of some "discovery" provision in § 25-224(2) regarding injury not immediately detectable, the unnecessarily harsh consequences of today's interpretation of the statute of repose will continue in cases of latent injury and undetected deleterious consequences from use of or exposure to an injury-producing substance. Oliver Wendell Holmes, Jr., observed: "The life of the law has not been logic: it has been experience." The "logic" of a literal interpretation of Nebraska's statute of repose for product liability is defied by the Nebraska Constitution and experience, the quite painful experiences of those who have suffered, and will suffer, latent injury from some product. Meanwhile, with all the injury-producing substances, known or unknown, which have become so much a part of our lives, Mother Nature has to be weeping, especially for those whose cry for redress is unheard in present Nebraska law.

KATHERINE M. YOUNGS, APPELLANT, V. DANIEL POTTER ET AL., APPELLEES.

467 N.W.2d 49

Filed March 22, 1991. No. 88-823.

1. **Motor Vehicles: Statutes: Negligence: Evidence.** Violation of traffic safety statutes does not constitute negligence in and of itself, but is merely evidence of negligence.
2. **Motor Vehicles: Negligence: Proximate Cause: Juries.** Whether negligence was the proximate cause of a collision is a determination left to the jury.
3. **Directed Verdict.** A directed verdict is proper only where reasonable minds cannot differ and can draw but one conclusion from the evidence; a trial court should direct a verdict as a matter of law only when the facts are conceded or undisputed.
4. **Verdicts: Juries: Appeal and Error.** A jury verdict may not be set aside unless clearly wrong, and it is sufficient if there is any evidence presented to the jury upon which it could find for the successful party.
5. **Juries: Evidence.** The jury, as the trier of fact, resolves conflicts in the evidence and determines the weight and credibility to be given to the witnesses' testimony.
6. **Motor Vehicles: Liability: Negligence.** Under the Nebraska automobile guest statute, liability attaches only if the negligence of the host driver toward the

guest is gross.

7. **Motor Vehicles: Negligence: Words and Phrases.** Gross negligence within the meaning of the automobile guest statute is great or excessive negligence, which indicates the absence of even slight care in the performance of a duty; it may be established if there is a persistence in negligence without regard for the consequences.
8. **Motor Vehicles: Negligence.** A momentary distraction cannot be defined as gross negligence, as required under the automobile guest statute, where there is no evidence that the driver knew of an imminent danger and yet persisted in a negligent manner.

Appeal from the District Court for Butler County: BRYCE BARTU, Judge. Affirmed.

Michael G. Connery and Gregory S. Heier, of Kutak Rock & Campbell, for appellant.

Donald D. Schneider for appellees Potter.

David D. Ernst, of Gaines, Mullen, Pansing & Hogan, for appellee Youngs.

HASTINGS, C.J., WHITE, CAPORALE, SHANAHAN, and FAHRNBRUCH, JJ., and COLWELL, D.J., Retired.

WHITE, J.

This is an appeal from a directed verdict in favor of defendant Robert Youngs and a jury verdict in favor of defendants Daniel Potter and William Potter. After a motion for judgment notwithstanding the verdict was overruled, the plaintiff, Katherine M. Youngs, appealed.

At approximately 7:30 p.m. on October 22, 1985, the plaintiff was a passenger in a car driven by her son, Robert Youngs, which car was being driven west on Highway 92 in Butler County. About 3.3 miles west of Rising City, the car, which was traveling at 55 miles per hour, collided with the rear end of a farm vehicle driven by defendant Daniel Potter, which vehicle was also traveling west. The farm vehicle was owned by Daniel Potter's father, defendant William Potter.

Daniel Potter testified that as he approached the highway from the field, with his tractor pulling a grain wagon, he could see a set of headlights (Youngs' car) approaching from the east, about one-half to three-fourths mile away. He did not wait for

the car, but pulled out onto the highway, accelerating from 0 to 5 miles per hour. Just prior to the accident, the farm vehicle was traveling 12 to 15 miles per hour.

Robert Youngs was driving with the car's cruise control set at 55 miles per hour. The windshield was clear, and he had on his low-beam headlights. The farm vehicle had two amber lights on the top rear of the tractor cab, which lights flashed on and off. The wagon did not have lights on the sides or on the rear, but did have a slow-moving vehicle sign affixed on the rear.

Plaintiff was awake immediately prior to the accident and did not see the tractor or farm vehicle, nor did she see the flashing yellow lights or the slow-moving vehicle sign. She gave no warning to Robert Youngs, and made no criticism of his driving when she testified at trial.

Daniel Potter had no view to the rear because the outside rearview mirror on the driver's side was out of adjustment from vibration of the tractor earlier in the day.

The north side of the highway was level ground, and Daniel Potter testified that he had in the past driven the farm vehicle on the shoulder, but did not on this date because with no view to the rear, he knew it would be hazardous to pull off to the side to let cars pass and then try to pull back onto the highway.

The state trooper who investigated the scene said that as he approached from the east he could see only the left amber light and that the grain wagon or the milo obscured the right amber light. He stated that the wagon was filled with grain on the night of the accident. As he neared the farm vehicle from the rear, he said, he lost sight of the light because it was no longer visible over the top of the wagon. The trooper testified that Robert Youngs told him on the night of the accident that Robert Youngs saw the trailer, that as he got closer he saw it was not moving and was without lights, and that he then swerved to his left and lost control.

Harold Warner was driving east on Highway 92 at the time of the accident and witnessed it. He said at one-half mile away he could see the flashing yellow lights from the rear of the tractor reflecting off an object behind it. Warner saw the Youngs' vehicle's headlights come over a rise behind the farm vehicle and then disappear from view. He said he saw at least one

headlight from the Youngs' vehicle move out into the left lane and then swing back in toward the tractor-trailer. Then he saw the Youngs' automobile skid across the lane of traffic following the collision.

An orthopedic surgeon, Dr. Richard Cimpl, testified that he saw plaintiff each day during her treatment at the Columbus hospital and that she told him she was a passenger in the front seat of a car that was attempting to pass some type of farm vehicle pulling a wagon, but since another car was coming, they could not pass and had to go back into their own lane. It was as they reentered their own lane that they hit the farm trailer from behind.

The plaintiff's expert witness, Dr. Ted Sokol, said his examination indicated that the Youngs' vehicle was left of the centerline, and as it came back into the westbound lane it struck the Potter trailer.

Plaintiff, 63 at the time of the accident, sustained a severely fractured left leg, a torn rotator cuff in her right arm, a severely lacerated face, and a bruised chest. She has had three complex operations on her leg and has been unable to return to work.

The plaintiff assigns as error: (1) the overruling of plaintiff's motion for directed verdict against the Potters and the submitting of the issue of the Potters' negligence to a jury, (2) the overruling of the motions for judgment notwithstanding the verdicts in favor of defendants Potter and defendant Youngs, (3) the receiving into evidence of still photographs from an accident reconstruction project, (4) the directing of a verdict for Robert Youngs, (5) the discussing with the jury of Robert Youngs' dismissal, and (6) the admitting of testimony of plaintiff's physician.

We initially observe the following: There is no complaint that the court erred in instructing the jury. The trial court determined as a matter of law that the plaintiff was not contributorily negligent. There is no cross-appeal, and, thus, in our analysis of the correctness of the trial court's ruling in favor of the Potters, any negligence as a matter of law, however slight, proximately causing or contributing to the plaintiff's injuries and damages would require a directed verdict in favor of the plaintiff and a reversal and remand for new trial against

the Potters.

There is evidence that Daniel Potter, in the operation of the farm tractor-trailer, (1) operated the tractor without adequate rearview mirrors when the trailer was so constructed or loaded as to prevent the driver from obtaining an unobstructed view of the rear and (2) failed to have appropriate lights and signs.

The Potters admitted that they operated the farm vehicle in violation of two Nebraska statutes: (1) Neb. Rev. Stat. § 39-6,124 (Reissue 1988), which requires the driver of a motor vehicle which is constructed or loaded so that the driver's view to the rear is obstructed to have his or her motor vehicle equipped with right and left outside mirrors which reflect a view of the highway for at least 200 feet to the rear of the vehicle, and (2) Neb. Rev. Stat. § 39-6,138(3) (Reissue 1984), which requires that farm tractors driven on state highways after sunset and at other times when there is insufficient light must be equipped with headlights and with a rear red light which is visible from at least 500 feet to the rear of the tractor.

The rule in Nebraska is that violation of traffic safety statutes "does not constitute negligence in and of itself, but is merely evidence of negligence." *Chlopek v. Schmall*, 224 Neb. 78, 83, 396 N.W.2d 103, 107 (1986); *Hartman v. Brady*, 201 Neb. 558, 270 N.W.2d 909 (1978). It must also be determined whether any such negligence was the proximate cause of the collision, and that determination is left to the jury. *Raben v. Dittenber*, 230 Neb. 822, 434 N.W.2d 11 (1989).

The plaintiff's motion for a directed verdict was overruled, and the issues were submitted to the jury. " '[O]ur review [of the overruling of a motion for directed verdict] is controlled by the rule that a directed verdict is proper only where reasonable minds cannot differ and can only draw but one conclusion from the evidence . . . .' " *Commerce Sav. Scottsbluff v. F.H. Schafer Elev.*, 231 Neb. 288, 298, 436 N.W.2d 151, 159 (1989); *Stoco, Inc. v. Madison's, Inc.*, 235 Neb. 305, 454 N.W.2d 692 (1990). The trial court here was correct because reasonable minds could differ as to the proximate cause of the collision.

When presented with the evidence, the jury returned a verdict for the Potters. "A jury verdict may not be set aside unless clearly wrong, and it is sufficient if there is any evidence

presented to the jury upon which it could find for the successful party." *Commerce Sav. Scottsbluff, supra* at 307, 436 N.W.2d at 164; *Bell v. Williams Care Center*, 226 Neb. 1, 409 N.W.2d 294 (1987). "It is for the jury, as trier of the facts, to resolve conflicts in the evidence and to determine the weight and credibility to be given to the testimony of the witnesses." *Chadron Energy Corp. v. First Nat. Bank*, 236 Neb. 173, 182, 459 N.W.2d 718, 727 (1990); *Raben, supra*. Nothing in the record supports a finding that the jury's verdict is clearly wrong. We affirm the jury's decision.

As to the plaintiff's son, a different analysis is required, since by the terms of the Nebraska automobile guest statute, the negligence of the host driver toward the guest must be gross. See Neb. Rev. Stat. § 39-6,191 (Reissue 1988). "Gross negligence within the meaning of the guest statute is great or excessive negligence, or negligence in a very high degree. It indicates the absence of even slight care in the performance of a duty." *Carlson v. Waddle*, 223 Neb. 671, 674, 392 N.W.2d 777, 779 (1986); *Teegerstrom v. H. J. Jeffries Truck Line*, 216 Neb. 917, 346 N.W.2d 411 (1984). Thus, plaintiff would not be entitled to a directed verdict against Robert Youngs unless he could be found to be grossly negligent as a matter of law.

Plaintiff told the doctor that her son was attempting to pass the tractor-trailer at the time of the collision. It can be inferred from her testimony and that of the only witness to the accident who was not a party to the lawsuit, Warner, that Robert Youngs believed he could safely pass the tractor-trailer, but when he saw the Warner vehicle approaching, he quickly pulled back into the right-hand lane, hitting the tractor-trailer. We have held that gross negligence may be established if there is "a persistence in negligence heedless of the consequences . . . ." *Liston v. Bradshaw*, 202 Neb. 272, 280, 275 N.W.2d 59, 63 (1979). Robert Youngs' momentary distraction and failure to maintain reasonable control and keep a proper lookout, even if determined to be the proximate cause of the accident, cannot be defined as gross negligence, as required under the guest statute. See *Davis v. Landis Outboard Motor Co.*, 179 Neb. 391, 138 N.W.2d 474 (1965).

"A trial court should direct a verdict as a matter of law only

when the facts are conceded, undisputed, or such that reasonable minds can draw but one conclusion therefrom." *Sundeen v. Lehenbauer*, 229 Neb. 727, 728, 428 N.W.2d 629, 630 (1988). The trial court granted Robert Youngs' motion for directed verdict because reasonable minds could only conclude that his negligence was not gross. He knew of the danger caused by the tractor-trailer only immediately prior to impact—there was no evidence that he knew of any imminent danger and yet persisted negligently.

The plaintiff has also objected to the trial court's admission of certain evidence. We find no error in the admission of evidence in this case.

Finding no error in the rulings of the trial court, we affirm the decision.

AFFIRMED.

GRANT, J., not participating.

NEBRASKA PUBLIC POWER DISTRICT, A PUBLIC CORPORATION, APPELLEE, V. BYFORD LOCKARD AND LORETTA LOCKARD, APPELLANTS.

467 N.W.2d 53

Filed March 22, 1991. No. 89-108.

1. **Injunction.** Injunction is an extraordinary remedy and ordinarily will not be granted except in a clear case where there is an actual and substantial injury; the right must be clear and the damage irreparable.
2. **Actions: Injunction.** The fact that a party, including a governmental subdivision, must expend substantial sums of money to defend a lawsuit is generally not evidence of either irreparable harm or damage, or the fact that no adequate remedy at law exists.

Appeal from the District Court for Richardson County: WILLIAM B. RIST, Judge. Reversed and injunction dissolved.

Douglas E. Merz, of Weaver, Beekman & Merz, for appellants.

Noyes W. Rogers, of Leininger, Grant, Rogers & Maul, for appellee.

HASTINGS, C.J., WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ., and COLWELL, D.J., Retired.

PER CURIAM.

The defendants-appellants, former landowners Byford Lockard and his wife, Loretta, assign as error the grant of a permanent injunction forbidding them from pursuing an action for inverse condemnation against the plaintiff-appellee, Nebraska Public Power District. For the reasons discussed below, we reverse the decree of the trial court and dissolve the injunction.

The Lockards filed a petition in the county court, alleging that the power district improperly installed an electric meter on their property, which included a grocery business; that as a result their electric bills were twice what they should have been; and that these overcharges constitute a taking of or damage to their property for public use without just compensation. This result is alleged to have occurred because the higher-than-warranted electric bills reduced the profitability of their grocery operation, thus reducing the price the Lockards were able to obtain when they sold the business. It is this county court proceeding which the district court enjoined.

The parties overlook that the case upon which the power district relies for the proposition that injunction will lie to prevent a landowner from pursuing an inverse condemnation action, *State v. Nickel Grain Co., Inc.*, 182 Neb. 191, 153 N.W.2d 727 (1967), was expressly overruled on that point in *City of Lincoln v. Cather & Sons Constr., Inc.*, 206 Neb. 10, 290 N.W.2d 798 (1980). In reversing *Nickel Grain*, the *Cather* court observed at 13-15, 290 N.W.2d at 801-02, that

> injunction is an extraordinary remedy and ordinarily will not be granted except in a clear case where there is an actual and substantial injury. The right must be clear and the damage, irreparable. [Citation omitted.]
>
> The fact that a party, including a governmental subdivision, must expend substantial sums of money to defend a lawsuit, while perhaps unfortunate, is generally

> not evidence of either irreparable harm or damage, or the fact that no adequate remedy at law exists. Would we enjoin a governmental subdivision from proceeding with condemnation merely because a landowner claimed that it would cost a substantial sum of money to prove its case, absent other evidence of irreparable harm or damage, or absent other evidence of inadequacy of the remedy at law? We think not. [Citation omitted.]
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> . . . .
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> . . . While there may be an extreme case [inverse condemnation] where such relief, if properly pleaded and proved, might be granted, generally, we should not try matters piecemeal or enjoin a party from having access to a statutory right such as that prescribed by the inverse condemnation statutes even if, ultimately, the landowner is unable to prove any damages. Generally, injunction is not a proper action to prevent a landowner from seeking damages to its property through inverse condemnation by reason of earlier governmental action.

The cause now before us is not the type of extreme case contemplated by *Cather*; accordingly, injunctive relief was improper. We therefore reverse the decree of the trial court and dissolve the injunction.

REVERSED AND INJUNCTION DISSOLVED.

AT&T INFORMATION SYSTEMS, INC., ET AL., APPELLANTS, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT, APPELLEE.

467 N.W.2d 55

Filed March 22, 1991. Nos. 89-965 through 89-971.

1. **Taxation: Valuation.** A taxpayer has the right to have his property assessed at actual value. If his property is assessed at a value in excess of its actual value, or in excess of that value at which others are taxed, then the taxpayer has a right to relief. In this regard, locally assessed taxpayers must seek relief from the county board of equalization.
2. **Constitutional Law: Taxation: Valuation.** It is the function of the county board

of equalization to determine the actual value of locally assessed property for tax purposes. In carrying out this function, the county board must give effect to the constitutional requirement that taxes be levied uniformly and proportionately upon all taxable property in the county. Individual discrepancies and inequalities within the county must be corrected and equalized by the county board of equalization.

3. **Taxation: Valuation: Collateral Attack: Appeal and Error.** One aggrieved by the action of a county board of equalization may appeal to the district court pursuant to Neb. Rev. Stat. § 77-1510 (Reissue 1990). A taxpayer who fails to pursue this remedy may not object to the valuation of his separate property for taxation purposes, and a collateral attack may not be made thereon unless the assessment is void, willfully discriminatory, or the result of fraud.
4. **State Equalization Board: Taxation: Valuation.** The State Board of Equalization and Assessment values and equalizes the property of centrally assessed taxpayers pursuant to Neb. Rev. Stat. § 77-505 (Reissue 1990).
5. **State Equalization Board: Counties: Taxation: Valuation.** In reviewing the county abstracts pursuant to Neb. Rev. Stat. § 77-505 (Reissue 1990), the State Board of Equalization and Assessment deals only with the values of the taxable property of a county in the aggregate.
6. _____: _____: _____: _____. Although the State Board of Equalization and Assessment has the power to increase or decrease the actual valuation of a class or subclass of real or personal property of any county or tax district pursuant to Neb. Rev. Stat. § 77-506 (Reissue 1990), it may do so only to change the value of the taxable property of a county in the aggregate so that there will be equalization between counties and centrally assessed property considered in the aggregate.
7. **State Equalization Board: Taxation: Valuation: Standing.** Locally assessed taxpayers do not have the right under Neb. Rev. Stat. § 77-506 (Reissue 1990) to request that the State Board of Equalization and Assessment equalize their property, as part of a class or subclass, with a class or subclass of centrally assessed property or similar property in other counties.

Appeal from the State Board of Equalization and Assessment. Appeals dismissed.

Norman H. Wright, John K. Boyer, and Amy S. Bones, of Fraser, Stryker, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., for appellants.

No appearance for appellee.

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

PER CURIAM.

These are appeals from the August 15, 1989, findings and

order of the State Board of Equalization and Assessment (State Board), denying the claims of appellants, which are locally assessed taxpayers that have requested the State Board to equalize their personal property. The State Board denied the claims for lack of standing, among other reasons. There were 180 locally assessed taxpayers that appealed the finding to this court. Of those appeals, 28 were dismissed pursuant to stipulations by the parties concerned, leaving 152 cases on appeal.

Pursuant to our order of September 11, 1989, the parties filed "cases stated" in accordance with Neb. Ct. R. of Prac. 5L (rev. 1989), separately setting forth the rulings of the State Board complained of by the appellants and the exceptions and contentions of the parties with respect to those issues.

On December 1, 1989, we ordered all locally assessed appellants to show cause why their appeals should not be dismissed for want of standing to appear before, or to appeal from, the State Board.

For the purpose of this opinion, in view of a community of issues and counsel, we have consolidated the appeals of AT&T Information Systems, Inc. (case No. 89-965); AT&T Technologies, Inc. (case No. 89-966); Gulf Central Storage & Terminal Co. (case No. 89-967); Koch Gathering Systems, Inc. (case No. 89-968); Koch Materials Company (case No. 89-969); Midlands International Trucks, Inc. (case No. 89-970); and Vickers, Inc. (case No. 89-971) for disposition.

In their response to the order to show cause, the appellants generally argue that they had standing to appear before the State Board pursuant to this court's decision in *Laflin v. State Board of Equalization and Assessment*, 156 Neb. 427, 56 N.W.2d 469 (1953). Citing *Laflin* and Neb. Rev. Stat. §§ 77-505 and 77-506 (Reissue 1990), the State Board contends it did not have jurisdiction to rule upon requests for the equalization of individual assessments. There is a difference between standing to appear before the State Board and the jurisdiction of the State Board to entertain a particular request.

In *Laflin v. State Board of Equalization and Assessment, supra*, a landowner in Johnson County appealed the action of the State Board in refusing to properly equalize the assessment

of farmland "in the various counties of the state" for the tax year 1952. This court held that

> an individual taxpayer assessed on "any class, classes or kinds of property, personal, real, or mixed in any county or tax district," is a person affected within the meaning of section 77-510, R.R.S. 1943, when the [State] Board fails in its duty to raise or lower the valuations of property within the county in which his property is situated . . . .

Laflin, supra at 429, 56 N.W.2d at 472.

The appellants appear to argue that under the holding in *Laflin*, the State Board has jurisdiction to consider a request to equalize the valuations of business personal property assessed in a particular county with those of specific centrally assessed taxpayers. However, the significance of Laflin's being a landowner in Johnson County and his appearance before the State Board in the *Laflin* case goes to the issue of standing, not jurisdiction. Section 77-505 concerns the jurisdiction of the State Board in discharging its duty to equalize all property statewide.

The dispositive issue presented in these appeals is what kind of affirmative action the State Board is *authorized to perform* with respect to the equalization of locally and centrally assessed business personal property. Section 77-505 provides that the State Board "shall annually *review the abstracts* of assessments of real and personal property submitted by the county assessors, *examine the valuation of all other property which is valued by the state*, and equalize such valuations for tax purposes within the state." (Emphasis supplied.) Section 77-506 provides that pursuant to § 77-505, the State Board "shall have the power to increase or decrease the actual valuation of a class or subclass of real or personal property of any county or tax district." Finally, Neb. Rev. Stat. § 77-506.01 (Reissue 1990) provides that in making any percentage adjustment to the valuation of property pursuant to § 77-506, the State Board may make its adjustment "so that the valuation of the property compares to the aggregate level of value of all taxable property in the state."

The rights and remedies of a taxpayer whose property is assessed locally are separate and distinct from those of a

taxpayer whose property is centrally assessed. It is important that this distinction be recognized and understood.

A taxpayer has the right to have his property assessed at actual value. If his property is assessed at a value in excess of its actual value, or in excess of that value at which others are taxed, then the taxpayer has a right to relief. See, Neb. Const. art. VIII, § 1; *Kearney Convention Center v. Board of Equal.*, 216 Neb. 292, 344 N.W.2d 620 (1984); *Sioux City Bridge v. Dakota County*, 260 U.S. 441, 43 S. Ct. 190, 67 L. Ed. 340 (1923). In this regard, locally assessed taxpayers must seek relief from the county board of equalization.

It is the function of the county board of equalization to determine the actual value of locally assessed property for tax purposes. *S. S. Kresge Co. v. Jensen*, 164 Neb. 833, 83 N.W.2d 569 (1957). In carrying out this function, the county board must give effect to the constitutional requirement that taxes be levied uniformly and proportionately upon all taxable property in the county. *Id.* Individual discrepancies and inequalities within the county must be corrected and equalized by the county board of equalization. See, Neb. Rev. Stat. §§ 77-1502 et seq. (Reissue 1990); *S. S. Kresge Co. v. Jensen, supra*. One aggrieved by the action of a county board of equalization may appeal to the district court pursuant to § 77-1510. A taxpayer who fails to pursue this remedy may not object to the valuation of his separate property for taxation purposes, and a collateral attack may not be made thereon unless the assessment is void, willfully discriminatory, or the result of fraud. See *S. S. Kresge Co. v. Jensen, supra*. See, also, *Olson v. County of Dakota*, 224 Neb. 516, 398 N.W.2d 727 (1987).

The State Board values and equalizes the property of centrally assessed taxpayers pursuant to § 77-505. In addition to performing that function, the State Board reviews the abstracts of assessments of real and personal property submitted by the county assessors. However, in reviewing the county abstracts the State Board deals only with the values of the taxable property of a county in the aggregate. Although the State Board has the power to "increase or decrease the actual valuation of a class or subclass of real or personal property of any county or tax district" pursuant to § 77-506, it may do so

only to change the value of the taxable property of a county in the aggregate so that there will be equalization between counties and centrally assessed property considered in the aggregate. Thus, locally assessed taxpayers do not have the right under § 77-506 to request that the State Board equalize their individual property, as part of a class or subclass, with a class or subclass of centrally assessed property or similar property in other counties.

The record shows that the appellants in these cases requested the following relief from the State Board: "[Appellants] hereby request that the State Board . . . direct the individual and collective counties of the State of Nebraska to equalize all of the personal property in the respective counties with the personal property of car lines, railroads, pipelines and any other similarly situated classes of property."

In support of their requests, the appellants advised the State Board that their personal property located in the State of Nebraska was taxed by the counties at 100 percent of its actual value. The appellants next stated that the personal property of centrally assessed taxpayers "will not be taxed for 1989" as the result of court orders in *Trailer Train Co. v. Leuenberger*, 885 F.2d 415 (8th Cir. 1988); *Burlington Northern RR. Co. v. Leuenberger,* No. CV87-L-565 (D. Neb. Dec. 10, 1987); *Oklahoma Gas & Electric Co. v. Leuenberger,* No. CV88-L-52 (D. Neb. Jan. 26, 1988); and *Northern Natural Gas Co. v. State Bd. of Equal.,* 232 Neb. 806, 443 N.W.2d 249 (1989), *cert. denied* 493 U.S. 1078, 110 S. Ct. 1130, 107 L. Ed. 2d 1036 (1990). The appellants concluded that "if all other taxpayers are not equalized with these entities, we [appellants] will be denied our constitutional right to be taxed uniformly and proportionally with property of the same subclass."

In their appearances before the State Board, the appellants did not request that the aggregate value of all taxable property in their counties be adjusted. Their request was that the valuation of all personal property in the counties be equalized with a particular class or subclass of centrally assessed property. The State Board did not have jurisdiction to grant this request.

Under § 77-505, the State Board functions like a county board when it values and equalizes centrally assessed property.

The centrally assessed taxpayers, as a group, are a separate entity, which might be analogized to an extra county.

At its annual meeting, the State Board also performs a statewide function, equalizing the valuations of all property within the state. In this process, the State Board deals in aggregates, and all the appellants agree the State Board has no jurisdiction to rule upon requests for the equalization of individual assessments. The language of § 77-505 contemplates that centrally assessed property is to be treated in the aggregate when the State Board equalizes valuations "for tax purposes within the state." This approach is consistent with our holding in *Northern Natural Gas Co. v. State Bd. of Equal.*, 232 Neb. 806, 443 N.W.2d 249 (1989), that a pipeline company was entitled to have its centrally assessed property equalized with centrally assessed property owned by railroad and car companies.

The appellants in these cases had standing to appear before the State Board, but the State Board did not have jurisdiction to grant the relief the appellants sought.

Although § 77-506 gives the State Board jurisdiction "to increase or decrease the actual valuation of a class or subclass of real or personal property of any county or tax district," that provision does not give the State Board jurisdiction to "pierce" the county abstracts before it at the request of a locally assessed taxpayer to equalize the specific property of all the taxpayers in a cognizable class or subclass in a county with specific classes of similar property throughout the state. In other words, under § 77-505, the State Board does not have jurisdiction to rule upon requests for the equalization of individual assessments and did not have jurisdiction to grant the relief requested in these cases. Accordingly, this court does not have jurisdiction over the matter, and the appeals are dismissed.

APPEALS DISMISSED.

STATE OF NEBRASKA, APPELLEE, V. DAVID E. ILLIG, APPELLANT.

467 N.W.2d 375

Filed March 22, 1991. No. 89-1273.

1. **Motions to Suppress: Appeal and Error.** The Supreme Court will uphold the trial court's ruling on a motion to suppress unless the trial court's findings of fact are clearly erroneous.
2. _____: _____. In reviewing a trial court's ruling on a motion to suppress, the Supreme Court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that the trial court has observed the witnesses testifying in regard to such motions.
3. **Constitutional Law: Search and Seizure: Judges.** As a general rule, searches conducted outside the judicial process without prior approval by a judge or magistrate are per se unreasonable under the fourth amendment to the U.S. Constitution.
4. **Police Officers and Sheriffs: Search and Seizure: Warrants.** Police may make warrantless entries on premises where the police reasonably believe that a person within is in need of immediate aid.
5. **Police Officers and Sheriffs: Search and Seizure: Warrants: Homicide.** Police may make a prompt warrantless search of the area to see if there are other victims or if a killer is still on the premises.
6. **Police Officers and Sheriffs: Search and Seizure: Warrants: Evidence.** If while on the premises the police inadvertently discover incriminating evidence in plain view or as a result of some activity on their part that bears a material relevance to the initial purpose for their entry, they may lawfully seize without a warrant.
7. **Search and Seizure: Evidence.** For a warrantless search to qualify as an emergency exception, there must reasonably appear to exist an exigency in the course of which a discovery related to the purpose of the entry is made. The exigent circumstances legitimate the presence, and the relevance of the discovery to the justification for the entry sanctions the seizure.
8. **Police Officers and Sheriffs: Search and Seizure: Evidence: Intent: Probable Cause.** The basic elements of the emergency exception regarding a warrantless search are that (1) the police must have reasonable grounds to believe that there is an emergency at hand and that there is an immediate need for their assistance for the protection of life or property, (2) the search must not be primarily motivated by intent to arrest and to seize evidence, and (3) there must be some reasonable basis, approximating probable cause, for associating the emergency with the area or place to be searched.
9. **Trial: Evidence: Appeal and Error.** An erroneous ruling regarding the admission of evidence results in prejudice to a defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt.
10. **Trial: Juries: Verdicts: Appeal and Error.** Error is harmless where the conduct of the trial court did not materially influence the jury in a verdict adverse to the substantial rights of the defendant.
11. **Trial: Evidence: Appeal and Error.** Erroneous admission of evidence is harmless

error and does not require reversal if the erroneously admitted evidence is cumulative and other relevant evidence, properly admitted, or admitted without objection, supports the findings of the trier of fact.

12. **Probation and Parole: Civil Rights: Convictions: Weapons.** The release of a convicted felon from probation and the restoring of his or her civil rights under Neb. Rev. Stat. § 29-2264 (Reissue 1989) does not nullify that conviction under the terms of Neb. Rev. Stat. § 28-1206(1) (Reissue 1989), which prohibits a person who has previously been convicted of a felony from possessing certain types of firearms.
13. **Trial: Joinder: Appeal and Error.** A trial court's ruling on a motion for consolidation of prosecutions properly joinable will not be disturbed on appeal in the absence of an abuse of discretion.
14. **Trial: Joinder: Evidence: Appeal and Error.** Joinder is not prejudicial error where evidence relating to both offenses would be admissible in a trial of either offense separately.
15. **Trial: Joinder: Proof.** The defendant bears the burden of proving that prejudice will result from a joinder of offenses.
16. **Convictions: Appeal and Error.** In determining the sufficiency of the evidence to support a criminal conviction, this court does not resolve conflicts in the evidence, pass upon the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence presented.
17. **Verdicts: Appeal and Error.** On a claim of insufficiency of the evidence, this court will not set aside a guilty verdict in a criminal case where such verdict is supported by relevant evidence.
18. _____: _____. A verdict of guilty must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support the verdict.
19. **Homicide: Intent: Circumstantial Evidence.** Malice and intent in a murder charge may be inferred from the words and acts of the defendant, from the facts and circumstances surrounding his or her conduct, and from the evidence relating to the circumstances of the criminal act.
20. **Criminal Law: Directed Verdict.** The trial court is justified in directing a verdict of not guilty only where the evidence completely fails to establish an essential element of the crime charged, or evidence is so doubtful in character and lacking probative value that a conviction based thereon cannot be sustained.

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

Thomas M. Kenney, Douglas County Public Defender, and Brian S. Munnelly for appellant.

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

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

HASTINGS, C.J.

David E. Illig, the defendant, appeals jury convictions of second degree murder, use of a firearm to commit a felony, and felon in possession of a firearm. We affirm.

During the early morning hours of January 24, 1989, the victim, Chris Smith, knocked loudly on the door of the residence of the defendant and his girl friend, Diane Antillon. Antillon went to the door, asked who was there, and related to the defendant that Smith was at the door. The defendant asked her for a gun and, thereafter, by his own devices, obtained a .38-caliber handgun which belonged to him.

The testimony indicates that the defendant opened the door and that the victim demanded a $100 payment, which he claimed was due and owing because of some earlier business transaction between the two men. Antillon tried to dissuade the victim from pressing his demands, and she somehow became situated between the defendant and the victim. During the confrontation at the door, the defendant asserts, he saw the victim thrust forward a knife and that defendant then fired one round from his handgun. He then "shut [his] eyes" and fired again.

The victim died as a result of the gunshot wounds. Defendant's girl friend and a neighbor called the 911 emergency number. Police officers arrived at the scene and made the customary investigation.

Officer Carlson of the Omaha Police Division was the first law enforcement officer to arrive on the scene. As he arrived, the defendant emerged from a group of trees near his residence. Carlson ordered the defendant to halt and then asked, "What happened?" The defendant replied, "He tried to kick my door in." Carlson asked where the victim was. Illig pointed toward the victim lying on the driveway. Carlson then asked, "Who shot him?" The defendant responded, "I did." Carlson had the defendant walk backward, did a visual check for weapons, and then had him lie face down on the driveway, following which Carlson's backup, Officer Zadalis, arrived and handcuffed Illig.

Officer Carlson then proceeded to the residence of the defendant. He testified that the screen door was shut, but that

the wooden front door to the house was open.

He said that he walked up to the screen door and Antillon opened the door. He asked her where the gun was. She pointed to the gun on the coffee table. Carlson entered the residence and secured the area around the weapon, leaving the weapon itself untouched. He could see that the weapon was unloaded because it was partially "broke" open.

Officer Briese, an officer of the homicide-assault unit of the Omaha Police Division, relieved Carlson and investigated the scene. Briese testified over objection as to observing in plain sight various weapons and spent and unfired cartridges, as well as the .38-caliber handgun which fired the fatal shots, all of which evidence he seized.

The trial court correctly instructed the jury as to second degree murder and manslaughter, and also as to the claimed defense of self-defense and as to the fact of restoration of civil rights of the defendant after having successfully completed a term of probation for the underlying conviction of a felony. Nevertheless, defendant appeals, assigning as error the action of the trial court in (1) overruling defendant's motion to suppress evidence seized in violation of his rights under the 4th and 14th amendments to the U.S. Constitution and article I, §§ 1 and 7, of the Nebraska Constitution (improper search and seizure as to the weapons and cartridges), (2) failing to quash and/or to dismiss the count as to felon in possession of a firearm (because of his successful completion of his probation and restoration of his civil rights by reason thereof), (3) failing to sever the count as to felon in possession of a firearm from second degree murder and use of a weapon to commit a felony, and (4) failing to dismiss the counts as to second degree murder and use of a firearm to commit a felony or, in the alternative, to direct a verdict of acquittal because there was insufficient evidence to support the verdict or to rebut the defendant's evidence of self-defense or defense of others.

The defendant argues that evidence was seized in violation of his rights under the 4th and 14th amendments to the U.S. Constitution and article I, §§ 1 and 7, of the Nebraska Constitution. The defendant moved to suppress this evidence, but the motion was denied. Defendant's objections to

admission of this evidence at trial were overruled.

The Supreme Court will uphold the trial court's ruling on a motion to suppress unless the trial court's findings of fact are clearly erroneous. *State v. Vrtiska*, 225 Neb. 454, 406 N.W.2d 114 (1987), *cert. denied* 484 U.S. 863, 108 S. Ct. 180, 98 L. Ed. 2d 133; *State v. Walker*, 236 Neb. 503, 461 N.W.2d 755 (1990); *State v. Porter*, 235 Neb. 476, 455 N.W.2d 787 (1990); *State v. Sardeson*, 231 Neb. 586, 437 N.W.2d 473 (1989). In making this determination, the Supreme Court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that the trial court has observed the witnesses testifying in regard to such motions. *Vrtiska, supra*; *State v. Walker*, 236 Neb. 155, 459 N.W.2d 527 (1990); *Porter, supra*; *Sardeson, supra*.

Defendant's motion to suppress covered all evidence seized from the defendant in which the defendant claimed that he had a reasonable expectation of privacy. This included the murder weapon, several other guns, cartridges, spent shell casings, and various pictures taken of the interior of defendant's residence.

The fourth amendment to the U.S. Constitution protects against unreasonable searches and seizures by the government. The Nebraska Constitution contains a similar provision. See Neb. Const. art. I, § 7.

The U.S. Supreme Court has stated that "[s]earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment —subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967). Accord *Thompson v. Louisiana*, 469 U.S. 17, 105 S. Ct. 409, 83 L. Ed. 2d 246 (1984).

The Supreme Court unanimously rejected a "murder scene exception" to the warrant clause in *Mincey v. Arizona*, 437 U.S. 385, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978). The Supreme Court held that such an exception was inconsistent with the 4th and 14th amendments. It should be pointed out that in *Mincey* and *Thompson*, a general search of the residences took place. In *Mincey*, this included the opening of cupboard doors and

envelopes, the searching of pockets in clothing, and the pulling up of carpeting.

In the above-cited cases, the Supreme Court noted that the police may make warrantless entries on the premises where the police "reasonably believe that a person within is in need of immediate aid." *Mincey, supra* at 437 U.S. at 392. The Court further noted that the police may also make "a prompt warrantless search of the area to see if there are other victims or if a killer is still on the premises." *Id.* Cf. *Michigan v. Tyler*, 436 U.S. 499, 98 S. Ct. 1942, 56 L. Ed. 2d 486 (1978). This exception is known as the "emergency doctrine," an exigent circumstance which authorizes a warrantless or nonconsensual entry into a suspect's home. *State v. Resler*, 209 Neb. 249, 306 N.W.2d 918 (1981). See, also, *State v. George*, 210 Neb. 786, 317 N.W.2d 76 (1982).

In *Resler*, this court cited a definition of the emergency doctrine which states the following:

> "Law enforcement officers may enter private premises without either an arrest or a search warrant to preserve life or property, to render first aid and assistance, or to conduct a general inquiry into an unsolved crime, provided they have reasonable grounds to believe that there is an urgent need for such assistance and protective action, or to promptly launch a criminal investigation involving a substantial threat of imminent danger to either life, health, or property, and provided further, that they do not enter with an accompanying intent to either arrest or search. If, while on the premises, they inadvertently discover incriminating evidence in plain view, or as a result of some activity on their part that bears a material relevance to the initial purpose for their entry, they may lawfully seize it without a warrant. Thus, to qualify as an emergency exception, there must reasonably appear to exist an exigency in the course of which a discovery related to the purpose of the entry is made. The exigent circumstances legitimate the presence, and the relevance of the discovery to the justification for the entry sanctions the seizure." See Mascolo, *The Emergency Doctrine Exception to the Warrant Requirement Under the Fourth*

Amendment, 22 Buffalo L. Rev. 419, 426-27 (1973). *Resler, supra* at 254, 306 N.W.2d at 922.

The Court in *Mincey* stated: " 'The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency.' " *Mincey, supra* at 437 U.S. at 392 (quoting *Wayne v. United States*, 318 F.2d 205 (1963), *cert. denied* 375 U.S. 860, 84 S. Ct. 125, 11 L. Ed. 2d 86). Furthermore, the Court concluded that any evidence that is in plain view may be seized by the police during the course of their legitimate emergency activities. *Mincey, supra*. See, also, *Tyler, supra*; *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971). A warrantless search must be strictly confined by the exigencies which justify its initiation. *Mincey, supra*; *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

An officer may seize evidence and contraband without a warrant if it is discovered inadvertently while it is in plain view and the officer has a right to be in the place where he has such a view. *State v. Searles*, 214 Neb. 849, 336 N.W.2d 571 (1983), *cert. denied* 466 U.S. 906, 104 S. Ct. 1684, 80 L. Ed. 2d 158 (1984); *State v. Holman*, 221 Neb. 730, 380 N.W.2d 304 (1986); *Resler, supra*. The seizure of evidence in plain view does not constitute a search. *State v. Walker*, 236 Neb. 155, 459 N.W.2d 527 (1990).

The court in *Resler, supra*, set out three guidelines for the application of the emergency doctrine.

> "The basic elements of the exception may be summarized in the following manner: (1) The police must have reasonable grounds to believe that there is an emergency at hand and an immediate need for their assistance for the protection of life or property. (2) The search must not be primarily motivated by intent to arrest and seize evidence. (3) There must be some reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched.
>
> "The first requisite is that the police have valid reasons for the belief that an emergency exists, a belief which must be grounded in empirical facts rather than subjective feelings . . . .

> "The second requirement is related to the first in that the protection of human life or property in imminent danger must be the motivation for the search rather than the desire to apprehend a suspect or gather evidence for use in a criminal proceeding. . . .
>
> "Finally, the limited privilege afforded to law enforcement officials by the emergency exception does not give them carte blanche to rummage for evidence if they believe a crime has been committed. There must be a direct relationship between the area to be searched and the emergency."

State v. Resler, 209 Neb. 249, 255-56, 306 N.W.2d 918, 923 (1981), quoting from *People v. Mitchell*, 39 N.Y.2d 173, 347 N.E.2d 607, 383 N.Y.S.2d 246 (1976), *cert. denied* 426 U.S. 953, 96 S. Ct. 3178, 49 L. Ed. 2d 1191. Accord *State v. Plant*, 236 Neb. 317, 461 N.W.2d 253 (1990).

The guidelines set forth in *Resler* are applicable. Officer Carlson's entry into the house was justified because of the life-threatening emergency present. The gun used to shoot the victim had not yet been located. Carlson's entry into the house to secure the gun was necessary to protect life and avoid serious injury. Until the gun was secure, the lives of all who responded to the emergency were in danger. Furthermore, at that time Carlson did not know if there were any other suspects or victims. Thus, Carlson was justified in believing that an emergency existed in which he had an obligation to enter the home, secure the gun, and determine if anyone else was injured.

The second requirement is also satisfied. Carlson did not enter the home to search the home or arrest the suspect. Carlson did not search the house or arrest Antillon. Carlson escorted Antillon out of the house and then secured the weapon. He did not search any other rooms in the house. He made no effort to determine whether any evidence was present elsewhere in the home. The only property he seized was in plain view in the living room.

Finally, Carlson had a reasonable basis, approximating probable cause, to associate the emergency with the place to be searched. The shooting took place on the porch of the defendant's home. When the first shot was fired, the defendant

was standing in his home. After he shot the victim, the defendant returned to the living room, and Antillon removed the gun from his hands and placed the gun on the coffee table in the living room. It was reasonable for Carlson to assume that the gun, another suspect, or another victim was located in the house.

Based on the guidelines, Carlson clearly did not enter the house to make an unreasonable search or to arrest a suspect. Carlson entered the house to protect the lives of all those responding to the emergency and to determine if there were any other victims. Carlson's actions fall completely within the emergency exception to the fourth amendment prohibition against warrantless, nonconsensual searches.

Carlson's entry into the house was proper based on the emergency exception. In responding to the emergency situation, Carlson could seize all the items in plain view. This included all the photographs of the living room and all the items taken from the living room which were in plain view. Therefore, the gun, the spent cartridges, and all the photographs taken in the living room were properly admitted.

The defendant argues that since Carlson did not physically seize the gun or any of the other items in plain view in the living room, the seizure of such evidence is improper. It is clear from the record that the items were seized by Carlson. Carlson would not have permitted the removal of the gun by anyone other than police personnel. Nor would Carlson have allowed the removal of the spent cartridges. All the items in the living room in plain view were seized upon Carlson's entry into the house.

The photographs taken of guns in various other parts of the home were not in plain view from the living room. There is no testimony from Carlson that he did a preliminary search or sweep of the entire house to determine if there were any other suspects or victims. At the time Carlson seized the gun in the living room, the weapon used in the shooting was believed to have been seized, the victim had been located, and the suspect apprehended. The photographs of the other guns were taken after all this had transpired, and thus the emergency situation no longer existed. The other rooms in the house had not yet been searched. Thus, any search of and seizure from the

remainder of the house constituted an illegal search and seizure of those items taken.

The items obtained in the illegal search and seizure were photographs of guns located throughout the house. These photographs should not have been admitted.

An erroneous evidential ruling results in prejudice to a defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt. *State v. Plant*, 236 Neb. 317, 461 N.W.2d 253 (1990); *State v. Cox*, 231 Neb. 495, 437 N.W.2d 134 (1989). Error is harmless where the conduct of the trial court did not materially influence the jury in a verdict adverse to the substantial rights of the defendant. *Plant, supra*; *Cox, supra*. Erroneous admission of evidence is harmless error and does not require reversal if the erroneously admitted evidence is cumulative and other relevant evidence, properly admitted, or admitted without objection, supports the findings of the trier of fact. *Plant, supra*; *Cox, supra*.

Antillon testified without objection that there were four guns on the premises, that three of the guns were hers, and that the other gun was the defendant's. Also, the defendant testified that he owned a gun and that Antillon had several guns. Any photographs of the guns would be cumulative to the testimony; therefore, there was no prejudice in admitting the pictures of the guns.

The trial court was correct in refusing to suppress photographs of the living room and the items taken from the living room which were in plain view. The failure to suppress the photographs taken of the guns located throughout the house is harmless error beyond a reasonable doubt. Grounds for reversal do not exist when the admission of evidence is harmless and no prejudice has been demonstrated. *State v. Benzel*, 220 Neb. 466, 370 N.W.2d 501 (1985).

Next, defendant assigns as error the failure of the trial court to quash and/or dismiss count III of the amended information. Count III of the amended information charges Illig with possession of a firearm by a felon, which is a violation of Neb. Rev. Stat. § 28-1206(1) (Reissue 1989). Section 28-1206 provides in part:

> (1) Any person who possesses any firearm with a barrel

> less than eighteen inches in length . . . and who has previously been convicted of a felony or who is a fugitive from justice commits the offense of possession of firearms by a felon or a fugitive from justice.

On July 14, 1989, the defendant moved to quash, or dismiss, count III or, in the alternative, to sever count III from counts I and II. The motion to dismiss, or quash, was based on the fact that the defendant had his civil rights restored by operation of Neb. Rev. Stat. § 29-2264 (Reissue 1989). The motion to sever was based upon unfair prejudice to the defendant because of the evidence relating to his prior felony conviction. The motions were denied.

Defendant asserts that pursuant to § 29-2264, a person who satisfactorily completes probation has his conviction nullified and civil rights restored the same as though a pardon had been issued. The record includes both the felony conviction and the order for expunction. The defendant argues that the conviction under § 28-1206 is erroneous, since he is not a convicted felon. Defendant does not cite to any cases which support his proposition.

Section 29-2264(5) provides several instances where the setting aside of the conviction does not prevent the use of that conviction in a later proceeding. The statute provides that the setting aside of the conviction shall not:

> (a) Require the reinstatement of any office, employment, or position which was previously held and lost or forfeited as a result of the conviction;
>
> (b) Preclude proof of a plea of guilty whenever such plea is relevant to the determination of an issue involving the rights or liabilities of someone other than the offender;
>
> (c) Preclude proof of the conviction as evidence of the commission of a crime, whenever the fact of its commission is relevant for the purposes of impeaching the offender as a witness, except that the order setting aside the conviction may be introduced in evidence;
>
> (d) Preclude use of the conviction for the purpose of determining sentence on any subsequent conviction of a criminal offense;
>
> (e) Preclude the proof of the conviction as evidence of

> the commission of a crime in the event an offender is charged with a subsequent offense and the penalty provided by law is increased if the prior conviction is proved; or
>
> (f) Preclude the proof of the conviction to determine whether an offender is eligible to have a subsequent conviction set aside....

§ 29-2264(5).

Notably absent from this list is the use of the conviction to prove a substantive element of the crime. In this instance, the substantive element was that defendant was a felon, as proved by the conviction.

Some states that have dealt with this issue have a specific statute which prohibits the possession of firearms by felons, even where their civil rights have been restored. See, e.g., *People v. Bell*, 49 Cal. 3d 502, 778 P.2d 129, 262 Cal. Rptr. 1 (1989) (stating that felons cannot possess a firearm, even after receiving a certification of rehabilitation); *State v. Jones*, 539 So. 2d 866 (La. App. 1989) (concluding that despite the fact that the defendant's conviction had been set aside after probation was concluded, the conviction could be considered for the purposes of the felon in possession charge; the court noted that although the law did provide that the setting aside of the conviction had the same effect as an acquittal in other respects, the conviction could be considered a first offense for any law relating to a cumulative offense).

Other states which do not have specific statutes have held that the restoration of civil rights does not include the right for a felon to possess a firearm. See, e.g., *State v. Hall*, 301 N.W.2d 729 (Iowa 1981) (concluding that statute prohibiting felons from possessing firearms was applicable to the defendant despite the fact that the defendant had received a full restoration of citizenship rights before enactment of the law prohibiting felons from possessing firearms; the court noted that an express authorization to possess firearms in the restoration of citizenship would have permitted the defendant to carry a firearm); *State v. Thomas*, 35 Wash. App. 161, 665 P.2d 914 (1983) (holding that it was proper to use a prior conviction to prove a felon in possession charge despite the fact

that all penalties and disabilities resulting from imposition of judgment and sentence had been removed, defendant's probation terminated, and his civil rights restored).

This court has not dealt with this issue directly; however, the U.S. Court of Appeals for the Eighth Circuit has applied the Nebraska expunction law to a federal firearm possession charge. In *United States v. Germaine*, 720 F.2d 998 (8th Cir. 1983), the court concluded that the Nebraska law which provided for expunction of a felony does not nullify the conviction for the purposes of 18 U.S.C. § 922(h) (1982), which makes it unlawful for a person previously convicted of a crime punishable by imprisonment for more than 1 year to receive firearms shipped in interstate commerce. See *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 103 S. Ct. 986, 74 L. Ed. 2d 845 (1983). The court of appeals stated:

> "[E]xpunction does not alter the legality of the previous conviction and does not signify that the defendant was innocent of the crime to which he pleaded guilty. Expunction * * * means no more than that the State has provided a means for the trial court not to accord a conviction certain continuing effects under state law. Clearly, firearms disabilities may be attached constitutionally to an expunged conviction * * *."

Germaine, supra at 999 (quoting from *Dickerson, supra*).

Although the felon in possession violation in *Germaine* arises through a federal law, the same rationale can be applied to state law. Thus, the firearm disability could be attached to the expunged conviction, and the conviction could be used to prove a violation of § 28-1206.

In addition, the State cites Neb. Rev. Stat. § 83-1,130(2) (Reissue 1987), which states:

> The Board of Pardons may, in appropriate cases where a person has been convicted of a felony, and has heretofore been granted a pardon by the appropriate authority of this state, or is hereafter granted a pardon for a conviction occurring prior or subsequent to August 25, 1969, empower the Governor to expressly authorize such person to receive, possess, or transport in commerce a firearm.

The State argues that this statute clearly shows the legislative

intent that the right to possess firearms by a felon is not automatically obtained with a pardon but, rather, is specifically reserved for the Governor's express authorization. The State alleges the defendant has no such authorization, and thus the conviction should stand.

At first glance, it appears that a restoration of civil rights should result in the restoration of the right to bear arms. However, upon viewing case law, it appears that this is usually not the case. There was no error by the trial court in not dismissing count III.

As his third assignment of error, Illig argues that the joinder of count III with counts I and II was improper and thereby prejudiced Illig's right to a fair trial under the 14th amendment. As previously noted, the motion to sever count III from counts I and II was denied.

The authority to join offenses may be found in Neb. Rev. Stat. § 29-2002 (Reissue 1989), which provides:

> (1) Two or more offenses may be charged in the same indictment, information, or complaint in a separate count for each offense if the offenses charged, whether felonies or misdemeanors, or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.
>
> . . . .
>
> (3) The court may order two or more indictments, informations, or complaints, or any combination thereof, to be tried together if the offense, and the defendants, if there are more than one, could have been joined in a single indictment, information or complaint. The procedure shall be the same as if the prosecution were under such single indictment, information, or complaint.
>
> (4) If it appears that a defendant or the state would be prejudiced by a joinder of offenses or of defendants in an indictment, information, or complaint, or by such joinder of offenses in separate indictments, informations, or complaints for trial together, the court may order an election for separate trials of counts, indictments, informations, or complaints, grant a severance of

defendants, or provide whatever other relief justice requires.

A trial court's ruling on a motion for consolidation of prosecutions properly joinable will not be disturbed on appeal in the absence of an abuse of discretion. *State v. Vrtiska*, 225 Neb. 454, 406 N.W.2d 114 (1987); *State v. Porter*, 235 Neb. 476, 455 N.W.2d 787 (1990); *State v. Thompson*, 231 Neb. 771, 438 N.W.2d 131 (1989). Joinder is not prejudicial error where evidence relating to both offenses would be admissible in a trial of either offense separately. *Porter, supra*; *Thompson, supra*; *State v. McGuire*, 218 Neb. 511, 357 N.W.2d 192 (1984). The right to a separate trial is statutory and depends upon a showing that prejudice will result from a joint trial. The defendant bears the burden of proving that prejudice will result from a joint trial. *State v. Andersen*, 232 Neb. 187, 440 N.W.2d 203 (1989).

In determining if the offenses are properly joinable, first this court must determine how the offenses are related. The offense in count III occurred at the same time as the offenses in counts I and II. Thus, the offenses which were joined are all part of the same act or transaction and are properly joinable under § 29-2002(1).

Second, this court must determine if the joinder of the offenses would be prejudicial to the State or to the defendant. The defendant bears the burden of proving that prejudice will result from a joinder of offenses. This burden has not been met.

Defendant alleges that the joinder of the offenses prejudiced him because evidence of his previous felony conviction would be admitted. Defendant further argues that the evidence of the felony conviction is inadmissible and unnecessarily and improperly prejudicial, thereby precluding his right to a fair trial.

Defendant continues by quoting extensively from Judge McCown's dissent in *State v. Nance*, 197 Neb. 95, 246 N.W.2d 868 (1976). The dissent states that evidence of unconnected other crimes is inadmissible because too much weight is given to this evidence, which could result in the conviction of a defendant because he is a bad man, rather than because he is guilty. See, *State v. Casados*, 188 Neb. 91, 195 N.W.2d 210 (1972) (finding that it was prejudicial error to join offenses

because crimes were independent); 1 S. Gard, Jones on Evidence § 4:18 (6th ed. 1972); 2 J. Wigmore, Evidence in Trials at Common Law § 302 (J. Chadbourn rev. 1979).

Defendant's argument is without merit. First, the facts in the *Nance* case are distinguishable from those in the case at bar. In *Nance*, the "unconnected" crimes Judge McCown referred to were two different robberies or burglaries which did not arise from a single act or event. Evidence of another crime was introduced to show the identity of the defendant. In the case at bar, the crimes are connected. The crimes occurred at the same time and arose from a single act or event, namely, the shooting of Smith. The potential witnesses, the crime scene, and the weapon were involved in all three crimes. These crimes were not unconnected.

Second, there was no undue prejudice from the joinder of the offenses. Evidence relating to all offenses would have been admissible in a trial of each offense separately, because the elements of the crimes were interwoven. Evidence of the felony could have been introduced to impeach the defendant's testimony, as provided by Neb. Rev. Stat. § 27-609 (Reissue 1989), which states the following:

> (1) For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination, but only if the crime (a) was punishable by death or imprisonment in excess of one year under the law under which he was convicted or (b) involved dishonesty or false statement regardless of the punishment.
>
> . . . .
>
> (3) Evidence of a conviction is not admissible under this rule if the conviction has been the subject of a pardon, annulment, or other equivalent procedure which was based on innocence.

Furthermore, despite the expunction of the felony charge, authority is given in § 29-2264(5)(c) to use the felony to impeach the offender as a witness. Therefore, evidence of the conviction of that felony would have been admitted even if the counts had been severed. In *State v. Thompson*, 231 Neb. 771, 438 N.W.2d

131 (1989), this court held that joinder was not prejudicial error where evidence relating to both offenses would have been admissible in a trial of either offense separately. The *Thompson* court followed the reasoning in *State v. Walker*, 200 Neb. 273, 263 N.W.2d 454 (1978), and *State v. McGuire*, 218 Neb. 511, 357 N.W.2d 192 (1984), and held that evidence of either robbery would have been admissible at a separate trial of the other robbery to establish identity and a method of operation. Therefore, since the defendant was not prejudiced by the consolidation, the trial court did not abuse its discretion in ordering the two informations consolidated for trial.

In the case at bar, the defendant was not prejudiced by the joinder of the counts. This assignment of error is without merit.

In the final assignment of error, the defendant alleges that the evidence was insufficient to support the verdicts or to rebut the evidence of self-defense or defense of others. In determining the sufficiency of the evidence to support a criminal conviction, this court does not resolve conflicts in the evidence, pass upon the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence presented. *State v. Fellman*, 236 Neb. 850, 464 N.W.2d 181 (1991); *State v. Thomas*, 236 Neb. 568, 462 N.W.2d 618 (1990); *State v. Peterson*, 236 Neb. 450, 462 N.W.2d 423 (1990); *State v. Reynolds*, 235 Neb. 662, 457 N.W.2d 405 (1990). On a claim of insufficiency of the evidence, this court will not set aside a guilty verdict in a criminal case where such verdict is supported by relevant evidence. *Fellman, supra*. A verdict rendered thereon must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support the verdict. *State v. Clark*, 236 Neb. 475, 461 N.W.2d 576 (1990); *Peterson, supra*. Only where evidence lacks sufficient probative force as a matter of law may the Supreme Court set aside a guilty verdict as unsupported by the evidence beyond a reasonable doubt. *Peterson, supra*; *State v. Meis*, 217 Neb. 770, 351 N.W.2d 79 (1984).

"A person commits murder in the second degree if he causes the death of a person intentionally, but without premeditation." Neb. Rev. Stat. § 28-304(1) (Reissue 1989). " 'The essential elements in the crime of murder in the second degree are that the

killing be done purposely and maliciously.' " *State v. Rowe*, 214 Neb. 685, 689, 335 N.W.2d 309, 312 (1983), quoting from *State v. Clermont*, 204 Neb. 611, 284 N.W.2d 412 (1979). The court in *Rowe* continued its discussion of malice and intent, stating: "We also said in *State v. Clermont* [citation omitted]: 'The elements of malice and intent concern the state of mind of the slayer. Malice, in its legal sense, denotes that condition of mind which is manifested by intentionally doing a wrongful act without just cause or excuse . . . .' " *Rowe, supra* at 689-90, 335 N.W.2d at 313. See, also, *State v. Johnson*, 200 Neb. 760, 266 N.W.2d 193 (1978); *State v. Hardin*, 212 Neb. 774, 326 N.W.2d 38 (1982).

Furthermore, this court has stated that malice and intent may be inferred from the words and acts of the defendant, from the facts and circumstances surrounding his or her conduct, and from the evidence relating to the circumstances of the criminal act. See, *State v. Anderson*, 229 Neb. 427, 427 N.W.2d 764 (1988); *State v. Ladehoff*, 228 Neb. 812, 424 N.W.2d 361 (1988); *State v. Pence*, 227 Neb. 201, 416 N.W.2d 581 (1987); *Rowe, supra*; *Clermont, supra*.

In *State v. Partee*, 199 Neb. 305, 258 N.W.2d 634 (1977), the court held that the evidence negated the theory that the victim's death was accidental. The court further found that a jury could infer that the perpetrator acted with malice and intent to kill, since his wife was so brutally beaten.

In *Rowe, supra*, the jury concluded that Rowe acted intentionally and with malice. The victim in *Rowe* had been struck on the head with a blunt object. She was then mutilated. The blow to the head was not the cause of death; rather, the cause was the loss of blood from the incisions that the defendant made to the body. The defendant had maintained that the head injury was caused by a fall. The defendant presented evidence to establish that he had made the incisions to the body; however, he argued that he was not guilty by reason of insanity. The jury chose not to believe Rowe's witnesses. The Nebraska Supreme Court stated that based on the circumstantial evidence, the jury could have concluded that the defendant intended to make the incisions which caused his wife's death. See *Rowe, supra*.

Partee and *Rowe* illustrate that the injury to the victim may be used to prove malice and intent. In the case at hand, the malice or intent to kill could be inferred from the injuries inflicted upon the victim and the manner in which those injuries were inflicted.

The evidence was sufficient to support the verdicts and further to reject the defendant's claim of self-defense or defense of others. First, the defendant was safe in his home with the door locked when the victim arrived. Rather than call the police or ignore the victim, the defendant, with a gun in his hand, chose to unlock the door and confront the victim. Once the defendant came out of the house with the gun, he also became an aggressor. Second, the defendant never retreated back into his home, even after he saw the knife in the victim's hand. There was no evidence presented that safe retreat was not possible for the defendant and Antillon. Third, Antillon never saw the victim with a knife. Fourth, the defendant fired five shots at the victim, four of which hit the victim. Fifth, two of the four gunshots hit the victim from behind. The defendant continued to shoot at the victim as the victim was retreating. Finally, the gunshots were not fired in rapid succession. There was a pause between the third and fourth gunshots. Based upon this evidence, the jury determined that the defendant was guilty of second degree murder.

The trial court is justified in directing a verdict of not guilty only where the evidence completely fails to establish an essential element of the crime charged, or evidence is so doubtful in character and lacking probative value that a conviction based thereon cannot be sustained. *State v. Anderson, supra*; *State v. Watkins*, 227 Neb. 677, 419 N.W.2d 660 (1988).

The evidence was sufficient to support the verdicts and to rebut the evidence presented by the defendant of self-defense or defense of others. This assignment of error is without merit.

The judgment of the district court is affirmed.

AFFIRMED.

RICHARD L. CHAPMAN, SR., APPELLANT, V. UNION PACIFIC RAILROAD, A CORPORATION, APPELLEE.

467 N.W.2d 388

Filed March 22, 1991. No. 89-1329.

1. **Federal Acts: Railroads: Constitutional Law.** The Federal Employers' Liability Act, 45 U.S.C. §§ 51 et seq. (1988), was enacted pursuant to the power granted to Congress for regulation of interstate commerce under the commerce clause of U.S. Const. art. I, § 8.
2. _____: _____: _____. As a statute of the United States, the Federal Employers' Liability Act, enacted pursuant to the U.S. Constitution, is a part of "the supreme Law of the Land." U.S. Const. art. VI, cl. 2.
3. **Constitutional Law: Federal Acts: States.** The supremacy clause of the U.S. Constitution binds the several states, subordinates state law, whether statutory or judicially enunciated, to a congressional enactment, and supersedes state law which conflicts with federal law.
4. **Federal Acts: Railroads: States: Negligence.** The Federal Employers' Liability Act preempts state law and statutorily supplies uniform law controlling a railroad employee's claim for damages caused by negligence of the employer railroad while the employee is engaged in the railroad's interstate commerce activity.
5. **Federal Acts: Railroads.** Among objectives of the Federal Employers' Liability Act are protection of railroad employees' safety and health and promotion of measures to prevent injury to railroad employees.
6. **Federal Acts: Railroads: Claims: Courts: Jurisdiction.** Courts of the United States and courts of the several states have concurrent jurisdiction to adjudicate and dispose of claims controlled by the Federal Employers' Liability Act.
7. **Federal Acts: Railroads: Claims: Courts.** In disposing of a claim controlled by the Federal Employees' Liability Act, a state court may use procedural rules applicable to civil actions in the state court unless otherwise directed by the act, but a substantive issue concerning a claim under the Federal Employers' Liability Act is controlled and determined by the provisions of the act and interpretative decisions of United States courts construing the Federal Employers' Liability Act.
8. **Federal Acts: Railroads: States: Negligence.** If the Federal Employers' Liability Act applies to an employee's negligence claim, the act supersedes a state's statutory and common law, even though the employee seeks relief in a state court.
9. **Federal Acts: Railroads: Actions: Negligence.** When the Federal Employers' Liability Act applies to a railroad employee's negligence claim, the cause of action against the railroad employer and recovery for negligent injury to a railroad employee are exclusively controlled by the Federal Employers' Liability Act.
10. **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.

11. **Federal Acts: Railroads: Negligence: Proximate Cause: Proof.** To recover under the Federal Employers' Liability Act, an employee must prove the employer's negligence and that the alleged negligence is a proximate cause of the employee's injury.
12. **Federal Acts: Railroads: Trial: Juries: Negligence: Evidence: Proximate Cause.** In a case under the Federal Employers' Liability Act, a court cannot allow a jury to speculate concerning the cause of an employee's injuries and must withhold or withdraw the employee's case from the jury unless evidence provides a basis for the reasonable inference that the employee's injury was caused by the employer's negligence.
13. **Federal Acts: Railroads: Expert Witnesses: Proximate Cause: Proof.** In an action under the Federal Employers' Liability Act, expert evidence is often required to establish the causal connection between the accident and some item of physical or mental injury unless the connection is a kind that would be obvious to laypersons.

Appeal from the District Court for Douglas County: KEITH HOWARD, Judge. Affirmed.

Lloyd R. Bergantzel for appellant.

Gayla L. Fletcher and Kathleen J. Ford for appellee.

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

SHANAHAN, J.

In two "divisions" of his amended petition, Richard L. Chapman, Sr., asserted actions against his employer, Union Pacific Railroad, a corporation, for personal injuries which Chapman sustained in an automobile accident that occurred during Chapman's employment on December 6, 1985. The district court for Douglas County struck certain allegations from "DIVISION I" of Chapman's amended petition and, after sustaining a demurrer to "DIVISION II," dismissed Chapman's action asserted in that division when Chapman declined to replead and stood on the allegations of Division II. At the close of evidence in Chapman's case in chief, the district court, on Union Pacific's motion, directed a verdict for the railroad. We affirm.

CHAPMAN'S AMENDED PETITION

Division I: Federal Employers' Liability Act.

In Division I of Chapman's amended petition, under the heading "Federal Employer's Liability Act," Chapman alleged that at the time of the accident, he was a Union Pacific employee in the interstate operation of a motor vehicle supplied by Union Pacific, which was then engaged in the "business of interstate commerce and interstate transportation as a common carrier by railroad." Chapman drove the railroad's vehicle from Omaha, Nebraska, to Council Bluffs, Iowa. When Chapman stopped Union Pacific's vehicle at a stop sign in Council Bluffs, an automobile, apparently driven by an uninsured motorist, struck the rear end of the Union Pacific vehicle.

According to Chapman's amended petition, Union Pacific was negligent by:

> (a) Failing to provide Plaintiff with a vehicle equipped with headrests. (b) Failure to provide Plaintiff with vehicle with both seatbelts and shoulder harness. (c) Failure to comply with Iowa uninsured/underinsured requirements. . . . (e) Failure to inform Plaintiff that he was not covered by any type of uninsured or underinsured coverage.

Chapman concluded that Union Pacific's "negligence was a violation of the Federal Employers' Liability Act," 45 U.S.C. §§ 51 et seq. (1988).

Division II: Negligence.

In Division II of his amended petition, under the heading "Negligence," Chapman, by reference, incorporated and reasserted all allegations contained in Division I. Chapman then alleged that Union Pacific failed to notify him that "he was not covered by an automobile insurance policy which contained uninsured or underinsured coverage" and failed to notify Chapman that "he should acquire proper automobile insurance," since Union Pacific, a self-insurer, see Neb. Rev. Stat. § 60-562 (Reissue 1988), did not provide "uninsured/underinsured" motorist protection on its vehicles. Those omissions, Chapman alleged, constituted negligence which resulted in Chapman's damages from the vehicular accident described in Division I of the amended petition.

UNION PACIFIC'S PLEADINGS

In a motion under Neb. Rev. Stat. § 25-833 (Reissue 1989) (irrelevant matter stricken), Union Pacific requested, among other things, that paragraph 9(c) and (e) of Division I in Chapman's amended petition be stricken as irrelevant to Chapman's action under the Federal Employers' Liability Act. Also, Union Pacific demurred to Division II of Chapman's amended petition and, pursuant to Neb. Rev. Stat. § 25-806 (Reissue 1989), claimed that the amended petition failed to state a cause of action, since the Federal Employers' Liability Act was Chapman's "exclusive remedy" under the circumstances.

DISTRICT COURT'S JUDGMENTS

The district court sustained Union Pacific's motion and struck paragraph 9(c) and (e) from Division I of Chapman's amended petition. The court also sustained Union Pacific's demurrer to Division II of Chapman's amended petition. When Chapman declined to replead, but stood on the allegations of his amended petition, the court dismissed Division II of Chapman's amended petition. Chapman's case proceeded to trial on Division I with paragraph 9(c) and (e) deleted or stricken by the court. At the conclusion of Chapman's case in chief, the district court directed a verdict for Union Pacific.

ASSIGNMENTS OF ERROR

Chapman contends that the district court erred (1) in striking paragraph 9(c) and (e) from Division I of Chapman's amended petition, (2) in sustaining the demurrer to Division II, and (3) in directing a verdict for Union Pacific.

FEDERAL EMPLOYERS' LIABILITY ACT

The Federal Employers' Liability Act provides in pertinent part:

> Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in commerce, [that is,

> liability] for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.
>
> Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

45 U.S.C. § 51.

We assume that a motor vehicle may be characterized as "equipment" for the purpose of the preceding provision in the Federal Employers' Liability Act. See, e.g., *Mortensen v. Southern Pacific Co.*, 245 Cal. App. 2d 241, 53 Cal. Rptr. 851 (1966) (absence of vehicular seatbelts; actionable negligence under the Federal Employers' Liability Act).

The Federal Employers' Liability Act was enacted pursuant to the power granted to Congress for regulation of interstate commerce under the commerce clause of U.S. Const. art. I, § 8. *Second Employers' Liability Cases*, 223 U.S. 1, 32 S. Ct. 169, 56 L. Ed. 327 (1912); *Parden v. Terminal R. Co.*, 377 U.S. 184, 84 S. Ct. 1207, 12 L. Ed. 2d 233 (1964). As a statute of the United States, the Federal Employers' Liability Act, enacted pursuant to the U.S. Constitution, is a part of "the supreme Law of the Land." U.S. Const. art. VI, cl. 2. See, also, *State ex rel. Douglas v. Karnes*, 216 Neb. 750, 346 N.W.2d 231 (1984) (the supremacy clause of the U.S. Constitution binds the several states, subordinates state law, including legislation, to a congressional enactment, and supersedes state law which conflicts with federal law). The Federal Employers' Liability Act preempts state law and statutorily supplies uniform law controlling a railroad employee's claim for damages caused by negligence of the employer railroad while the employee is engaged in the railroad's interstate commerce activity. *Second*

Employers' Liability Cases, supra; *Dice v. Akron, C. & Y. R. Co.*, 342 U.S. 359, 72 S. Ct. 312, 96 L. Ed. 398 (1952).

Among objectives of the Federal Employers' Liability Act are protection of railroad employees' safety and health and promotion of measures to prevent injury to railroad employees. *Parden, supra*; *Urie v. Thompson*, 337 U.S. 163, 69 S. Ct. 1018, 93 L. Ed. 1282 (1949); *Jamison v. Encarnacion*, 281 U.S. 635, 50 S. Ct. 440, 74 L. Ed. 1082 (1930); *Minneapolis &c. R. Co. v. Rock*, 279 U.S. 410, 49 S. Ct. 363, 73 L. Ed. 766 (1929).

The U.S. Supreme Court stated in *Sinkler v. Missouri Pacific R. Co.*, 356 U.S. 326, 329-30, 78 S. Ct. 758, 2 L. Ed. 2d 799 (1958):

> [I]n interpreting the FELA, we need not depend upon common-law principles of liability. This statute, an avowed departure from the rules of the common law [citation omitted], was a response to the special needs of railroad workers who are daily exposed to the risks inherent in railroad work and are helpless to provide adequately for their own safety. [Citation omitted.] The cost of human injury, an inescapable expense of railroading, must be borne by someone, and the FELA seeks to adjust that expense equitably between the worker and the carrier. [Citation omitted.] The Senate Committee which reported the Act stated that it was designed to achieve the broad purpose of promoting "the welfare of both employer and employee, by adjusting the losses and injuries inseparable from industry and commerce to the strength of those who in the nature of the case ought to share the burden."

The Federal Employers' Liability Act is a broad remedial statute and should be interpreted liberally to fulfill the intent of Congress. *Atchison, T. & S. F. R. Co. v. Buell*, 480 U.S. 557, 107 S. Ct. 1410, 94 L. Ed. 2d 563 (1987).

Courts of the United States and courts of the several states have concurrent jurisdiction over claims controlled by the Federal Employers' Liability Act. 45 U.S.C. § 56. In disposing of a claim controlled by the Federal Employees' Liability Act, a state court may use procedural rules applicable to civil actions in the state court unless otherwise directed by the act, *St. Louis*

Southwestern R. Co. v. Dickerson, 470 U.S. 409, 105 S. Ct. 1347, 84 L. Ed. 2d 303 (1985), and *Geris v. Burlington Northern, Inc.*, 277 Or. 381, 561 P.2d 174 (1977), but substantive issues concerning a claim under the Federal Employers' Liability Act are determined by the provisions of the act and interpretative decisions of federal courts construing the Federal Employers' Liability Act, see, *Monessen Southwestern R. Co. v. Morgan*, 486 U.S. 330, 108 S. Ct. 1837, 100 L. Ed. 2d 349 (1988); *Chesapeake & Ohio Ry. Co. v. Kuhn*, 284 U.S. 44, 52 S. Ct. 45, 76 L. Ed. 157 (1931); *Southern Ry. v. Gray*, 241 U.S. 333, 36 S. Ct. 558, 60 L. Ed. 1030 (1916); *Seaboard Air Line v. Horton*, 233 U.S. 492, 34 S. Ct. 635, 58 L. Ed. 1062 (1914). See, also, *McDermott v. Chicago & N. W. R. Co.*, 124 Neb. 727, 730, 248 N.W. 59, 60 (1933): "The state courts are bound by the interpretation of the federal act [Federal Employers' Liability Act] given by the federal courts." Thus, if the Federal Employers' Liability Act applies to an employee's negligence claim, the act supersedes a state's common and statutory law, even though the employee seeks relief in a state court. *Erie R. R. Co. v. Winfield*, 244 U.S. 170, 37 S. Ct. 556, 61 L. Ed. 1057 (1917).

Thus, when the Federal Employers' Liability Act applies to a railroad employee's negligence claim, the cause of action against the railroad employer and recovery for negligent injury to a railroad employee are exclusively controlled by the Federal Employers' Liability Act. See, *Second Employers' Liability Cases*, 223 U.S. 1, 32 S. Ct. 169, 56 L. Ed. 327 (1912); *Janelle v. Seaboard Coast Line R. Co.*, 524 F.2d 1259 (5th Cir. 1975); *Geris v. Burlington Northern, Inc., supra.*

THE STRICKEN ALLEGATIONS

Chapman claims that reversible error occurred as the result of the district court's striking paragraph 9(c) and (e) of the amended petition regarding provision for indemnification against Chapman's bodily injury from a collision between Union Pacific's vehicle and a vehicle driven by an uninsured or underinsured motorist. Chapman does not refer to any federal statute or decision regarding the Federal Employers' Liability Act which supports Chapman's contention that a railroad

employer's failure to provide uninsured or underinsured motorist protection for the railroad's vehicle, used in interstate commerce activity, renders the vehicle an "unsafe workplace" or "defective" as a basis for a claim under the act. We are unable to locate any federal statute or decision whereby uninsured or underinsured motorist indemnificatory protection is required for a railroad's vehicle under federal law.

The statutory law of Iowa and Nebraska, the states in which Chapman drove the Union Pacific vehicle, does not require uninsured or underinsured motorist coverage whether the owner is self-insured or not. See, Iowa Code Ann. § 516A.1 (West 1988) (uninsured and underinsured motorist coverage optional); Neb. Rev. Stat. §§ 60-509.01 and 60-577 (Reissue 1988) (uninsured and underinsured motorist coverage optional).

As noted, under the statutory law of Iowa and Nebraska, there is no requirement that a vehicle operated within either state must be covered by indemnificatory protection against an uninsured or underinsured motorist. Hence, Union Pacific was under no statutory duty to provide indemnification against an uninsured or underinsured motorist in collision with its vehicles. As Chapman's self-insured employer and owner of the vehicle in question, Union Pacific had the option to provide uninsured and underinsured protection on its vehicles, but made no such provision. Even if some nonstatutory duty were fashioned, to complete the allegation of causation for actionable negligence, namely, the railroad's legal obligation to inform Chapman concerning the absence of uninsured or underinsured motorist protection on its vehicle, Chapman had to plead, under principles for pleading a negligence case in Nebraska, that if the railroad had informed him about the absence of such protection, he would have obtained uninsured or underinsured motorist insurance coverage for the Union Pacific vehicle. See *State Auto. & Cas. Underwriters v. Farmers Ins. Exchange*, 204 Neb. 414, 282 N.W.2d 601 (1979). Cf. *Reynolds v. Atlantic Coast Line*, 336 U.S. 207, 69 S. Ct. 507, 93 L. Ed. 618 (1949) (complaint must allege proximate cause). Consequently, by itself, absence of uninsured or underinsured indemnificatory protection on Union Pacific's vehicle has no

bearing on Chapman's negligence action against the railroad. On the one hand, if the insurance coverages were unavailable to an employee concerning an employer-owned vehicle in Chapman's case, then the alleged absence of uninsured or underinsured motorist protection is irrelevant to a negligence action under the circumstances. On the other hand, if the insurance coverages were available, Chapman failed to allege that on the railroad's notice that the vehicle in question was not protected by indemnification against damages from an uninsured or underinsured motorist, he could have obtained the insurance coverage, a sequence of events necessary to complete causation for actionable negligence. Without that complete and necessary allegation about Chapman's ability to obtain insurance coverage to protect against an uninsured and underinsured motorist, protection which Union Pacific did not supply, Chapman's allegations about nonexistence of uninsured or underinsured motorist protection for Union Pacific's vehicle was irrelevant to a negligence action. For that reason, any allegation that Union Pacific failed to provide uninsured and underinsured protection or notify Chapman regarding the absence of such protection is irrelevant to the negligence action. Therefore, the district court properly struck paragraph 9(c) and (e).

DISMISSAL OF DIVISION II

Next, Chapman contends that the district court erred by dismissing the cause of action asserted in Division II of Chapman's amended petition.

" 'In reviewing an order sustaining a demurrer, the Supreme Court accepts the truth of facts well pled and the factual and legal inferences which may be reasonably deduced from such facts, but does not accept conclusions of the pleader.' " *Security Inv. Co. v. State*, 231 Neb. 536, 538, 437 N.W.2d 439, 442 (1989).

> 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.

Schuyler State Bank v. Cech, 228 Neb. 588, 593, 423 N.W.2d 464, 468 (1988). Accord *Parrett v. Platte Valley State Bank*, 236 Neb. 139, 459 N.W.2d 371 (1990).

From Chapman's allegations in Division II of his amended petition, we assume that the vehicle which collided with Union Pacific's vehicle was either uninsured for negligently caused personal injury to another person or, if covered by liability insurance concerning personal injury to another, the insurance coverage was insufficient to indemnify Chapman's loss.

As we construe the cause of action asserted in Division II of the amended petition, Chapman sought a recovery for his damages caused by Union Pacific's alleged common-law negligence in failing to inform Chapman that the railroad had not provided any indemnity protection against an uninsured or underinsured motorist who might negligently operate a vehicle in collision with the railroad's vehicle driven by Chapman. However, according to Chapman's allegations for the cause of action asserted in Division II, any of Union Pacific's negligence was occasioned by the railroad's and Chapman's conduct in the course of interstate commerce. Since the Federal Employers' Liability Act preempts state law concerning an employee's negligence claim against the railroad employer, the cause of action asserted in Division II of Chapman's amended petition is exclusively controlled by the Federal Employers' Liability Act and, therefore, is not a cause of action determined or disposed by state law concerning an action based on common-law negligence. See § 25-806(1) (lack of subject matter jurisdiction). Thus, Chapman's alleged facts for the cause of action asserted in Division II of his amended petition failed to state a cause of action based on negligence determined by state law because there was no allegation that all alleged negligent conduct occurred in intrastate commerce. See § 25-806(6). Consequently, the district court correctly dismissed the common-law cause of action asserted by Chapman in Division II of his amended petition. Chapman's second assignment of error is without merit.

DIRECTED VERDICT

Chapman claims that there was evidence to establish a cause-and-effect relationship between Chapman's injuries and the lack of an appropriate seatbelt with shoulder harness and suitable headrest for the driver of Union Pacific's vehicle, and contends that the district court improperly excluded testimony of Chapman's expert witness, George F. Lynch, an accident reconstructionist, who sought to testify about feasibility of proper seatbelt and headrest devices. Therefore, according to Chapman, the district court erred in directing a verdict against Chapman on the issue of causation for Chapman's injury sustained in the motor vehicle accident.

An action brought under the Federal Employers' Liability Act must be submitted to a jury if the jury could reasonably find that "employer negligence played any part, even the slightest, in producing the injury . . . for which damages are sought." *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, 506, 77 S. Ct. 443, 1 L. Ed. 2d 493 (1957). Therefore, "the role of the jury is significantly greater in . . . FELA cases than in common law negligence actions. The right of a jury to pass upon a question of fault and causation must be most liberally viewed." *Johannessen v. Gulf Trading & Transp. Co.*, 633 F.2d 653, 656 (2d Cir. 1980).

To recover under the Federal Employers' Liability Act, an employee must prove the employer's negligence and that the alleged negligence is a proximate cause of the employee's injury. In a case under the Federal Employers' Liability Act, a court cannot allow a jury to speculate concerning the cause of an employee's injuries and must withhold or withdraw the employee's case from the jury unless evidence provides a basis for the reasonable inference that the employee's injury was caused by the employer's negligence. *A., T. & S. F. Ry. Co. v. Toops*, 281 U.S. 351, 50 S. Ct. 281, 74 L. Ed. 896 (1930). Cf. *Zeller v. County of Howard*, 227 Neb. 667, 671, 419 N.W.2d 654, 657 (1988): "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." See, also, *Rahmig v. Mosley Machinery Co.*, 226 Neb. 423, 412 N.W.2d 56 (1987). " 'Expert

evidence is often required to establish the causal connection between the accident and some item of physical or mental injury unless the connection is a kind that would be obvious to laymen, such as a broken leg from being struck by an automobile.' " *Moody v. Maine Cent. R. Co.*, 823 F.2d 693, 695-96 (1st Cir. 1987) (quoting 4 F. Harper, F. James & O. Gray, The Law of Torts § 20.2 (2d ed. 1986)). Cf. *Mendoza v. Omaha Meat Processors*, 225 Neb. 771, 785, 408 N.W.2d 280, 289 (1987):

> 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.

Accord *Fees v. Rivett Lumber Co.*, 228 Neb. 617, 423 N.W.2d 483 (1988).

We bear in mind that Chapman alleged very specific negligence of Union Pacific in reference to its vehicular equipment, namely, lack of a proper seatbelt and headrest. In the histories given by Chapman to his two physicians who testified for him, and in the background for the medical opinions expressed in Chapman's trial, there is no reference to a seatbelt or headrest. Neither physician, testifying for Chapman, causally related Chapman's injury and the seatbelt or headrest questions raised by Chapman.

Dr. Patrick Bowman testified that "there is a relationship between [Chapman's] symptoms . . . and the accident of 6 December 1985." Dr. Charles Pigneri testified that "a great portion of [Chapman's] low back pain and his symptoms were as a direct result of the accident occurring on 12-6-85."

Chapman's action is not against the driver whose car struck the rear end of the Union Pacific van driven by Chapman. Whether the medical testimony for Chapman would be sufficient to submit the causation issue to a jury in a negligence action against the other driver is immaterial. Rather, while Chapman does not allege that Union Pacific caused the collision, he does allege that Union Pacific negligently failed to equip its vehicle with certain devices which would have

prevented or reduced Chapman's injuries.

Chapman presented no medical testimony which suggests that if Union Pacific's van had had a seatbelt and shoulder-harness arrangement, the belt system would have prevented Chapman's injury or reduced the extent of his injury. Furthermore, there is no medical testimony which indicates that if Union Pacific's vehicle had been equipped with a headrest, that device would have prevented or reduced Chapman's injury. Cf. *Hartel v. Long Island Rail Road Company*, 476 F.2d 462 (2d Cir. 1973), *cert. denied* 414 U.S. 980, 94 S. Ct. 273, 38 L. Ed. 2d 224 (a railroad's failure to install certain protective devices did not, as a matter of law, cause an employee's death, when those devices, if installed, would have been ineffective).

We do not address the question concerning exclusion of Lynch's testimony regarding the seatbelt system and headrest for the Union Pacific van. Even if Lynch had testified about those devices as safety features on the van, Chapman's medical proof presented nothing for the jury on the issues of whether the seatbelt system and absent headrest caused Chapman's injury. Thus, Chapman's evidence failed to establish a prima facie negligence case for submission to the jury. See *Ches. & Ohio Ry. v. Carnahan*, 241 U.S. 241, 36 S. Ct. 594, 60 L. Ed. 979 (1916) (a Federal Employers' Liability Act plaintiff must prove proximate cause). See, also, *Dale v. Thomas Funeral Home, ante* p. 528, 529, 466 N.W.2d 805, 807 (1991): "A 'prima facie case' means that evidence sufficiently establishes elements of a cause of action and, notwithstanding a motion for a directed verdict in a jury trial or a motion to dismiss in a nonjury trial, allows submission of the case to the fact finder for disposition."

Accordingly, we affirm the district court's judgment in Chapman's case.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DEREK W. DIXON, APPELLANT.

467 N.W.2d 397

Filed March 22, 1991. No. 89-1334.

1. **Constitutional Law: Effectiveness of Counsel: Proof.** To sustain a claim of ineffective assistance of counsel as a violation of the sixth amendment to the U.S. Constitution and thereby obtain reversal of a defendant's conviction, the defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defense, that is, a demonstration of reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different.
2. **Postconviction: Effectiveness of Counsel: Proof.** To determine whether counsel's performance is deficient in representation of a criminal defendant, the standard is whether an attorney, in representing the accused, performed at least as well as a lawyer with ordinary training and skill in the defense of a criminal case.
3. **Search and Seizure: Property: Words and Phrases.** A "seizure" of property occurs when there is some meaningful interference with an individual's possessory interests in that property.
4. **Constitutional Law: Search and Seizure.** The constitutional protection against an unreasonable search and seizure proscribes only governmental action and is inapplicable to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the government or with the participation or knowledge of any governmental official.
5. **Constitutional Law: Search and Seizure: Waiver.** The right to be free from unreasonable search and seizure can be waived by the consent of the citizen.
6. **Police Officers and Sheriffs: Property: Prisoners.** Police may remove and list or inventory property found on the person or in the possession of an arrested person who is to be jailed.
7. _____: _____: _____. A range of governmental interests supports an inventory of an arrested person's property, which include (1) protecting property of an arrestee in custody, (2) protecting police from groundless claims that an arrestee's property has not been properly safeguarded, (3) protecting or maintaining security of a detention facility by preventing introduction of weapons or contraband into the facility, and (4) ascertaining or verifying an arrestee's identity.
8. **Trial: Appeal and Error.** In the absence of plain error, when an issue is raised for the first time in an appellate court, the issue will be disregarded inasmuch as a trial court cannot commit error regarding an issue never presented and submitted for disposition in the trial court.
9. **Constitutional Law: Appeal and Error.** Generally, a constitutional question not properly raised in the trial court will not be considered on appeal.
10. **Trial: Effectiveness of Counsel: Witnesses.** As a matter of strategy for trial of a criminal case, a defense counsel's decision to call or not to call a witness is not, by itself, ineffectiveness of counsel.
11. **Effectiveness of Counsel: Witnesses: Testimony: Proof.** In the absence of

evidence indicating the substance of a witness' testimony if the witness had been called to testify as a defense witness, a defendant fails to establish prejudice from the absence of that witness.

12. **Homicide: Intent.** Under Neb. Rev. Stat. § 28-303 (Reissue 1989), a specific intent to kill is not required for felony murder, but only the intent to do a felonious act which causes a victim's death.
13. **Criminal Law: Miranda Rights.** Once an accused is arrested and given the *Miranda* admonitions or warnings, there is no requirement that those admonitions or warnings be renewed each time the accused, pursuant to the original arrest, is subsequently questioned about a crime or crimes which differ from the criminal conduct for which the accused has been arrested.
14. **Constitutional Law: Self-Incrimination: Waiver.** A suspect's awareness of all the possible subjects of questioning in advance of interrogation is not relevant to determining whether the suspect voluntarily, knowingly, and intelligently waived the privilege against self-incrimination under the fifth amendment to the U.S. Constitution or article I, § 12, of the Nebraska Constitution.
15. **Postconviction: Prisoners: Testimony.** Although a prisoner cannot be prevented from testifying in support of the prisoner's motion for postconviction relief, the prisoner has no right to be personally present at an evidentiary hearing on the motion.

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

Daniel W. Ryberg for appellant.

Robert M. Spire, Attorney General, and Terri M. Weeks for appellee.

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

SHANAHAN, J.

Derek W. Dixon appeals from the Douglas County District Court's denial of postconviction relief under Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1989).

The State charged Dixon with first degree murder, a violation of Neb. Rev. Stat. § 28-303 (Reissue 1989), and alleged that Dixon, "during the perpetration of, or attempt to perpetrate a burglary," killed the victim identified in the information filed against Dixon. A jury found Dixon guilty as charged. The district court later sentenced Dixon to life imprisonment. On direct appeal, this court affirmed Dixon's conviction. See *State v. Dixon*, 222 Neb. 787, 387 N.W.2d 682 (1986). The facts underlying Dixon's conviction are detailed in our opinion in

State v. Dixon, supra, and need not be entirely repeated here.

Dixon filed a motion to vacate or set aside his conviction pursuant to §§ 29-3001 et seq., and claimed that he had been denied effective assistance of defense counsel at trial and in his direct appeal. The Douglas County public defender's office represented Dixon at trial and in his direct appeal. At the postconviction hearing and in the present appeal, Dixon is represented by counsel who is not a member of the Douglas County public defender's office.

Dixon assigns numerous errors regarding the district court's finding that Dixon was not denied the constitutional right to effective assistance of counsel and overruling of Dixon's motion to compel his personal attendance at the postconviction hearings.

STANDARD OF REVIEW

" 'In an evidentiary hearing, as a bench trial provided by §§ 29-3001 et seq. for postconviction relief, the trial judge, as the "trier of fact," resolves conflicts in evidence and questions of fact, including witness credibility and weight to be given a witness' testimony.' " *State v. Clear*, 236 Neb. 648, 650, 463 N.W.2d 581, 583 (1990) (quoting from *State v. Williams*, 224 Neb. 114, 396 N.W.2d 114 (1986)). " '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. Clear, supra* at 650, 463 N.W.2d at 583 (quoting from *State v. Williams, supra*). Accord *State v. Dillon*, 224 Neb. 503, 398 N.W.2d 718 (1987).

ASSISTANCE OF DEFENSE COUNSEL AT TRIAL

Dixon claims the district court erred in finding that defense counsel competently represented Dixon at trial, although counsel did not (1) move to suppress certain physical evidence, raise *Miranda* issues, inform Dixon concerning the State's offer for a plea bargain, adequately prepare and examine the cause of the victim's death, and investigate the possibility of another perpetrator in the victim's death; (2) object to jury instructions involving causation and intent; and (3) adequately raise a question concerning constitutionality of the felony murder statute.

"In a proceeding under the Nebraska Postconviction Act, the movant, in custody under sentence, must allege facts which, if proved, constitute a denial or violation of the movant's rights under the Nebraska or federal Constitution, causing the judgment against the movant to be void or voidable." *State v. Start*, 229 Neb. 575, 577-78, 427 N.W.2d 800, 802 (1988); § 29-3001.

> "[T]o sustain a claim of ineffective assistance of counsel as a violation of the sixth amendment to the U.S. Constitution and thereby obtain reversal of a defendant's conviction, the defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defense, that is, a demonstration of reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different."

State v. Clear, supra at 655, 463 N.W.2d at 585 (quoting from *State v. Hawthorne*, 230 Neb. 343, 431 N.W.2d 630 (1988)). See, also, *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

In *Hawthorne*, we noted the U.S. Supreme Court's observation in *Strickland*:

> "Although we have discussed the performance component of an ineffectiveness claim prior to the prejudice component, there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one. In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result." 466 U.S.

at 697.

230 Neb. at 347, 431 N.W.2d at 633. Accord, *State v. Bostwick*, 233 Neb. 57, 443 N.W.2d 885 (1989); *State v. Williams, supra.*

To determine whether counsel's performance is deficient in representation of a criminal defendant, the standard is whether an attorney, in representing the accused, performed at least as well as a lawyer with ordinary training and skill in the defense of a criminal case. See *State v. Britt, ante* p. 163, 465 N.W.2d 466 (1991).

Suppression of Physical Evidence.

Dixon questions the absence of a motion to suppress a pair of Dixon's tennis shoes as evidence that linked Dixon to the crime. Before his arrest, Dixon was living at a Job Corps site in Excelsior Springs, Missouri. A Job Corps security officer, William McCant, transported Dixon from the Job Corps school to the Excelsior Springs Police Department, where Dixon was placed under arrest in response to a Nebraska warrant, but he was later transferred for booking at police headquarters in Clay County, Missouri. Officers in Clay County took custody of Dixon's clothing, marked and bagged it, placed it in an evidence locker, and issued a property receipt to Dixon. Later, from McCant, officers received Dixon's personal effects, including the tennis shoes, which had been kept at Dixon's Job Corps residence, property which was also marked, sealed, and placed in an evidence room at the Clay County police headquarters. These items were not examined by police until two Omaha police detectives brought Dixon to Omaha and obtained a search warrant.

Before trial, Dixon's trial attorney talked with McCant and Dixon regarding the circumstances under which Dixon's property came into possession of police. These conversations confirmed that before McCant relinquished Dixon's property to police, he had asked Dixon whether he wanted his belongings to accompany him or remain at the Job Corps campus. Dixon replied that he wanted to bring his property with him. Therefore, counsel concluded that there was no constitutional issue concerning police possession of Dixon's property. Dixon now claims that counsel failed to file a suppression motion

concerning Dixon's personal effects and to raise the issue of an unconstitutional seizure of Dixon's property, that is, possession of the property by McCant and delivery to the Clay County police.

The fourth amendment provides that the "right of the people to be secure in their . . . effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV. Accord Neb. Const. art. I, § 7. "A 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property." *United States v. Jacobsen*, 466 U.S. 109, 113, 104 S. Ct. 1652, 80 L. Ed. 2d 85 (1984). The constitutional protection against an unreasonable search and seizure proscribes only governmental action and is inapplicable to a " 'search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any governmental official.' " *United States v. Jacobsen, supra* at 466 U.S. at 113 (quoting from *Walter v. United States*, 447 U.S. 649, 100 S. Ct. 2395, 65 L. Ed. 2d 410 (1980)). See, also, *Burdeau v. McDowell*, 256 U.S. 465, 41 S. Ct. 574, 65 L. Ed. 1048 (1921) (fourth amendment protection against unlawful searches and seizures applies to governmental action and is intended to restrain sovereign authority). It is doubtful that McCant, who brought Dixon's personal effects to police, was a law enforcement officer. Nevertheless, a suppression motion based on McCant's possession of Dixon's property would have been unsuccessful under the circumstances because Dixon consented, within the meaning of search and seizure law, to McCant's possession and transportation of the property. "[T]he right to be free from unreasonable search and seizure . . . can be waived by the consent of the citizen." *State v. Juhl*, 234 Neb. 33, 41, 449 N.W.2d 202, 208 (1989).

As a result of the conversations with Dixon and McCant, defense counsel was unaware of any circumstances which would have negated Dixon's consent extended to McCant regarding possession of Dixon's property. To the contrary, Dixon explicitly requested that his belongings accompany him. Based on applicable law, counsel reasonably decided to forgo a suppression motion regarding McCant's possession of Dixon's

personal effects and delivery of that property to police. Counsel acted within the range of reasonable professional assistance, so that his actions in this regard cannot be considered ineffective and thereby be a basis to set aside Dixon's conviction. Although Dixon testified that "[i]t was never made clear" how the police received his property, the trial judge resolved any factual question against Dixon. We cannot conclude that the trial court was clearly erroneous in its decision.

Dixon also argues that his counsel at trial was derelict by not filing a similar suppression motion regarding the Missouri police officers' "seizure" of Dixon's property as the result of an inventory at police headquarters. "At the station house, it is entirely proper for police to remove and list or inventory property found on the person or in the possession of an arrested person who is to be jailed. A range of governmental interests supports an inventory process," *Illinois v. Lafayette*, 462 U.S. 640, 646, 103 S. Ct. 2605, 77 L. Ed. 2d 65 (1983), which include (1) protecting property of an arrestee in custody, (2) protecting police from groundless claims that an arrestee's property has not been properly safeguarded, (3) protecting or maintaining security of a detention facility by preventing introduction of weapons or contraband into the facility, and (4) ascertaining or verifying an arrestee's identity. See, W. LaFave & J. Israel, Criminal Procedure § 3.5 (West 1985); *Illinois v. Lafayette, supra*.

Dixon has not shown how the absence of a suppression motion based on the officers' possession of his inventoried personal property fell below the objective standard of reasonableness as required to sustain an ineffective assistance of counsel claim. Therefore, Dixon's assignment of error regarding suppression of physical evidence is without merit.

Exploration of "Miranda" Questions.

Dixon broadly asserts that defense counsel's performance was deficient at the suppression hearing because counsel failed to "[a]dequately raise and examine [Dixon's] Miranda rights," including Dixon's invocation of the right to counsel, the "pretextual" reasons given by officers for interrogation of Dixon, police enticement through a promise that Dixon would

have "conjugal" visits with his girl friend if he went to jail, and the officers' lying to Dixon during interrogation. Dixon also complains about his counsel's failure to call a certain police officer as a witness at the suppression hearing. All these arguments focus on Dixon's interrogation by two Omaha police detectives, Paul Wade and Richard Circo, who traveled to Missouri and brought Dixon to Nebraska. See *State v. Dixon*, 222 Neb. 787, 387 N.W.2d 682 (1986).

Dixon first contends that "[a]t no time during the cross-examination of Officer Circo at the suppression hearing nor at the direct examination of [Dixon] did trial counsel elicit any questioning concerning whether [Dixon] invoked his right to an attorney at a point during the interrogation." Brief for appellant at 16. Contrary to Dixon's assertion, at the suppression hearing counsel specifically asked Officer Circo on cross-examination whether and when Dixon had requested a lawyer. Additionally, in the suppression hearing the prosecutor raised the issue during direct examination of Circo and in cross-examination of Dixon. Therefore, the issue of Dixon's invocation of the right to an attorney was definitely and adequately before the court, whether presented by defense counsel or the prosecutor. The district court subsequently resolved the issue as a matter of fact. Dixon fails to explain how defense counsel's presentation of this issue was insufficient and how the ultimate outcome of the case would have been different if defense counsel had pursued a more expansive line of questioning on the subject.

Dixon next claims that during the suppression hearing, his lawyer failed to raise a question about "pretextual" *Miranda* admonitions or warnings, that is, the *Miranda* admonitions or warnings to Dixon before interrogation related only to a burglary charge, not a homicide charge, and were an "attempt to misrepresent the true purpose and the intent of the officers," namely, questioning Dixon about a murder. Brief for appellant at 20. At the suppression hearing, defense counsel repeatedly raised the "pretext" issue throughout cross-examination of Officer Circo and during direct examination of Dixon. Moreover, during interrogation by the Nebraska officers in Missouri, "Dixon asked to see Detective Wade's 'calling card,'

which designated Wade as an officer of the 'homicide unit' of the Omaha Police Department." *State v. Dixon, supra* at 791, 387 N.W.2d at 685. Dixon's claim about the "pretext" issue is frivolous.

On appeal, Dixon makes additional claims about defense counsel's failure to pursue police promises regarding Dixon's visitations with his girl friend during any confinement of Dixon and police "lies" in an attempt to encourage Dixon's confession. Because these issues were not raised in Dixon's postconviction motion or during the hearing on Dixon's motion and are unmentioned in the district court's decision, we will not consider these matters on appeal in the absence of plain error.

> In the absence of plain error, when an issue is raised for the first time in an appellate court, the issue will be disregarded inasmuch as a trial court cannot commit error regarding an issue never presented and submitted for disposition in the trial court. See *State v. Fletcher*, 221 Neb. 562, 378 N.W.2d 859 (1985) (failure to raise, at the trial level, a question concerning an allegedly unreasonable search preserved no question for appellate review regarding the search). . . . Generally, a constitutional question not properly raised in the trial court will not be considered on appeal.

State v. Oldfield, 236 Neb. 433, 438-39, 461 N.W.2d 554, 559 (1990).

In his final argument regarding possible *Miranda* violations, Dixon alleges ineffective assistance of counsel in failure to call Officer Wade as a witness at the suppression hearing. At the hearing, Officer Circo testified that the officers did not tell Dixon a "parable" in an attempt to elicit a confession, whereas at trial, Officer Wade stated that a parable was related to Dixon when the officers were transporting him from Missouri to Omaha. Dixon argues that "[b]y not calling Wade at the suppression hearing, [Dixon] was denied corroboration from a police officer," since Dixon also claimed that a parable was, in fact, given. Brief for appellant at 18. In the suppression hearing, Dixon related the "parable":

> "So then he [one of the detectives] had asked me, what do I think would be best, and then he gave me the parable

> of two children caught stealing in a store, or something of that nature. And he said — he asked me, if I had kids, which one would I punish if they had both got caught stealing and this one here comes home and tells his mother that he didn't get — that he wasn't stealing, and this one said he was, which one would she get on the most, you know."

State v. Dixon, 222 Neb. 787, 792, 387 N.W.2d 682, 685 (1986).

Before the suppression hearing, defense counsel talked with Officer Wade regarding the officer's prospective testimony and, at that time, determined that Wade's testimony would duplicate and strengthen Circo's testimony. As defense counsel explained: "I thought Dixon's testimony was exceptionally credible, and I felt that by putting Wade on the stand with what my information was at that time . . . that Wade is an inherently more believable officer and that if he backed up what Circo was saying, I lose."

As a matter of strategy for trial of a criminal case, a defense counsel's decision to call or not to call a witness is not, by itself, ineffectiveness of counsel. *State v. Britt, ante* p. 163, 465 N.W.2d 466 (1991). See, also, *State v. Evans*, 235 Neb. 575, 456 N.W.2d 739 (1990); *State v. El-Tabech*, 234 Neb. 831, 453 N.W.2d 91 (1990). Dixon's argument is without merit.

Plea Bargain.

Defense counsel maintained that he had brief conferences with Dixon concerning the possibility of a plea bargain, but Dixon "was not very interested" in any plea arrangement. Dixon claimed that his lawyer never discussed a plea bargain with him. The trial judge, as the trier of fact in this postconviction proceeding, determined witness credibility and weight to be accorded testimony from Dixon and his lawyer and resolved factual issues, including conflicts in the evidence, consistent with the version recounted by Dixon's defense counsel. We are unable to conclude that the district court's findings are clearly erroneous.

Cause of Death.

Dixon next contends that his defense counsel was ineffective by failing to adequately explore the cause of the victim's death.

As detailed in *State v. Dixon, supra*, Dr. Blaine Roffman, a pathologist and witness for the State, testified about the autopsy of the homicide victim. At the conclusion of the State's direct examination, Dr. Roffman expressed the opinion that the cause of the victim's death was "cardiac arrhythmia, which is an abnormal rhythm, due to the underlying coronary artery disease which I described in association with being exposed to severe cold weather." During cross-examination, Dr. Roffman identified "the shock value and the emotional trauma inflicted upon this lady at the time of the break-in" as the cause of the arrhythmia which eventually led to the victim's death. Dixon now argues that defense counsel introduced the factor of "shock value" into the trial by choosing to cross-examine Dr. Roffman. "Had trial counsel not asked any questions of the pathologist [Dr. Roffman], there would have been inadequate medical causal connection between the death of the victim, and any acts of [Dixon] or other person[s]." Brief for appellant at 29.

In cross-examining Dr. Roffman, defense counsel engaged in a rigorous inquiry about other possible causes for cardiac arrhythmia, such as age and overexertion, and the doctor's lack of personal knowledge concerning the precise circumstances surrounding the victim's death. The cross-examination culminated in the doctor's acknowledgement that, in the absence of information about actual events, he could not state what caused the particular cardiac arrhythmia which resulted in the victim's death. As defense counsel explained at the postconviction hearing:

> My concern was trying to raise some issue of the cause of death, other than exposure to cold, because it was apparent to me that exposure to cold was going to be linked to the fact that the door was kicked in in the burglary.
>
> And, you know, if that's the cause of death, the burglar, if it's Dixon, is in big trouble.

Dixon has demonstrated neither that defense counsel's strategy in the cross-examination of Dr. Roffman reflected unreasonable professional judgment, nor that counsel failed to perform at least as well as an attorney with ordinary training

and skill in defending criminal cases. From the fact that Dixon was eventually convicted, we are unable to draw the conclusion that defense counsel's strategy at trial constitutes ineffective assistance of counsel. See *State v. Williams*, 234 Neb. 890, 453 N.W.2d 399 (1990).

Dixon complains about the absence of Dr. Roffman's pretrial deposition, the absence of a challenge to Dr. Roffman's qualifications as an expert witness, and defense counsel's offer to stipulate Dr. Roffman's qualifications as an expert, although no stipulation was actually achieved. In making these assertions, Dixon shows neither that defense counsel's performance fell outside the range of professionally sufficient assistance, nor that counsel's actions or inactions prejudiced Dixon's defense. Thus, Dixon has failed to demonstrate reasonable probability that, but for defense counsel's allegedly deficient performance, if there was any deficiency, Dixon's trial would have turned out any differently. Therefore, Dixon has not shown a deficiency in defense counsel's performance or that Dixon's conviction is constitutionally unsustainable.

Possibility of Another Perpetrator.

Dixon states that fingerprints of Michael Lytle, a known burglar, were discovered in the vicinity where the victim lived and that on the day the victim's body was found, officers arrested Melvin Harris, who was wearing tennis shoes similar to those which left prints at the crime scene. According to Dixon, defense counsel failed to explore these circumstances.

Once again, Dixon has not clarified a particular course of action which defense counsel should have taken within the bounds of reasonable professional competence, nor has Dixon specified how any alternate course of action would have changed the outcome of his trial. Neither has Dixon indicated the substance of the information which the supposed witnesses would have provided. Moreover, Dixon did not call the named individuals as witnesses for the postconviction hearing. In the absence of evidence indicating the substance of a witness' testimony if the witness had been called to testify as a defense witness, a defendant fails to establish prejudice from the absence of a witness. See, *State v. Otey*, 212 Neb. 103, 321

N.W.2d 453 (1982); *State v. Anderson*, 216 Neb. 521, 344 N.W.2d 473 (1984). Therefore, Dixon has not established ineffective assistance of counsel regarding any absent witness.

Jury Instructions.

Dixon next claims that defense counsel was ineffective when he failed to object to jury instruction No. 5, which involved causation, and instruction No. 11, which dealt with intent.

Because instruction No. 5 was not the subject of Dixon's postconviction motion, was not considered at the suppression hearing, and is not mentioned in the district court's decision, we decline to address Dixon's contention regarding instruction No. 5. See, *State v. Oldfield*, 236 Neb. 433, 461 N.W.2d 554 (1990); *State v. Fletcher*, 221 Neb. 562, 378 N.W.2d 859 (1985).

Dixon also asserts that defense counsel was ineffective by failing to object to part of instruction No. 11 given to the jury, namely: "The turpitude involved in the burglary takes the place of intent to kill or premeditated malice, and the purpose to kill is conclusively presumed from the criminal intention required for burglary." Dixon correctly points out that the "conclusive presumption" language in the instruction was expressly disapproved before Dixon's trial. See *State v. Bradley*, 210 Neb. 882, 317 N.W.2d 99 (1982). However, we find that any error as the result of the instruction was harmless beyond a reasonable doubt. "Harmless error exists in a jury trial of a criminal case when there is some incorrect conduct by the trial court which, on review of the entire record, did not materially influence the jury in a verdict adverse to a substantial right of the defendant." *State v. Watkins*, 227 Neb. 677, 686, 419 N.W.2d 660, 666 (1988).

The instruction in question could not have materially influenced the jury in its verdict because, according to the instructions given, "purpose to kill," which was "conclusively presumed" from the criminal intent required for burglary, is not an element of felony murder defined by § 28-303, the statute under which Dixon was convicted. In Nebraska, a specific intent to kill is not required for felony murder, but only the intent to do a felonious act which causes a victim's death. *State v. Bradley, supra*; *State v. Perkins*, 219 Neb. 491, 364

N.W.2d 20 (1985); *State v. Hubbard*, 211 Neb. 531, 319 N.W.2d 116 (1982); *State v. Montgomery*, 191 Neb. 470, 215 N.W.2d 881 (1974). Under the instructions given to the jury, the State was not relieved of its burden to prove, beyond a reasonable doubt, that Dixon committed the underlying or predicate felony with the requisite criminal intent. Hence, there is no reversible error in Dixon's felony murder conviction as a result of instructions to the jury.

Constitutionality of the Felony Murder Statute.

Dixon complains that defense counsel was ineffective (1) in failing to dispute the constitutionality of the felony murder statute and (2) in not adequately preparing or presenting the "cruel and unusual punishment aspect of the constitutionality." Brief for appellant at 39.

Dixon expressly admits that *State v. Bradley, supra*, a decision issued in 1982 and, therefore, in existence at the time of Dixon's trial in 1985, "rejected the constitutional argument of the felony murder rule. However, [Dixon's] counsel should raise every issue so that this Court can state or restate its opinion." Brief for appellant at 39. Contrary to Dixon's contention, defense counsel was dutybound to avoid asserting frivolous positions in litigation.

> [An advocate's] conduct is within the bounds of the law, and therefore permissible, if the position taken is supported by the law or is supportable by a good faith argument for an extension, modification, or reversal of the law. However, a lawyer is not justified in asserting a position in litigation that is frivolous.

Canon 7, EC 7-4, of the Code of Professional Responsibility. Because Dixon does not indicate how an argument by defense counsel would have been justified or how such an argument would have altered the outcome of his trial and conviction, Dixon has failed to show that defense counsel's conduct fell outside the realm of reasonable professional assistance or that counsel's conduct prejudiced Dixon's defense.

Dixon also argues that defense counsel did not adequately argue that the felony murder rule resulted in cruel and unusual punishment under the eighth amendment to the U.S.

Constitution and article I, § 9, of the Nebraska Constitution. Although Dixon's lawyer did not present the district court with any supporting case law on the subject, he did move for

> an order to declare the felony murder statute unconstitutional as applied to Derek Dixon in this case on the grounds that the penalty of life or death for this type of an offense is cruel and unusual punishment in violation of the Eighth Amendment of the Constitution of the United States and to that section of the Nebraska Constitution prohibiting cruel and unusual punishment.

Counsel then proceeded to state several reasons underlying the motion.

Dixon has again failed to demonstrate how defense counsel's presentation of the "cruel and unusual punishment" issue fell below that of a lawyer with ordinary training and skill in the defense of a criminal case, and how defense counsel's performance, if deficient, prejudiced Dixon's defense. Dixon's contention is without merit.

ASSISTANCE OF APPELLATE COUNSEL

Dixon also raises complaints about the performance of his appellate counsel in the direct appeal, a lawyer who was also a member of the Douglas County public defender's office. Dixon challenges his appellate counsel's failure to raise in the direct appeal (1) defense counsel's failure to raise the issue of Dixon's invocation of his right to an attorney, (2) police promises regarding Dixon's visits with his girl friend while Dixon was in confinement, (3) the "pretextual" nature of the officers' reasons for interrogation of Dixon, (4) the unconstitutionality of the felony murder statute, and (5) defense counsel's failure to object to instructions on causation and intent. We have examined each of Dixon's arguments directed to performance of his appellate counsel, arguments which are substantially similar, if not identical, to many of Dixon's complaints about the performance of his lawyer at trial. We find that none of Dixon's challenges or complaints are meritorious. In any event, Dixon has failed to show how appellate counsel was deficient in performance regarding the foregoing issues and in what manner Dixon sustained detriment from appellate counsel's

performance, or how taking a different course of action would have, in reasonable probability, changed the result of Dixon's direct appeal. Since Dixon has failed to show prejudice as one of the requirements to sustain an ineffective assistance of counsel claim, we are not obligated to discuss the issues of the "pretextual" nature of the reasons for Dixon's interrogation and unconstitutionality of the felony murder statute. Nevertheless, if appellate counsel had raised the "pretextual" nature of the reasons for Dixon's interrogation, that is, Dixon believed that he was being questioned about a burglary, when the police were actually seeking information about a homicide, that question would have been resolved against Dixon. At the time of Dixon's trial and direct appeal, Nebraska law indicated that once an accused is arrested and given the *Miranda* admonitions or warnings, there is no requirement that those admonitions or warnings be renewed each time the accused, pursuant to the original arrest, is subsequently questioned about a crime or crimes which differ from the criminal conduct for which the accused has been arrested. See *State v. Comer*, 205 Neb. 549, 288 N.W.2d 487 (1980), which was later supported by *Colorado v. Spring*, 479 U.S. 564, 577, 107 S. Ct. 851, 93 L. Ed. 2d 954 (1987): "[W]e hold that a suspect's awareness of all the possible subjects of questioning in advance of interrogation is not relevant to determining whether the suspect voluntarily, knowingly, and intelligently waived his Fifth Amendment privilege."

Similarly, if appellate counsel had made the constitutional challenge that the felony murder statute allows cruel and unusual punishment, an issue raised by defense counsel at trial, that argument would have been rejected in Dixon's direct appeal. At the time of Dixon's direct appeal, this court, in *State v. Perkins*, 219 Neb. 491, 364 N.W.2d 20 (1985), had rejected a challenge to the felony murder statute on the claim that the statute allowed "disproportionately harsh sentences of death or life imprisonment to be imposed upon a defendant who did not kill or have the intent to kill." *State v. Perkins, supra* at 498, 364 N.W.2d at 26. Later, in *State v. Rust*, 223 Neb. 150, 161, 388 N.W.2d 483, 493 (1986), this court stated: "It cannot be said that our Legislature acted outside the bounds of the eighth

amendment to the U.S. Constitution when it determined that one who kills in the perpetration of a felony might thereby subject himself or herself to the death penalty." In retrospect, we are reasonably certain that if Dixon's counsel had raised the cruel and unusual punishment issue during Dixon's direct appeal, we would have then reached the same conclusion which we later expressed in *State v. Rust, supra.*

MOTION TO COMPEL ATTENDANCE

In his final assignment of error, Dixon claims the district court erred in overruling Dixon's motion to compel his personal attendance at the postconviction hearing instead of accepting Dixon's testimony through his deposition. This alleged error is also meritless. Section 29-3001 specifically states that in a postconviction proceeding, a court "may entertain and determine such motion without requiring the production of the prisoner . . . . Testimony of the prisoner or other witnesses may be offered by deposition."

> In *State v. Woods*, 180 Neb. 282, 142 N.W.2d 339 (1966), we held that although a prisoner could not be prevented from testifying in support of his motion, he had no right to be personally present at an evidentiary hearing on the motion. See, also, *State v. Wells*, 197 Neb. 584, 249 N.W.2d 904 (1977), and *Davis v. State*, 51 Neb. 301, 70 N.W. 984 (1897), relating to the right to be present at the hearing on a motion for a new trial.
>
> We conclude it was not error for the trial court to require that the defendant's testimony be presented by deposition.

State v. Otey, 212 Neb. 103, 104-05, 321 N.W.2d 453, 454 (1982).

CONCLUSION

In his allegations regarding ineffective assistance of defense counsel at trial and in the direct appeal, Dixon has failed to demonstrate that his lawyers failed to properly function as effective counsel in accordance with the right guaranteed by the sixth amendment to the U.S. Constitution and article I, § 11, of the Nebraska Constitution. Dixon's right to counsel pursuant to the state and federal Constitutions was neither denied nor

infringed, which constitutional violations would require setting aside his conviction. Dixon's assignments of error are without merit. Consequently, the judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. CONSUELO T. ESCAMILLA, APPELLANT.

467 N.W.2d 59

Filed March 22, 1991. No. 90-064.

1. **Sentences: Probation and Parole.** When a court sentences a defendant to probation, it may impose any conditions of probation that are authorized by statute.
2. **Statutes.** Special provisions of a statute in regard to a particular subject will prevail over general provisions in the same or other statutes so far as there is a conflict.
3. _____. A subsequently enacted special statute will be regarded as an exception to, or qualification of, a general law passed prior in time.
4. _____. Statutes relating to the same subject are in pari materia and should be construed together.
5. **Sentences: Probation and Parole: Restitution.** An order to make restitution as a condition of probation is limited to the direct loss resulting from that offense of which a defendant has been convicted.

Appeal from the District Court for Lancaster County: BERNARD J. MCGINN, Judge. Affirmed as modified.

Dennis R. Keefe, Lancaster County Public Defender, and Michael D. Gooch for appellant.

Robert M. Spire, Attorney General, and David Edward Cygan for appellee.

HASTINGS, C.J., WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ., and COLWELL, D.J., Retired.

FAHRNBRUCH, J.

In this case we hold that restitution ordered in a sentence of probation is limited to the loss resulting from that offense of

which the defendant has been convicted.

The defendant, Consuelo T. Escamilla, appeals an order of the district court for Lancaster County requiring her, as a condition of her probation, to make restitution to the State of Nebraska in the sum of $13,253, when her only conviction was of fraudulently obtaining food stamps having a value of $4,763.

Originally, Escamilla was charged in a two-count information. Count I charged her with fraudulently obtaining or fraudulently attempting to obtain aid to dependent children (ADC) benefits in the amount of $500 or more. Count II charged the defendant with fraudulently obtaining or fraudulently attempting to obtain $500 or more in food stamps to which she was not entitled. Each count is a Class IV felony violation of Neb. Rev. Stat. § 68-1017 (Reissue 1990) and carries a penalty of up to 5 years' imprisonment, a fine of up to $10,000, or both, see Neb. Rev. Stat. § 28-105 (Reissue 1985).

Pursuant to a plea agreement, Escamilla entered a plea of guilty to the food stamp charge and in return the State dismissed the ADC charge. At the time of the defendant's guilty plea, a deputy county attorney, in establishing a factual basis for Escamilla's guilty plea, told the court that by claiming that she had no earned income, Escamilla received food stamp benefits in the amount of $4,763 and ADC payments in the amount of $8,490 during the period of October 1, 1986, through June 30, 1988. The prosecutor advised the court that the defendant had been employed from October 1986 to June 1988. The deputy county attorney also told the court that Escamilla admitted to an investigator that she intentionally denied her employment in order to receive benefits to which she knew she was not entitled and that these events occurred in Lancaster County, Nebraska.

Escamilla informed the court that she had no argument with the State's version of the facts. The defendant specifically admitted that the prosecutor's account was correct with respect to the count alleging unlawful acquisition of the food stamps. The court accepted the defendant's guilty plea to the food stamp charge and ordered a presentence investigation. Escamilla was subsequently sentenced to probation for a 3-year

period. As one of the conditions of probation, Escamilla was ordered to make restitution to the State of Nebraska in the sum of $13,253, the combined amount the record reflects she received in ADC *and* food stamp payments.

Escamilla's first assignment of error can be summarized as follows: She was not convicted of fraudulently obtaining or attempting to obtain ADC payments in the amount of $8,490, as that count was dismissed. However, the court's order of restitution includes that amount. Escamilla contends that the court thereby abused its discretion in ordering her to make restitution for an offense of which she was not convicted.

Other than in a few scattered statutes which are not relevant to this case, restitution in criminal cases is provided for in Neb. Rev. Stat. §§ 29-2280 to 29-2289 (Reissue 1989). "A *sentencing court* may order the defendant to make restitution for the actual physical injury or property damage or loss sustained by the victim as a direct result *of the offense for which the defendant has been convicted.*" (Emphasis supplied.) § 29-2280. Because probation constitutes a sentence, see Neb. Rev. Stat. §§ 29-2246(4) and 29-2260(4) (Reissue 1989), the district court was acting as a "sentencing court" when it ordered Escamilla to make restitution as a condition of her sentence to probation. It is clear that if an ordinary meaning is attributed to the language of § 29-2280, Escamilla could only be ordered to make restitution for the food stamp benefits unlawfully procured because that is the sole offense of which she was convicted.

This court has applied a plain reading to § 29-2280 on the two occasions in which it has been confronted with determining the meaning of the first sentence of that statute. The defendant in *State v. Kelly*, 235 Neb. 997, 458 N.W.2d 255 (1990), was originally charged with four counts of obtaining property by issuing account-closed checks. Pursuant to a plea agreement, the defendant pled guilty to two counts and agreed to pay restitution for all checks then in the office of the Dodge County Attorney's office. Count I involved a check for $628.68, and the check involved in count II was in the amount of $802.88. In return, two counts were dismissed, and the county attorney agreed not to file additional charges on some 84 checks then in

his office. A written stipulation signed by Kelly listed those checks, which with protest fees amounted to $8,829.24. The defendant was sentenced to concurrent terms of imprisonment for 1 to 2 years and ordered to pay restitution in the amount of $8,239.77. Kelly appealed to this court. Noting plain error, we reduced the amount of restitution to $1,431.56, which was the loss sustained by the victims of the offenses of which the defendant was convicted. Accord *State v. Arvizo*, 233 Neb. 327, 444 N.W.2d 921 (1989) (losses suffered by victims of other similar crimes of which the defendant was not convicted could not serve as a subject of a restitution order under § 29-2280 in connection with a guilty plea to one count of writing a no-fund check). See, also, *State v. Rios, ante* p. 232, 465 N.W.2d 611 (1991) (the amount of restitution is limited to the reasonable law enforcement expenses incurred in connection with the purchase of controlled substances for the sale of which the defendant was convicted).

The State contends that *Kelly, supra*, and *Arvizo, supra*, are inapplicable to this case because they involved an order to make restitution, which the State claims is different from an order to make restitution as a condition of probation. In support of its position, the State relies on the Nebraska Probation Administration Act, Neb. Rev. Stat. §§ 29-2246 to 29-2268 (Reissue 1989). Section 29-2262 provides in relevant part, "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." Section 29-2262 further authorizes a court to require an offender "[t]o satisfy any other conditions reasonably related to the rehabilitation of the offender." Because probation is involved in this case, the State argues that the only limit on the trial court's power regarding the amount of restitution is § 29-2262. We further note that § 29-2260(3)(f) provides that the fact an offender has compensated or will compensate a victim of his or her crime for the injury sustained by the victim weighs in favor of withholding a sentence of imprisonment.

We have held that when a court sentences a defendant to probation, it may impose any conditions of probation that are authorized by statute. See *State v. Schroder*, 218 Neb. 860, 359

N.W.2d 799 (1984). The question in Escamilla's case turns on what is authorized by statute, and that requires interpretation of two statutory schemes, Nebraska's Probation Administration Act and Nebraska's main restitution statutes. Escamilla argues that § 29-2280, which is part of the restitution statutes codified at §§ 29-2280 to 29-2289, is controlling.

As stated, § 29-2262 authorizes a court to attach certain broad conditions to probation, with the goal of rehabilitating the offender. Section 29-2260 mandates that compensation to the victim for his or her loss militates in favor of probation, and § 29-2280 limits restitution to the offense of which a defendant has been convicted.

In interpreting those statutes, we are guided by the well-established rule that "special provisions of a statute in regard to a particular subject will prevail over general provisions in the same or other statutes so far as there is a conflict. [Citation omitted.]" *Holdrege Co-op Assn. v. Wilson*, 236 Neb. 541, 548, 463 N.W.2d 312, 317 (1990). Section 29-2280 specifically provides that one may not be required to make restitution for an offense of which he or she was not convicted. No mention is made of restitution in § 29-2262. While § 29-2260 refers to restitution, it merely states that weight will be given to that fact in determining whether to withhold a sentence of imprisonment. Section 29-2260 does not answer the specific question of whether restitution is limited to convictions, as does § 29-2280. Significantly, § 29-2260(3)(f) was enacted in 1971, see 1971 Neb. Laws, L.B. 680; whereas § 29-2280 was not enacted until 1986, see 1986 Neb. Laws, L.B. 956. A subsequently enacted special statute will be regarded as an exception to, or qualification of, a general law passed prior in time. *Holdrege Co-op Assn., supra.*

To the extent there may be a conflict between § 29-2280 and § 29-2260 or § 29-2262, § 29-2280 is controlling. Upon an examination of the legislation under which the restitution statutes were enacted, this conclusion becomes inescapable. Prior to 1986, § 29-2262(j) (Reissue 1985) authorized a court, as a condition of a probation sentence, to require an offender "[t]o make restitution of the fruits of his crime or to make such reparation as the court determines to be

appropriate for the loss or damage caused thereby." When the Legislature enacted §§ 29-2280 to 29-2289, it amended § 29-2262 in that same bill. It struck from § 29-2262 the language authorizing a court to order an offender to make restitution. See 1986 Neb. Laws, L.B. 956. Due to the changes made in 1986, there is no mention of restitution in § 29-2262 (Reissue 1989). Obviously, the Legislature did not seek to eliminate restitution as a condition of probation. Instead, the Legislature intended that if restitution is imposed as a condition of probation, it is to be governed by §§ 29-2280 to 29-2289. Indeed, reference is made to probation in two instances in the restitution statutes. In § 29-2281, it is provided, "A person may not be granted or denied *probation* . . . either solely or primarily due to his or her financial resources or ability or inability to pay restitution." (Emphasis supplied.) Conditions for revoking probation for failure to comply with a restitution order are set forth in § 29-2284. Statutes relating to the same subject are in pari materia and should be construed together. *McGowen v. Nebraska State Bank*, 229 Neb. 471, 427 N.W.2d 772 (1988). Through interpretation of the relevant statutes, it is clear that the Legislature intended that § 29-2280 apply to an order to make restitution as a condition of probation. Therefore, we hold that an order to make restitution as a condition of probation is limited to the direct loss resulting from that offense of which a defendant has been convicted.

The State cites this court to *State v. McClanahan*, 194 Neb. 261, 231 N.W.2d 351 (1975). We have reviewed that case and find that the factual issue involved there is so dissimilar to the facts in this case that the rule stated in *McClanahan* is inapplicable to this case.

Having concluded that § 29-2280 does not permit a court to order an offender to make restitution on a charge of which the offender is not convicted, we need not reach the defendant's remaining assignments of error. The judgment and sentence of the district court are affirmed in all respects, except that the amount of restitution required to be paid to the State by Escamilla is reduced to $4,763.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V. JOSEPH L. MORROW, APPELLANT.

467 N.W.2d 63

Filed March 22, 1991. No. 90-127.

1. **Homicide: Lesser-Included Offenses: Jury Instructions.** Where murder is charged, the court is required, without request, to charge on such lesser degrees of homicide as to which the evidence is properly applicable.
2. **Homicide: Words and Phrases.** As used in Neb. Rev. Stat. § 28-305(1) (Reissue 1989), the phrase "sudden quarrel" does not necessarily mean an exchange of angry words or an altercation contemporaneous with the unlawful killing and does not require a physical struggle or other combative corporal contact between the defendant and the victim. Rather, in relation to manslaughter, a sudden quarrel is a legally recognized and sufficient provocation which causes a reasonable person to lose normal self-control.
3. **Trial: Motions for Mistrial.** When a party has knowledge during trial of irregularity or misconduct, he must timely assert his right to a mistrial.
4. **Trial: Evidence: Waiver: Appeal and Error.** If a party does not make a timely objection to evidence, the party waives the right on appeal to assert prejudicial error.
5. **Trial: Juries: Discrimination: Appeal and Error.** The court's determination of the adequacy of the State's "neutral explanation" of its challenges will not be reversed upon appeal unless clearly erroneous.
6. **Convictions: Appeal and Error.** In determining the sufficiency of the evidence to support a finding of guilt in a criminal case, this court does not resolve conflicts in the evidence, determine the plausibility of explanations, or weigh the evidence. Those matters are for the finder of fact, whose findings must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support them.
7. **Verdicts: Appeal and Error.** After a jury has considered all the evidence and returned a verdict of guilty, that verdict may not as a matter of law be set aside on appeal for insufficiency of evidence if the evidence sustains some rational theory of guilt.
8. **Evidence: Intent.** The law is settled that independent evidence of specific intent is not required. 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.

Appeal from the District Court for Douglas County: JERRY M. GITNICK, Judge. Affirmed.

James Martin Davis for appellant.

Robert M. Spire, Attorney General, and Linda L. Willard for appellee.

HASTINGS, C.J., WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ., and COLWELL, D.J., Retired.

COLWELL, D.J., Retired.

A jury found defendant, Joseph L. Morrow, guilty of the two counts charged in the information, count I, second degree murder, see Neb. Rev. Stat. § 28-304(1) (Reissue 1989), and count II, using a firearm to commit a felony, see Neb. Rev. Stat. § 28-1205(1) (Reissue 1989), in the shooting death of Thomas Jordan. Defendant was sentenced to 40 years' imprisonment on count I and to 5 to 10 years' imprisonment on count II. The sentence on count II is to run consecutively to the sentence on count I.

Section 28-304 provides in part: "(1) A person commits murder in the second degree if he causes the death of a person intentionally, but without premeditation."

Neb. Rev. Stat. § 28-305 (Reissue 1989) provides in part: "(1) A person commits manslaughter if he kills another without malice, either upon a sudden quarrel, or causes the death of another unintentionally while in the commission of an unlawful act."

Section 28-1205 provides:

> (1) Any person who uses a firearm . . . or any other deadly weapon to commit any felony which may be prosecuted in a court of this state . . . commits the offense of using firearms to commit a felony.
>
> . . . .
>
> (3) The crime defined in this section shall be treated as a separate and distinct offense from the felony being committed, and sentences imposed under the provisions of this section shall be consecutive to any other sentence imposed.

At the court's instruction conference, defendant requested the court to include in the jury instructions the crime of voluntary manslaughter as a lesser-included offense of the crime of second degree murder. The request was denied; however, the court did instruct the jury on the crime of involuntary manslaughter as a lesser-included offense of second degree murder.

After defendant's motion for a new trial was denied, he perfected his appeal to this court, assigning five errors: (1) the court's refusal to instruct the jury on the lesser-included offense of voluntary manslaughter; (2) the court's instruction to the jury as to transfer of intent; (3) the court's failure to either declare a mistrial or give a cautionary instruction to the jury because of prejudicial testimony of Officer Lanny Lenker; (4) the court's failure to reinstate two black jurors peremptorily stricken from the jury panel by the prosecutor, thereby denying defendant a fair trial; and (5) the insufficiency of the evidence to support the guilty verdicts.

FACTS

On Sunday, July 2, 1989, at approximately 1:30 a.m., Morrow, a black person, was at 3602 Lake Street, Omaha, Nebraska, standing next to his car in the parking lot of M & B's liquor store, talking with friends. In the same area there were more than 100 people visiting and milling around, including Rodney Glass and several other members of an Omaha gang called the Crips who had just left a Crip party nearby, where alcoholic liquor and illegal drugs were consumed and used. The victim, Jordan, who was intoxicated and described as acting "hyper," was moving among the crowd, complaining about Morrow and jumping on a car. Shortly thereafter, Glass, along with several Crips, crossed Lake Street and headed in the direction of Morrow. Glass was intoxicated and agitated because of some comments about the Crips attributed to defendant. Glass, cursing as he walked, went up to the defendant and stood directly in front of him, confronting him with profanity. Standing at his left were Joseph Gray and the victim, Jordan. Meanwhile, six or seven other Crips stationed themselves in a semicircle in front of and around Morrow.

The exchange of profanity continued between Morrow and Glass when Morrow told Glass to take his business elsewhere. After further exchanges, Glass threw his hat down and stated that he was going to "kick [defendant's] ass."

Morrow got his gun, approached close to Glass, and fired the gun while either striking or pointing the gun at Glass. Glass was not wounded by the shot; however, he somehow was cut on the

chin and apparently was knocked to the ground by the force of the blow. Immediately after the shooting, the parking lot cleared rapidly. It was only then that Jordan was found on the ground, fatally wounded. Morrow left the area immediately. He testified, "I had thought Rodney had got shot, because when I hit him my gun went off and he fell, so I thought he had got shot." Morrow later learned that Jordan had been shot. Morrow consulted a lawyer and turned himself in to the police after July 4. While released on bond, Morrow was stopped in a car on August 3, 1989, by the Omaha police, who found a .45-caliber automatic pistol under the seat of the car.

As later fully discussed, there is a conflict in the evidence concerning the kind and use of the gun that fired the fatal shot. Some of the evidence indicates that Morrow's gun was discharged only one time. There was other evidence from witnesses that they heard two or three shots fired. Jordan suffered a single gunshot wound to the chest. The bullet was identified by an expert as a .38-caliber hollow-point bullet fired from either a .38- or .357-caliber revolver. Glass did not remember ever seeing Morrow's gun. Defendant testified that the weapon he used to strike Glass was his .45-caliber automatic pistol, which he carried with him for personal protection. This gun was test fired and determined not to be the murder weapon. There is no evidence that any firearms, ammunition, or cartridge casings of any type were recovered at the crime scene.

The State's theory of prosecution was that Morrow, at close range, pointed a .38- or .357-caliber gun at Glass' chin and intentionally pulled the trigger and that the bullet somehow struck and killed Jordan. The State claims the theory of transferred intent is applicable, namely, that Morrow intended to kill Glass but killed Jordan instead.

The defendant's theory of the case was that Morrow, during a confrontation and argument with Glass and using a .45-caliber automatic pistol, struck Glass with the gun and it accidentally discharged. Morrow denied, however, that this was the firearm that killed Jordan. Through counsel, however, it is argued that even if the firearm Morrow used to strike Glass was the firearm that killed Jordan, his conduct would only constitute involuntary manslaughter, if the shooting was

unintentional, or voluntary manslaughter, since the shooting was upon a sudden quarrel.

VOLUNTARY MANSLAUGHTER

Defendant first assigns as error the court's refusal to instruct the jury on the crime of voluntary manslaughter as a lesser-included offense of second degree murder, arguing that there was evidence of a sudden quarrel, requiring an instruction on that crime to be submitted to the jury.

The crime of voluntary manslaughter is described in § 28-305(1): "A person commits manslaughter if he kills another without malice . . . upon a sudden quarrel . . . ." Also in § 28-305(1), the crime of involuntary manslaughter is described as the unlawful but unintentional killing of a person as the result of the actor's commission of an unlawful act. See *State v. Pettit*, 233 Neb. 436, 445 N.W.2d 890 (1989).

Malice denotes that condition of the mind which is manifested by the intentional doing of a wrongful act without just cause. Absence of malice may exist where the killing occurs upon a sudden quarrel. "[W]here murder is charged, the court is required, without request, to charge on such lesser degrees of homicide as to which the evidence is properly applicable." *State v. Rowe*, 210 Neb. 419, 424, 315 N.W.2d 250, 255 (1982).

In *Boche v. State*, 84 Neb. 845, 854, 122 N.W. 72, 75 (1909), this court said a killing in voluntary manslaughter cases "must have been intentional, but in sudden passion or heat of blood caused by reasonable provocation, without malice . . . ." Recently, the element of provocation was further addressed in *Pettit, supra* at 454, 445 N.W.2d at 901:

> As used in § 28-305(1), the phrase "sudden quarrel" does not necessarily mean an exchange of angry words or an altercation contemporaneous with the unlawful killing and does not require a physical struggle or other combative corporal contact between the defendant and the victim. . . . Rather, in relation to manslaughter, a sudden quarrel is a legally recognized and sufficient provocation which causes a reasonable person to lose normal self-control . . . .

Throughout the evidence, Glass and the small group

surrounding defendant are described as Crips, i.e., members of an Omaha gang who usually wear blue clothing. Gray testified that it was common knowledge that the Crips do not get along with a rival Omaha gang called the Bloods.

There is no clear and direct evidence bearing on the immediate cause and origin of the confrontation between defendant and Glass that relates to the sudden quarrel issue. Briefly, in addition to the activity at the crime scene previously described, the jury could find that defendant was by his car. Jordan, who was intoxicated and described as acting "hyper" had some negative conversation with defendant, causing Jordan to complain to Glass that defendant was "sweating" (bothering) him. Jordan, Glass, and Gray then approached within a few feet of defendant, followed by six or seven other persons described as Crips. Defendant had been making some remarks about the Crips. Glass and defendant exchanged strong words and epithets. Glass and other members of the group made threats of violence to defendant that they would get him and kick his ass. Defendant was not sure whether these words were meant for him, but, he testified, "still they acted like they were going to make me the one, you know." Apparently as a response regarding some of defendant's past activity, defendant said, "Don't bring the bullshit here, I sell to Crips, Bloods, whoever." Thereupon Glass said, "Man you are fronting. I'm going to kick his ass," and Glass threw his hat onto the ground. Defendant got and fired his gun, killing Jordan.

Throughout defendant's brief, he argues that there was evidence of a sudden quarrel, requiring submission of voluntary manslaughter to the jury, as shown by statements and events described in the brief as "confrontation," "heated argument," "heated exchange of words," "threats," "intimidating gestures," "angry exchange of profanity," "throwing his hat down in . . . a threatening gesture," and "members of the Crips gang had surrounded [defendant]." Brief for appellant at 12-15.

While there was an exchange of angry words and threats by Glass, nowhere in defendant's briefs or in the record is there a claim or showing that any of those acts and circumstances

which defendant claims to be a sudden quarrel, either singularly or as a whole, were evidence of reasonable provocation disturbing defendant's power of reasoning, causing him to lose his normal control and to act without due deliberation and reflection, as required by *State v. Pettit*, 233 Neb. 436, 445 N.W.2d 890 (1989).

The court's refusal to instruct the jury on voluntary manslaughter as a lesser-included offense of second degree murder was correct.

Defendant claims that at the instruction conference attended by counsel in chambers at the conclusion of the evidence, the trial judge found that there was a quarrel. Neither party submitted written requested instructions. The record shows that defendant objected to instruction No. 10 concerning the issue of "transfer of intent," because it related only to the charge of second degree murder. Defendant requested that the court also submit an instruction on voluntary manslaughter as an included lesser offense and to amend instruction No. 10 accordingly. The court refused, saying:

> The evidence in this case shows no quarrel of any sort between the defendant and the decedent. The evidence in this case shows the decedent was remote in distance from the quarrel which did exist between the defendant and one Rodney Glass. I think it's the intent of the statute to say that the quarrel has to be between the defendant and the decedent and not between the defendant and some third person. For that reason the Court has not given the lesser included offense of manslaughter upon a sudden quarrel.

Defendant thereafter offered no substitute instruction.

Black's Law Dictionary 1244 (6th ed. 1990) describes quarrel as "an altercation, an angry dispute, an exchange of recriminations, taunts, threats or accusations between two persons."

The judge's comments had their origin in discussing the issue of transfer of intent, the proposed instruction No. 10, and defendant's objection. The judge used the word "quarrel" only as a general description of the related circumstances without regard to either the presence of provocation or the definition of "sudden quarrel" as found in *Pettit, supra*. The judge may have

been relying on *State v. Bautista*, 193 Neb. 476, 227 N.W.2d 835 (1975), which held that the provocation doctrine in voluntary manslaughter cases does not apply to a nonprovoking victim. The facts therein were that Bautista and one Esparza had a fight. Esparza left the scene. Bautista approached Esparza's father and demanded information as to Esparza's whereabouts. The father refused, and Bautista shot and killed the father. Whether the *Bautista* rule applies to the facts here is not decided, since it has already been determined that there was no submissible issue of voluntary manslaughter. Further, it is harmless error when a correct order is entered, although for an incorrect reason. *State v. Highly*, 195 Neb. 498, 238 N.W.2d 909 (1976).

JURY INSTRUCTION

Defendant next contends that the trial court committed prejudicial error by improperly instructing the jury as to transferred intent. The transferred intent instruction, instruction No. 10 given by the court, states: "Where one attempts to kill a certain person, but by mistake or inadvertence kills a different person, the crime, if any, so committed is the same as though the person originally intended to be killed, had been killed."

Defendant does not challenge instruction No. 10 as an improper statement of the law concerning transfer of intent, and we do not address that issue. Rather, defendant complains only that the instruction did not include the theory of transfer of intent in a charge of voluntary manslaughter. There is no merit to this claim because (1) the defendant did not tender a substitute instruction and (2) the crime of voluntary manslaughter was not given to the jury in the instructions as a lesser-included offense of second degree murder.

VOLUNTEERED EVIDENCE

The third assignment of error is that the trial court failed to either declare a mistrial or give a cautionary instruction to the jury concerning a part of defendant's cross-examination of Officer Lenker, who related the details of an interview with defendant as follows:

Q. The location of where he said he retrieved the —

A. (Interrupting) I am saying in the original interview he said he opened the door, I don't know what door.

Q. You don't know what door?

A. He ran to his car and opened the door and came out with what *he described as a chrome-plated .38.*

Q. He also talked about a .44, didn't he, Officer?

[Prosecutor]: I object, improper impeachment.

A. Not that I know of.

THE COURT: What was your objection?

[Prosecutor]: Improper impeachment, Your Honor. I don't know why he is going into a question about collateral matters.

THE COURT: Objection is sustained.

Q. (By [defendant's counsel]) I asked you, Officer Lenker, about locations, did I not? I didn't ask you about calibers, isn't that true?

A. That is true.

(Emphasis supplied.)

From this testimony, counsel was immediately aware of the claim of a possible prejudicial effect of the phrase "a chrome-plated .38." However, no objection was made, and the cross-examination continued briefly. Then counsel complained to the judge about the volunteered statement. The judge suggested that if a motion for mistrial was being considered, the same should be made forthwith. Counsel declined, witness Lenker was excused, and another witness testified. Then counsel moved for a mistrial or in the alternative for the judge to give a cautionary instruction to the jury to disregard the volunteered testimony. The judge refused.

"When a party has knowledge during trial of irregularity or misconduct, he must timely assert his right to a mistrial." *State v. Archbold*, 217 Neb. 345, 352, 350 N.W.2d 500, 505 (1984). "If a party does not make a timely objection to evidence, the party waives the right on appeal to assert prejudicial error." *Id.*

There is no merit to this claimed error. Defendant's motion was not timely made, the ruling of the trial judge was not clearly wrong, and defendant cannot now claim error. Further, there is other strong evidence in the record that the gun held and fired by the defendant was either a .38- or .357-caliber revolver.

Defendant was not prejudiced by the judge's ruling.

JUROR CHALLENGES

Defendant's fourth assignment of error claims racial discrimination in the jury selection. He contends that the trial court erred by failing to reinstate two black venire members peremptorily stricken from the jury panel by the State. This issue arose after the jury panel had been passed for cause by both parties and after the State and defendant had indicated on the jury panel list their respective juror peremptory challenges, which included the State's striking of three black jurors: Truman Hays, Deborah Prince, and Mark Will. One black juror was not stricken. Before the strikes were announced, the court invited counsel's attention to the list and paused for motions. Thereupon, defendant moved that the panel not be sworn because three jurors were stricken because they were black persons or that, in the alternative, Hays, Prince, and Will be reinstated to the panel.

> " '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.' " . . . "[A] trial court's determination as to whether a defendant has established purposeful discrimination in the selection of a jury is a finding of fact which will not be reversed on appeal unless clearly erroneous."

(Citation omitted.) *State v. Culver*, 233 Neb. 228, 232, 444 N.W.2d 662, 665 (1989). See, also, *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). The court's determination of the adequacy of the State's "neutral explanation" of its challenges will not be reversed upon appeal unless clearly erroneous. *State v. Alvarado*, 226 Neb. 195, 410 N.W.2d 118 (1987); *State v. Walton*, 227 Neb. 559, 418 N.W.2d 589 (1988).

A *Batson*-type hearing followed, resulting in reinstating

Hays to the panel and approving the strikes of Prince and Will.

The record contains none of the jury voir dire; therefore this review is limited to the *Batson* hearing. In response to defendant's having made prima facie showings of discrimination, the State provided these neutral explanations of its challenges. Prince was removed because of her youth (from observation); her familiarity with the crime scene, see *State v. Threet*, 225 Neb. 682, 407 N.W.2d 766 (1987); and her lack of regular employment history and because she was female. Will was removed because of his youth (by observation the youngest person on the panel) and his early interest in a prelaw college course. At the time of trial, defendant was 24 years of age. There is nothing in the record showing that the striking of jurors Prince and Will was racially motivated, and we cannot say that the court's finding that the State had articulated neutral explanations of its challenges was clearly wrong. There was no error in striking jurors Prince and Will.

SUFFICIENCY OF THE EVIDENCE

Defendant claims that there was insufficient evidence to submit count I, second degree murder, to the jury and, particularly, that the element of intent to kill without just cause or excuse was not proven beyond a reasonable doubt.

> "In determining the sufficiency of the evidence to support a finding of guilt in a criminal case, this court does not resolve conflicts in the evidence, determine the plausibility of explanations, or weigh the evidence. Those matters are for the finder of fact, whose findings must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support them." . . .
>
> " 'On a claim of insufficiency of evidence, the Supreme Court will not set aside a guilty verdict in a criminal case where such verdict is supported by relevant evidence. Only where evidence lacks sufficient probative force as a matter of law may the Supreme Court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt.' "

State v. Cortis, ante p. 97, 110-11, 465 N.W.2d 132, 142 (1991). "[A]fter a jury has considered all the evidence and returned a verdict of guilty, that verdict may not, as a matter of law, be set

aside on appeal for insufficiency of evidence, if the evidence sustains some rational theory of guilt." *State v. Evans*, 215 Neb. 433, 443, 338 N.W.2d 788, 794 (1983).

" ' "[T]he law is settled that independent evidence of specific intent is not required. 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. Costanzo*, 227 Neb. 616, 623, 419 N.W.2d 156, 162 (1988).

Defendant's argument is twofold. First, Jordan was killed by a .38-caliber bullet fired by an unknown third person other than the defendant from a gun not produced in the evidence. Second, if the jury could find that defendant did hold and fire the gun that killed Jordan, the gun was discharged accidentally when defendant struck Glass.

Jury instructions Nos. 9 and 11 are standard instructions on the element of intent and on direct and circumstantial evidence respectively.

The conflict in the evidence relating to the facts and circumstances existing immediately before and at the time of the shooting requires a further summary of the evidence considered by the jury. Defendant and 13 other at-the-scene witnesses testified (5 for the State and 8 for defendant). It is noted that most of defendant's witnesses agree on the gestures of Glass and the word exchanges between Glass and defendant and that they had informally discussed the case among themselves.

Dr. Blaine Roffman, an Omaha pathologist, performed the autopsy on the body of Jordan, making findings that Jordan died of a gunshot wound to his upper right chest beveled at the 7 to 10 o'clock position ("the bullet came in from the side, so to speak," lodging "[a]t the level of T7/T8 of the thoracic spine"). In addition, there were 15 other wounds on the chest, face, and arm of Jordan; 13 of the wounds were described as superficial; and 3 contained metallic fragments. Some of the wounds had blackened edges.

Glass testified that at the time of the shooting he was wearing a gold necklace, which he later discovered was missing. This necklace was found at the scene of the crime by the police. It

had been severed.

Mark Stranglen, a laboratory technician for the Omaha Police Division, made an official crime scene search soon after the shooting. The purpose of the search was to collect and preserve all items of evidence that might be relevant to the reported crime. Apparently, the only relevant evidence found was the gold-plated necklace.

Marcellus Deats, senior crime lab technician for the Omaha Police Division, testified generally concerning handguns, ammunition, bullets, and identification of guns. In describing the characteristics of a revolver and the cylinder that holds the cartridges, he explained that each time one pulls the trigger of a revolver, the cylinder rotates, bringing a fresh cartridge up under the firing pin. In describing defendant's automatic pistol, a Colt Combat Commander .45, or a single-action automatic, he stated that the firing procedure requires the user to load the first cartridge from the magazine (clip) by physically withdrawing the slide on the top of the gun (pulling the slide back), which also cocks the gun, making it ready for firing by pulling the trigger. When such a pistol is fired, the cartridge case is automatically ejected, generally falling within a radius of 6 to 15 feet.

Donald G. Havekost, a special agent with the Federal Bureau of Investigation and a specialist in metal analysis, testified that he examined the bullet, pieces of a metal shard (exhibits 31A and B) that had been removed from one of the victim's wounds, and a fractured necklace made of brass coated with nickel and with an outside coating of gold. Exhibits 31A and B, the metal shard, contained brass, nickel, and gold. Havekost testified that both the necklace (at the point of fracture) and the bullet had copper and lead smears, and it was his opinion that "that bullet, or another bullet or object comprised of those two metals, fractured that necklace."

Defendant testified that he had the gun in the right side of his pants ("my gun was right on my side") when Glass threw his hat down. Defendant testified, "He kind of like jumped back and that's when I jumped up and slapped him in the face . . . [w]ith that gun." During defendant's testimony, the following dialog transpired: "Q. Did you take it out of your pants before — A.

(Interrupting) Just like this (indicating), and I hit him on the side of the face just like that (indicating) [and] [h]e fell." Defendant is right-handed.

Witness Gray said that when Glass threw his hat down, defendant ran to his car and came back holding a gun and that defendant "[ran] up to the Crip, and had the gun to his neck, and he shot him," and "I ran." Gray later learned that Jordan had been shot and killed.

There was other evidence concerning defendant's striking Glass. Defendant said that when he slapped Glass, the gun was pointing straight up, "[b]ecause that is the way I would hold it if I was going to hit somebody." Witness Jerome Williams said that defendant struck Glass across the face and "the gun was facing west" (also described as westerly). "It looked like he struck him with his left hand from my side, walked up to him, hit him on the side of the face, and his gun went off after he hit him."

Witness Tony Bass said that defendant struck Glass "upwards" under the chin and the gun went off and that defendant did not strike Glass on the side of the head. Bass also testified as follows:

> Q. Now, you saw Joe Morrow cock the gun, didn't you?
>
> A. Yes.
>
> Q. And when you say cock the gun, do you mean pull back the hammer?
>
> A. Yes.
>
> Q. You are sure it was a .45, but you saw him pull back the hammer with his thumb?
>
> A. Yes.

Witness Lisa Brewer testified that the gun held by defendant was pointed straight up when defendant hit Glass. She testified, "[T]he Crip, he took - he threw down his hat, took about two steps back, that's when Joe hit him" with the gun.

Taking the evidence most favorable to the State, we find that defendant admitted holding and firing a gun near the head of Glass. Witness Gray testified that defendant was pointing a gun at and near Glass' neck. There is relevant evidence supported by expert testimony that the gun held and fired by defendant was a

revolver and that the .38-caliber bullet fired from it at close range severed a necklace worn by Glass, the intended victim, and the bullet then traveled a few feet further to Glass' left, striking and killing Jordan and leaving metallic traces of the lead bullet and the severed gold necklace on Jordan's body. There was further relevant evidence from the acts and words of defendant, together with all of the surrounding circumstances, that defendant intended to kill Glass, which intent was legally transferred to the killing of the victim, Jordan. We neither reweigh the evidence nor resolve the conflicts in the evidence. We conclude that there was sufficient relevant evidence sustaining a rational theory of defendant's guilt for the jury to find defendant guilty beyond a reasonable doubt of count I, second degree murder, i.e., the intentional killing of Thomas Jordan without just cause or excuse.

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V. WILLIAM J. SCHUH, APPELLEE.

467 N.W.2d 409

Filed March 22, 1991. No. 91-086.

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

Michael D. Wellman, Sarpy County Attorney, for appellant.

Thomas J. Garvey, of Hascall, Jungers & Garvey, for appellee.

CAPORALE, J.

In this interlocutory appeal to a single judge of this court taken pursuant to the provisions of Neb. Rev. Stat. § 29-824 (Reissue 1989), the plaintiff-appellant State claims the district court erred in sustaining defendant-appellee William J. Schuh's motion to suppress certain evidence. For the reasons hereinafter set forth, the order of the district court is reversed.

An officer of the LaVista Police Department arrested Paul Hunter for being in possession of and intending to deliver a controlled substance, marijuana, in violation of Neb. Rev. Stat. §§ 28-405(c)(10) [Schedule I] and 28-416 (Reissue 1989). Under police questioning, Hunter revealed that he had obtained the marijuana from Schuh at the latter's residence. Based on that information, without any further investigation as to Hunter's status and therefore without knowledge that he had been placed on parole by the State of Florida and was serving that parole in Nebraska, the police obtained a warrant to search Schuh's residence. As the result of the execution of the warrant and the evidence seized thereunder, Schuh was charged with possessing marijuana with the intention of both manufacturing and delivering the substance, all in violation of §§ 28-405(c)(10) [Schedule I] and 28-416, and with possession of methamphetamine, in violation of §§ 28-405(c)(3) [Schedule II] and 28-416.

Schuh moved for an order suppressing any and all evidence seized, on the grounds that (1) the "search and seizure was contrary to the laws" of Nebraska and (2) the issuance of the warrant "was not based upon reliable information."

Neb. Rev. Stat. § 29-2262.01 (Reissue 1989) reads:

> A person placed on probation by a court of the State of Nebraska, an inmate of any jail or correctional or penal facility, or an inmate who has been released on parole, probation, or work release shall be prohibited from acting as an undercover agent or employee of any law enforcement agency of the state or any political subdivision. Any evidence derived in violation of this section shall not be admissible against any person in any proceeding whatsoever.

At the close of the suppression hearing, the district court observed that, as interpreted in *State v. Wilcox*, 230 Neb. 123, 430 N.W.2d 58 (1988), § 29-2262.01 seemed to preclude the police from using any information provided by Hunter. *Wilcox* is a single-judge ruling that there exists no "good faith" exception to the foregoing statute such as to permit the admission of evidence derived from an operation conducted jointly by the police and a confidential informant who was not

known to the police to be a probationer. The district court then took the matter under advisement and later sustained Schuh's motion. In so decreeing, the district court noted its specific reliance upon *Wilcox* and advanced no other ground for its decision.

In *Wilcox*, the probationer contacted the police and described Wilcox' drug activities. The police then provided the probationer with sound-recording equipment and sent him to purchase drugs from Wilcox while they monitored the conversation between the two. When the police heard from the probationer the prearranged code word informing them that the purchase had been completed, they moved in and arrested Wilcox. While sound, *Wilcox*, as a single-judge ruling, is neither binding nor eligible to be cited as precedent. *State v. White*, 220 Neb. 527, 371 N.W.2d 262 (1985). In any event, unlike the probationer in *Wilcox*, Hunter was simply an arrestee who, during postarrest questioning, identified his supplier. Thus, the situation in *Wilcox* and the one at hand are not comparable.

As the Nebraska Supreme Court has recently reaffirmed, in the absence of anything indicating to the contrary, statutory language is to be given its plain and ordinary meaning; when the words of a statute are plain, direct, and unambiguous, no interpretation is necessary or will be indulged to ascertain their meaning. *State v. Matthews, ante* p. 300, 465 N.W.2d 763 (1991). The plain and ordinary meaning of the words of § 29-2262.01 prohibits those placed on probation by a court of this state and inmates who have been released on parole by any court from acting as undercover agents for, or employees of, law enforcement agencies. The certificate of the Florida Parole and Probation Commission recites that it ordered Hunter's release and associates him with a prison number; thus, it must be inferred that Hunter had in fact been "an inmate" of a Florida prison and was "released on parole." However, there is no evidence which suggests that Hunter was acting as an undercover agent for the LaVista Police Department or that he was employed by it. In point of fact, the evidence is that he was neither employed by the department nor acting on its behalf when he purchased the contraband. Thus, § 29-2262.01 does

not render the evidence in question inadmissible.

Schuh next urges that even if § 29-2262.01 does not apply, the district court's ruling should nonetheless be affirmed, for it could well have found that the information supplied by Hunter was not sufficiently reliable to justify issuance of the warrant. It is true the controlling rule in this regard is that a trial court's factual findings in ruling on a motion to suppress are to be upheld unless they are clearly wrong. *State v. Illig, ante* p. 598, 467 N.W.2d 375 (1991); *State v. Cortis, ante* p. 97, 465 N.W.2d 132 (1991). However, the contention that the district court ruled as it did on any basis other than the perceived prohibition of § 29-2262.01 is meritless. The district court's statements, both at the time it took the matter under advisement and at the time it ruled, foreclose any such conclusion.

Accordingly, the district court's ruling is reversed.

REVERSED.

LESTER LANTIS ET AL., APPELLANTS AND CROSS-APPELLEES, V. CITY OF OMAHA, A MUNICIPAL CORPORATION, APPELLEE AND CROSS-APPELLANT.

467 N.W.2d 649

Filed March 29, 1991. No. 87-1090.

1. **Eminent Domain: Damages.** The measure of compensation for land taken for public use is the fair and reasonable market value of the land actually appropriated and the difference in the fair and reasonable market value of the remainder of the land before and after the taking.
2. **Eminent Domain: Damages: Proof.** In an eminent domain proceeding, anticipated profits from the continued carrying on of a business in an established location cannot be considered in estimating damages due a landowner, and the profits of a business cannot be shown for the purpose of proving the value of the property.
3. **Expert Witnesses: Appeal and Error.** A trial court's ruling in receiving or excluding an expert's opinion which is otherwise relevant will be reversed only when there has been an abuse of discretion.
4. **Jury Instructions: Appeal and Error.** All the jury instructions given must be read together, and if, taken as a whole, they correctly state the law, are not

misleading, and adequately cover the issues supported by the pleadings and evidence, there is no prejudicial error necessitating reversal.

5. **Appeal and Error.** Errors assigned but not discussed will not be considered by this court.

Appeal from the District Court for Douglas County: J. PATRICK MULLEN, Judge. Affirmed. Cross-appeal dismissed.

Eric W. Kruger, of Rickerson, Welch & Kruger, and J. Patrick Green for appellants.

Herbert M. Fitle, Omaha City Attorney, and Michael A. Goldberg for appellee.

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

FAHRNBRUCH, J.

Complaining that the trial court erred (1) in failing to admit testimony of their expert witness and (2) in failing to properly instruct the jury, Lester and Viola Lantis, husband and wife, and other parties who are mortgagees of the land involved appeal a $48,500 verdict awarded them against the City of Omaha for the partial taking of land upon which a trailer court was located.

On appeal, this eminent domain proceeding initially was heard by the Appellate Division of the District Court. We affirmed the jury verdict of the district court for Douglas County. See *Lantis v. City of Omaha*, 235 Neb. xvii (case No. 87-1090, May 18, 1990). Subsequently, this court granted a rehearing. Following the rehearing, we again affirm the verdict of the district court.

Throughout the appeal to this court, the appellants have specifically assigned as error the trial court's failure to (1) admit the testimony of the landowners' valuation witness, (2) instruct the jury on the "before and after" measure of just compensation in a case of a partial taking, and (3) give the landowners' requested instruction No. 12.

The trailer court involved in this lawsuit, Garden Valley Trailer Court, owned by the Lantises, is located on 7.78 acres of improved real estate located at approximately 16th and Jaynes Streets in Omaha. The mobile home park is bisected into a

north and a south parcel by a tract of land owned by a third party. Both parcels of the mobile home park, prior to condemnation, contained improved trailer lots, consisting of concrete pads with utility hookups for gas, water, sewer, electric, and telephone services for each mobile home. Before the eminent domain proceedings, there existed 122 to 129 usable mobile home sites at the park. The City of Omaha condemned approximately 47 feet of the north portion of the trailer court for construction of the Storz Expressway. This partial taking eliminated 15 of the mobile home spaces and rendered 4 other spaces useless because they then were so situated that a mobile home could not be pulled in and out of each of those 4 spaces. The City of Omaha also obtained a 16,878.9-square-foot construction easement for a 1-year period from the trailer court and took 11,700 square feet of concrete and 510 feet of chain link fence.

During the course of the trial, the appellants offered testimony of George McCabe, Ph.D., a professor of finance at the University of Nebraska-Lincoln, as to the appellants' "just compensation." Through a motion in limine, the City of Omaha objected to the use of Dr. McCabe's testimony, his report entitled "Value of Garden Valley Trailer Court," and his estimate of the reduction in value of the trailer court. The City of Omaha claimed that McCabe utilized an inappropriate method in arriving at damages in this eminent domain case.

Outside the presence of the jury, the trial court permitted the appellee to conduct a voir dire examination of McCabe. At the conclusion of the examination, McCabe's testimony was the subject of an offer of proof by the appellants, to which testimony the appellee objected. The trial court sustained the City of Omaha's motion in limine and objection. Appellants, in their first assignment of error, claim that the trial court's rejection of McCabe's testimony was erroneous.

The condemnees called only McCabe as an expert witness. McCabe testified that he was not a licensed real estate appraiser in Nebraska, that he did not hold himself out as an expert in the appraisal of real estate, that he had never before appraised a trailer court, and that he made no independent study on his own to verify or study any market sales. At the trial court level, the

City of Omaha questioned whether McCabe was qualified to testify as an expert witness in an eminent domain proceeding. The condemner did not preserve that issue for appellate review, and we therefore make no determination in regard to that matter. The record reflects that McCabe valued the Lantis trailer court as an ongoing business both before and after the taking and determined the difference between the two to be the condemnees' just compensation.

There are basically two means by which just compensation in partial takings is determined. 7A Nichols, The Law of Eminent Domain § 12.02 (rev. 3d ed. 1990). Under one method the value of the entire tract is found just prior to the taking, the value of the remaining tract is evaluated after the taking, and the difference of these two quantities gives the compensation. *Id.* The appellants acknowledge that McCabe used this method to determine just compensation and in so doing valued the trailer court as an "ongoing concern." Using this "before and after" valuation of an ongoing concern, McCabe found the appellants' just compensation to be $121,736.

The second means by which just compensation in partial takings is determined involves determining the market value of the land taken and then measuring the difference in value of the remainder before and after the taking. *Id.* This is the measure of compensation used for partial takings of land in eminent domain proceedings in this state. "The measure of compensation for land taken for public use is the fair and reasonable market value of the land actually appropriated and *the difference in the fair and reasonable market value of the remainder of the land before and after the taking.*" (Emphasis supplied.) *Harmony Lanes v. State*, 193 Neb. 826, 830, 229 N.W.2d 203, 206 (1975). Accord, *Verzani v. State*, 188 Neb. 162, 195 N.W.2d 762 (1972); *Berlowitz v. State*, 180 Neb. 164, 141 N.W.2d 764 (1966); *Chaloupka v. State*, 176 Neb. 746, 127 N.W.2d 291 (1964).

McCabe did not purport to testify as to the value of the real estate actually taken, nor did he purport to testify as to the difference in the fair and reasonable market value of the remainder of the land before and after the taking. This deficiency in and of itself was sufficient reason for the trial

court's refusal to permit McCabe to testify as to the compensation to which the appellants were entitled.

In sustaining the condemner's objection to McCabe's testimony, the trial court declared: "There's no question in my mind that the witness, George McCabe, Ph.D., is incorporating into his computations regarding the fair market value of this property future and anticipated profits. In so doing, he's in contravention of Nebraska law as I understand it." The trial court's perception that McCabe utilized profits in determining appellants' just compensation is conceded in appellants' brief: "To allow capitalization of income, but not capitalization of profits, is to swallow the camel and then strain at the gnat." Brief for appellants at 28. In *Y Motel, Inc. v. State*, 193 Neb. 526, 227 N.W.2d 869 (1975), we held that gross rentals may be admissible to allow a jury to gauge comparability of sales relied upon for comparison and, upon proper foundation, that gross rental may be received as an item to which prospective buyers give substantial consideration. We also held in *Y Motel* that in an eminent domain proceeding, anticipated profits from the continued carrying on of a business in an established location cannot be considered in estimating damages due a landowner and that the profits of a business cannot be shown for the purpose of proving the value of the property. Accord *Verzani v. State, supra*.

A trial court's ruling in receiving or excluding an expert's opinion which is otherwise relevant will be reversed only when there has been an abuse of discretion. *Fuglsang v. Blue Cross*, 235 Neb. 552, 456 N.W.2d 281 (1990); *Aetna Cas. & Surety Co. v. Nielsen*, 222 Neb. 92, 382 N.W.2d 328 (1986); *Priest v. McConnell*, 219 Neb. 328, 363 N.W.2d 173 (1985). In this case there was no abuse of discretion. To the contrary, it would have been an abuse of discretion to admit in evidence McCabe's testimony, since he used the wrong measure of damages. Because McCabe used the wrong measure of damages in formulating what he determined to be just compensation in this case, his testimony would not assist the jury either in understanding the evidence or in determining a fact in issue and, therefore, was not relevant. See Neb. Rev. Stat. § 27-702 (Reissue 1989). Evidence which is not relevant is not admissible.

Neb. Rev. Stat. § 27-402 (Reissue 1989).

Appellants' second and third assignments of error can be considered together. The appellants' assigned errors claim that the trial court failed to give their requested instruction No. 12 and that the instructions given were not proper. After a careful review of the instructions given, we find they are an accurate and proper statement of the law. All the jury instructions given must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and evidence, there is no prejudicial error necessitating reversal. *Denesia v. St. Elizabeth Comm. Health Ctr.*, 235 Neb. 151, 454 N.W.2d 294 (1990). In this case, the trial court submitted the usual standard eminent domain instructions, which clearly stated the proper measure of damages in a partial taking case such as this. Instruction No. 12 offered by the appellants embraced the same improper measure of damages contained in McCabe's proffered testimony. Therefore, appellants' requested instruction No. 12 was properly refused.

In its brief, the appellee purports to cross-appeal, and in its assignment of error claims the trial court erred "in denying Appellee's motion nunc pro tunc for an order requiring the condemnees to return damages awarded them for the acquisition of Tract No. 46A to the County Court." Appellee did not argue this assignment of error. Errors assigned but not discussed will not be considered by this court. *Horst v. Johnson, ante* p. 155, 465 N.W.2d 461 (1991).

We dismiss appellee's cross-appeal and affirm the judgment of the district court.

AFFIRMED. CROSS-APPEAL DISMISSED.

WHITE, J., dissenting.

The previous decisions of this court holding that profits obtained from the operation of a business on the premises are inadmissible in an eminent domain action are justified only when the activity involves a business venture whose success is unrelated to the physical location and condition of the business premises. A successful freight company whose profits are largely derived from cartage agreements negotiated by mail or telephone could not demonstrate a rational relationship

between profit and value of the real estate.

However, when the gross income largely arises from the physical use of the premises themselves, the amount of the gross rental is admissible. *Y Motel, Inc. v. State*, 193 Neb. 526, 227 N.W.2d 869 (1975).

I find no meaningful distinction between space rental at a trailer court and room rental at a motel. Obviously, the gross rental value of the trailer lots was admissible and the expert could base his opinion on that gross rental. See *Y Motel, supra.*

To suggest, as we have in previous cases, that profit is not an item considered by a prospective buyer of real estate is obviously an invented concept. Indeed, it seems logical that a prospective buyer would acquire all information available and give such weight as the information deserved. It is my view that the gross profit of the operation of the trailer court was admissible and that the amount of the profit may be used as the basis for an opinion of value. See 4 Nichols, The Law of Eminent Domain § 12B.09[1] (rev. 3d ed. 1990).

I would reverse.

GRANT, J., joins in this dissent.

MARCIA MILLER, APPELLANT AND CROSS-APPELLEE, V. AMERICAN SPORTS COMPANY, INC., AND ROGER WILLIAM OWEN, APPELLEES AND CROSS-APPELLANTS.

467 N.W.2d 653

Filed March 29, 1991. No. 88-841.

1. **Invasion of Privacy.** Conduct to which one consents cannot constitute an invasion of privacy.
2. **Libel and Slander.** In determining whether a communication is libelous, it must be viewed in the context of the entire publication of which it is a part, and the entire publication must be considered as a whole.
3. _____. In determining whether a publication is libelous, the circumstances under which it was made and the character of the audience and its relationship to the subject of the publication must be taken into consideration, as well as the effect that the publication complained of may reasonably have had upon such audience.

4. **Trial: Libel and Slander.** It is for the trial court to determine in the first instance whether a particular publication was libelous.
5. **Actions: Libel and Slander.** Consent to a publication provides an absolute defense to an action for libel.
6. **Appeal and Error.** A correct result will not be set aside merely because it is based upon incorrect reasoning.

Appeal from the District Court for Douglas County: J. PATRICK MULLEN, Judge. Affirmed.

Richard J. Rensch for appellant.

Dennis C. Magnuson and William E. Gast, of Gast & Peters, for appellees.

HASTINGS, C.J., WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ., and COLWELL, D.J., Retired.

CAPORALE, J.

Upon motion of the defendants-appellees and cross-appellants, American Sports Company, Inc., and its president and owner, Roger William Owen, made at the close of all the evidence, the district court discharged the jury and dismissed plaintiff-appellant Marcia Miller's action for invasion of privacy and libel. Miller charges the district court erred in its rulings relating to the law applicable to the correction of objectionable publications and the proof of actual malice. On the other hand, American Sports and Owen assign as error the district court's disregard of the claimed failure of Miller to prove a prima facie case under either of the theories she pled. Inasmuch as the record supports defendants' claim of error, we affirm without reaching the errors assigned by Miller.

Owen contacted an advertising agency, seeking a model to pose and be photographed with some of the products American Sports manufactured and wished to promote. Miller, a young woman employed by the agency as a receptionist who had prior experience as an advertising model, volunteered to pose and be photographed without pay. Miller knew that the photographs were to be used in promoting American Sports' products at a builders' "Street of Dreams" trade show, but the evidence concerning what she was told as to other uses which might be made of the photographs is conflicting. While Miller testified

she understood that the photographs would be used only in connection with the Street of Dreams promotion, she admitted she knew that she could have so restricted their use, but did not.

The first of Miller's photographs appears as a 6- by 8-inch rectangle on the front of an 11- by 25 1/2-inch brochure folded into thirds which also pictures and describes American Sports' whirlpool bathtubs. The Miller photograph is in full color and is the only thing on the front page of the brochure other than American Sports' name and logogram, which are in white letters against a black background. This photograph displays a lateral view of Miller seated in a water-filled oval tub with her head resting against one end of the vessel. In addition to her head and face, the photograph shows the right side of Miller's neck; all of the top of her right arm, resting on the inner rim of the tub; the top of approximately the lower three-fourths of her left arm, also resting on the inner rim; and her bent right knee, together with approximately the lower one-fourth of her thigh and upper one-fifth of her lower leg. The remainder of her body is hidden by the tub and its swirling contents.

The second photograph, also in color, appears on the last page of the same brochure. It is a 2 1/2- by 1 1/2-inch oval depicting a frontal view of Miller seated on the outer rim of the tub. She is smiling and wears a lavaliere and a ring on the third finger of her left hand, which grasps a bath towel wrapped around her body. The towel extends from just above the upper breastline to slightly below midthigh on her bent right leg and slightly below groin level on her bent left leg. The photograph omits approximately one-fourth of Miller's lower right leg and foot and one-fifth of her lower left leg and foot. In addition to appearing as part of the brochure, the first photograph was displayed at the Street of Dreams promotion as a blowup "larger . . . than [a] chalkboard" of undisclosed dimensions.

Miller makes no complaint with respect to those two photographs nor to the uses made of them. She does, however, take offense at the third photograph and the use made of it. This photograph, a 6- by 2 3/8-inch top-rounded rectangular reproduction of the second photograph described above, adding only the front view of the remainder of Miller's legs and her feet, appears as part of another American Sports

promotion, a leaflet directed at industrial manufacturers. This single-sheet advertisement measures 9¼ by 4⅜ inches when folded and opens into a 9¼- by 12⅞-inch document with print on both sides. In addition to showing and describing whirlpools, spas, and hot tubs, the leaflet pictures refrigerators generally shaped and labeled as bottles of "popular soft drink & beer brands," on and around which are portrayed three young fully clothed female models other than Miller and one young completely dressed male model. Miller's color photograph is located against a black background on the left half of the folded leaflet under the centered word "SEX" printed in pink, which word, when the leaflet is opened, becomes part of the phrase "SEE US NEXT TIME YOU BUILD OR BUY" printed in pink and brown letters across the top of the front and back of the document. The only thing which can be seen on the right half of the folded leaflet, other than American Sports' vertical name in brown letters against a black background at the right edge of the document, is the left side view, against a white background, of approximately the upper one-sixth of one of the other three female models described above. Under Miller's photograph appear, in white against a black background, American Sports' logogram, the words "quality first," and in larger letters under them, the right one-third of an "E" followed by "R'S DIR" and the right one-fourth of an "O" followed by an "N." Thus, the first glance reveals that the leaflet is folded and designed to be pulled open.

The right to privacy Miller pled is founded on certain statutory provisions, and is a limited one. See *Schoneweis v. Dando*, 231 Neb. 180, 435 N.W.2d 666 (1989). In relevant part, these provisions impose liability on one who "exploits a natural person, name, picture, portrait, or personality for advertising or commercial purposes," except for

> [t]he use of such name, portrait, photograph, or other likeness in connection with the resale or other distribution of literary, musical, or artistic productions or other articles of merchandise or property when such person has consented to the use of his or her name, portrait, photograph, or likeness on or in connection with the initial sale or distribution thereof so long as such use does not

> differ materially in kind, extent, or duration from that authorized by the consent as fairly construed . . . .

Neb. Rev. Stat. § 20-202 (Reissue 1987).

The uncontradicted evidence is that Miller volunteered to serve as an unpaid advertising model. Neither is there any doubt that she knew she could limit the use of the photographs if she so desired. For whatever reason, perhaps because she wanted as wide a distribution of her photographs as possible as an aid to promoting her services as a model, she elected to impose no restrictions on their use. Under those circumstances, whatever she thought the uses might be is irrelevant, for the meaning of a contract is judged objectively and not subjectively. See *Bedrosky v. Hiner*, 230 Neb. 200, 430 N.W.2d 535 (1988).

Inasmuch as Miller agreed to the unremunerated and unrestricted use of her photographs to sell products, she, as a matter of law, cannot now complain that the use to which she consented invaded her privacy. See, § 20-202; *O'Brien v. Pabst Sales Co.*, 124 F.2d 167 (5th Cir. 1941), *cert. denied* 315 U.S. 823, 62 S. Ct. 917, 86 L. Ed. 1220 (1942) (football player who had consented to widespread publication of his photograph depicting him in throwing posture could not complain that his privacy had been invaded by use of the photograph on calendar adjacent to photographs of glass and beer bottle with words "Pabst Breweries, Blue Ribbon Export Beer" and "Pabst Blue Ribbon Beer," thus falsely implying he used or endorsed product); *Johnson v. Boeing Airplane Co.*, 175 Kan. 275, 262 P.2d 808 (1953) (privacy of one consenting to publication of photograph in national magazines not invaded); *Brunson v. Ranks Army Store*, 161 Neb. 519, 73 N.W.2d 803 (1955) (contract not breached by arrest resulting from actor's agreed-upon portrayal of robber in an advertising scheme).

That leaves the matter of libel. The first rule of the law of libel is that the communication which is claimed to be defamatory must be viewed in the context of the entire publication of which the communication is a part and that the entire publication must be considered as a whole. See *Houston v. Interstate Circuit*, 132 S.W.2d 903 (Tex. Civ. App. 1939) (in determining whether libelous, movie must be considered as a whole; separate scenes and sentences cannot be isolated and

independently examined). Moreover, the circumstances under which the publication was made and the character of the audience and its relationship to the subject of the publication must be taken into consideration, as well as the effect that the publication complained of may reasonably have had upon such audience. As noted in *Greyhound Secur. v. Greyhound Corp.*, 11 A.D.2d 390, 207 N.Y.S.2d 383 (1960), decided at a time when it made a difference, a statement that a lawyer is an aggressive and successful solicitor of legal business might elicit nothing but admiration from an association of salespersons and an entirely contrary reaction from a bar association.

The second rule is that it is for the trial court to determine in the first instance whether a particular publication was libelous. *Silence v. Journal Star Printing Co.*, 201 Neb. 159, 266 N.W.2d 533 (1978). Contrary to Miller's contention, there is nothing in the publication of the third photograph which reasonably suggests that she is promoting or selling herself for another's sexual gratification. She is not identified in any fashion, nor does the folder disclose how she might be contacted, two items of information which would be a necessary part of any advertisement of one's availability as a sexual partner. The fact is that the pamphlet is pitched not toward those seeking sexual gratification, but toward those who would purchase various types of bathtubs and unusual refrigerators. The brochure is a familiar sales tool which does nothing more than attempt to make American Sports' products appear more desirable by associating them with young people. The publication of which the third photograph is a part is of such a nature as to render the photograph not libelous as a matter of law.

Moreover, even if the third photograph were libelous, Miller, as the analysis of the privacy issue demonstrates, consented to its publication. Such consent provides an absolute defense to an action for libel. See *Hellesen v. Knaus Truck Lines*, 370 S.W.2d 341 (Mo. 1963) (employee who agreed through union contract that employer would provide union with copy of notice warning employee of impending discharge because of dishonesty consented to publication and thus could not recover for libel). See, also, *Ramos v. Henry C. Beck Co.*, 711 S.W.2d 331 (Tex. App. 1986).

Indeed, this court's observation with respect to the suddenly-turned-shy actor in *Brunson v. Ranks Army Store, supra*, has equal application to Miller as the suddenly-turned-shy would-be advertising model. "Generally, actors and actresses seek publicity and often adopt various and sundry ways of securing such notoriety as will attract attention to them. This is considered their stock in trade." *Id.* at 526, 73 N.W.2d at 807. In short, Miller received exactly that for which she bargained and may not now complain of the benefit of that commercial transaction.

While the trial court erred in not finding that Miller failed to prove a prima facie case of either invasion of privacy or libel, its judgment was nonetheless correct. Since a correct result will not be set aside merely because it is based upon incorrect reasoning, *In re Interest of G.G. et al., ante* p. 306, 465 N.W.2d 752 (1991), the judgment is affirmed.

AFFIRMED.

RODNEY K. LICHTY, APPELLANT, V. THE FEDERAL LAND BANK OF OMAHA, A CORPORATION, ET AL., APPELLEES, BRUNING STATE BANK, A CORPORATION, INTERVENOR-APPELLEE.

467 N.W.2d 657

Filed March 29, 1991. No. 88-1033.

1. **Uniform Commercial Code: Security Interests: Sales.** Under the terms of Neb. U.C.C. § 9-504(4) (Reissue 1980), a good faith purchaser at a private sale takes the secured property free of the claims of the defaulting debtor, even if the secured seller fails to comply with the provisions of article 9 of the code.
2. **Summary Judgment.** Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record show that no genuine issue exists as to any material fact or as to the ultimate inferences that may be drawn from any material fact and that, as a matter of law, the moving party is entitled to judgment.

Appeal from the District Court for Thayer County: ORVILLE L. COADY, Judge. Affirmed.

John C. Hahn, of Jeffrey, Hahn & Hemmerling, P.C., for appellant.

Ronald G. Sutter, of Everson, Wullschleger, Sutter, Korslund & Willet, for appellee Federal Land Bank.

Joseph H. Murray, of Germer, Murray & Johnson, for appellees Bruning State Bank and Korff.

HASTINGS, C.J., WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ., and COLWELL, D.J., Retired.

CAPORALE, J.

Plaintiff-appellant, Rodney K. Lichty, assigns as error the district court's sustainment of defendant-appellee The Federal Land Bank of Omaha's motion for summary judgment and the resultant dismissal of his action to replevin a center pivot irrigation system. We affirm.

Plaintiff's father borrowed money from intervenor-appellee, Bruning State Bank. As collateral for this and any future loans, the father granted Bruning a security interest in "all equipment, including but not limited to all farm equipment, tractors, machinery and implements," "whether now owned or hereafter acquired." Although the record does not indicate when the pivot in question was first acquired by the father, the parties do not contest the fact that it was covered by the security interest.

Later, the father and his wife gave Federal a mortgage to the farm on which the pivot was located and where it has always remained. Following default, Federal foreclosed the mortgage and purchased the farm.

After Federal purchased the farm, the father, Bruning, and Federal began to discuss the sale of the pivot to Federal. During these conversations, it was contemplated that the father would join in any bill of sale. Following the father's default on his Bruning loan, Bruning executed a bill of sale to the pivot in favor of Federal, in which the father did not join. Nonetheless, negotiations apparently continued between Federal and the father for a few more days, but nothing came of them. The father received no advance notice that Bruning intended to proceed without him.

While the father and Federal were negotiating, but after

Bruning had conveyed the pivot to Federal, the father sold a batch of machinery, having an appraised value of $72,690 and purporting to include the pivot, to plaintiff; plaintiff tendered a cashier's check for $54,000, drawn payable to the order of his parents and Bruning; Bruning thereupon released its security interest in "[a]ll equipment, including, but not limited to, all farm equipment, tractors, machinery and implements, any and all titled vehicles, tools . . . or any other items of personal property of the Debtors." Plaintiff was aware of the Bruning-Federal bill of sale when the father sold the equipment to him. A short time later, Federal sold the farm and the pivot to defendant-appellee William S. Korff.

The gravamen of an action for replevin is the plaintiff's immediate right to possession of the property in controversy at the time the action is commenced. *International Harvester Credit Corp. v. Lech*, 231 Neb. 798, 438 N.W.2d 474 (1989); *Barstow v. Wolff*, 148 Neb. 14, 26 N.W.2d 390 (1947); *Blue Valley Bank v. Bane & Co.*, 20 Neb. 294, 30 N.W. 64 (1886).

Because we are dealing with equipment subject to a security interest, article 9 of the Nebraska Uniform Commercial Code is applicable to plaintiff's action. See Neb. U.C.C. § 9-109 (Reissue 1980). The relevant portions of article 9 are as follows: "Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace . . . ." Neb. U.C.C. § 9-503 (Reissue 1980).

> (1) A secured party after default may sell, lease or otherwise dispose of any or all of the collateral in its then condition or following any commercially reasonable preparation or processing. . . .
>
> . . . .
>
> (3) Disposition of the collateral may be by public or private proceedings and may be made by way of one or more contracts. Sale or other disposition may be as a unit or in parcels and at any time and place and on any terms but every aspect of the disposition including the method, manner, time, place and terms must be commercially reasonable. Unless collateral is perishable or threatens to

decline speedily in value or is of a type customarily sold on a recognized market, reasonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor, if he has not signed after default a statement renouncing or modifying his right to notification of sale. . . .

(4) When collateral is disposed of by a secured party after default, the disposition transfers to a purchaser for value all of the debtor's rights therein, discharges the security interest under which it is made and any security interest or lien subordinate thereto. The purchaser takes free of all such rights and interests even though the secured party fails to comply with the requirements of this part or of any judicial proceedings

(a) in the case of a public sale, if the purchaser has no knowledge of any defects in the sale and if he does not buy in collusion with the secured party, other bidders or the person conducting the sale; or

(b) in any other case, if the purchaser acts in good faith.

Neb. U.C.C. § 9-504 (Reissue 1980).

Because the father was in default on his loan from Bruning at the time of the purported sale to plaintiff, Bruning had the right to possession of the pivot, see § 9-503, and was entitled to dispose of it in conformity with § 9-504. Since the pivot was in the possession of the prospective buyer, Federal, Bruning did not need to resort to judicial process in order to obtain possession of the pivot. See § 9-503.

It is plaintiff's position that Bruning did not provide his father with reasonable notice of the time after which Bruning would dispose of the equipment as required by § 9-504(3), that the purported transfer to Federal was therefore void, and that because of this, the later release by Bruning of its security interest in the father's personalty included a release of the security interest in the pivot. However, under the terms of § 9-504(4), a good faith purchaser at a private sale takes the secured property free of the claims of the defaulting debtor, even if the secured seller fails to comply with the provisions of

article 9 of the code.

Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record show that no genuine issue exists as to any material fact or as to the ultimate inferences that may be drawn from any material fact and that, as a matter of law, the moving party is entitled to judgment. *Coleman v. Chadron State College, ante* p. 491, 466 N.W.2d 526 (1991). Summary judgment is therefore appropriate in this case if there is no genuine issue as to Federal's good faith in purchasing the pivot. If Federal, as a purchaser at a private sale, acted in good faith, § 9-504(4) applies, and Federal took the pivot free of the father's claims; in that event, any subsequent release by Bruning could have no effect as against Federal, and plaintiff's action for replevin cannot lie.

In his brief, plaintiff claims that Federal did not act in good faith. His entire argument in this regard is as follows:

> Another inherent requirement concerning the sale of collateral involves good faith on the part of the secured creditor under Neb. U.C.C. 9-507. Prior to this "sale" by [Federal, the father] was recognized as the rightful owner of the center pivot irrigation system . . . . This is evidenced by the fact that the parties realized the pivot could not be sold without first obtaining his signature . . . . It was only after the sale occurred that [Federal] and [Bruning] stated the signature of [the father] was not required. This belief was premised upon [the father] supposedly being in default on his security agreement. However, as was stated before, no written notice was given to [the father] concerning this situation . . . .
>
> As such, it appears that [Federal] did not act in good faith concerning this "sale" of the center pivot irrigation system.

(Citations to record omitted.) Brief for appellant at 9-10.

Since the argument refers to "good faith on the part of the secured creditor" and refers to the sale *by* Federal rather than the sale *to* Federal, it appears the argument assumes that Federal held the security interest to the pivot. Yet, the sale by Federal would be the sale to Korff. If indeed this is the

transaction which plaintiff claims involved a lack of good faith by Federal, it is immaterial as far as plaintiff's right to possession of the pivot is concerned. In that connection, it is Federal's good faith as a purchaser under § 9-504(4) that concerns us, and it is the Bruning-Federal transaction, not the Federal-Korff transaction, which is the key to plaintiff's rights.

If, however, plaintiff is contending that Federal's purchase was not in good faith, he fails to recognize that once the father was in default on his security agreement with Bruning, his signature on a bill of sale was unnecessary, no matter what the parties discussed. Federal's acceptance of the bill of sale cannot therefore, without more, evince bad faith. The only purported impropriety to which plaintiff points is Bruning's failure to give the father the notice required by § 9-504. There is nothing in the record, however, which implicates Federal in this or which would indicate that Federal had reason to suspect that Bruning failed to give the father notice. The failure to give notice is neither attributed nor attributable to Federal. Moreover, plaintiff's petition does not allege the absence of good faith on the part of Federal, does not allege any facts which could be construed as indicating lack of good faith, nor does it even make mention of the Bruning-Federal transaction.

In sum, the record before the district court did not raise any material issues of fact or the ultimate inferences which may be drawn from any material fact which, if decided in favor of plaintiff, would have entitled him to the relief requested against Federal.

Accordingly, the judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MICHAEL W. EGGER, APPELLANT.

467 N.W.2d 411

Filed March 29, 1991. No. 90-110.

1. **Sentences: Appeal and Error.** An order imposing a sentence within the statutorily prescribed limits will not be disturbed on appeal absent an abuse of discretion.
2. **Trial: Words and Phrases.** Judicial abuse of discretion occurs when the reasons or rulings of the trial judge are clearly untenable, unfairly deprive a litigant of a substantial right, and deny a just result.
3. **Sentences: Appeal and Error.** On direct appeal, this court has the power to remand for a lawful sentence where the one pronounced was erroneous or void as being beyond the power of the trial court and where the accused himself or herself invoked appellate jurisdiction.

Appeal from the District Court for Saline County: ORVILLE L. COADY, Judge. Affirmed as modified.

Peter K. Blakeslee for appellant.

Robert M. Spire, Attorney General, and Donald A. Kohtz for appellee.

HASTINGS, C.J., WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ., and COLWELL, D.J., Retired.

WHITE, J.

Michael W. Egger appeals from a sentence imposed upon him following a remand from this court. We affirm the decision of the district court as modified.

Egger was convicted by a jury in Saline County of two felonies—making a terroristic threat and using a firearm to commit a felony. He was sentenced to 2 years in prison, with credit for 5 days served. The judge ordered the sentence to be served concurrently with that for another charge filed, a misdemeanor theft, if the misdemeanor was affirmed on appeal.

The felony charges were appealed to this court. In *State v. Egger*, 234 Neb. 175, 449 N.W.2d 558 (1989), we remanded to the district court for resentencing, after finding that the court had not sentenced Egger to a separate consecutive term on the firearm charge, as required by Neb. Rev. Stat. § 28-1205(3)

(Reissue 1989). See, also, *State v. Stratton*, 220 Neb. 854, 374 N.W.2d 31 (1985).

On resentencing, the judge imposed a 2-year sentence for each offense, but failed to give the appellant credit for time served. No new evidence was presented by the prosecution, and Egger presented only testimony from his employer as to his work history. Egger now appeals that decision, assigning as error the imposition of an increased sentence without providing valid reasons for the greater penalty.

Under Nebraska law, making a terroristic threat is a Class IV felony, which is punishable by up to 5 years in prison, up to a $10,000 fine, or both. See Neb. Rev. Stat. §§ 28-311.01 (Reissue 1989) and 28-105(1) (Reissue 1985). Use of a firearm to commit a felony is a Class III felony, which is punishable by 1 to 20 years in prison, a fine of up to $25,000, or both. See §§ 28-1205 and 28-105(1). Therefore, Egger could legally have been sentenced to 1 to 25 years in prison, a fine of up to $35,000, or both. "In an oft-stated rule, we have held that an order imposing a sentence within the statutorily prescribed limits will not be disturbed on appeal absent an abuse of discretion." *State v. Dean, ante* p. 65, 76, 464 N.W.2d 782, 790 (1991); *State v. Valdez*, 236 Neb. 627, 463 N.W.2d 326 (1990). Judicial abuse of discretion "means that the reasons or rulings of the trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition." *State v. Trevino*, 230 Neb. 494, 499, 432 N.W.2d 503, 509-10 (1988). No evidence has been presented to indicate that the judge abused his discretion in imposing the greater prison term on Egger upon resentencing. The district court stated on the record that the resentencing was pursuant to the order of this court. The evidence is clear that the district court was simply following the directions of this court in correcting the original sentence to provide for consecutive terms.

The appellant argues that his sentences are in error because, under *North Carolina v. Pearce*, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), a judge who imposes a greater sentence after a new trial must provide reasons which affirmatively appear on the record. *Pearce* is intended to prevent a trial judge

from imposing a vindictive sentence against the defendant for exercising his constitutional right to appeal.

However, Egger's case differs from *Pearce*. On appeal, in *Pearce*, the defendant's original conviction was set aside for constitutional deficiencies. Egger was unsuccessful in his appeal—his sentence for the making of a terroristic threat was not reversed, modified, or overturned, nor was a retrial ordered. The cause was remanded merely to comply with statutory requirements for imposition of a consecutive sentence on the firearm charge.

Nor did Egger have a retrial, as did the defendant in *Pearce*. Egger's second sentence was imposed on rehearing and was actually the first legally correct sentence. The second sentence was within the statutory boundaries, and no reasons for it were required to be placed on the record. We do not find that *Pearce* is applicable to this case.

"On direct appeal this court has the power to remand for a lawful sentence where the one pronounced was erroneous or void as being beyond the power of the trial court to pronounce and where the accused himself or herself invoked appellate jurisdiction for the correction of errors." *State v. Wren*, 234 Neb. 291, 294, 450 N.W.2d 684, 687 (1990); *State v. Gaston*, 191 Neb. 121, 214 N.W.2d 376 (1974).

Because the *Pearce* case is not applicable here, and the second sentence imposed falls within the statutory limits for felonies, the resentencing is affirmed, with the exception that the district court is directed to reinstate 5 days' credit for time served by the defendant.

AFFIRMED AS MODIFIED.

IN RE INTEREST OF J.R.W., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. A.W., APPELLANT.

467 N.W.2d 413

Filed March 29, 1991. No. 90-118.

1. **Parental Rights: Appeal and Error.** In reviewing a termination of parental rights, the Supreme Court tries factual questions de novo on the record, reaching a conclusion independent of the trial court's findings.
2. **Parental Rights: Proof.** Termination of parental rights is permissible when the basis for such termination is proved by clear and convincing evidence.
3. **Parental Rights: Appeal and Error.** When there is a conflict in the evidence in an appeal from a judgment terminating parental rights, we consider and may give weight to the trial court's observation of the witnesses and acceptance of one version of the facts rather than another.
4. **Public Health and Welfare: Public Assistance: Parent and Child.** The Nebraska family policy act, Neb. Rev. Stat. §§ 43-532 to 43-535 (Reissue 1988), passed to provide guidance for state government in dealing with problems and crises involving children and families, calls for state entities to provide assistance in the least intrusive and least restrictive method, and to implement the act through cooperative efforts.
5. **Parental Rights: Juvenile Courts.** Nebraska statutes provide the juvenile court with the discretionary power to prescribe a reasonable parental rehabilitation plan.
6. **Parental Rights: Proof.** Noncompliance with a reasonable plan of rehabilitation is sufficient grounds for termination of parental rights.
7. **Parental Rights.** The primary concern in a termination case must be the child, who cannot, and should not, be suspended in foster care, nor be made to await uncertain parental maturity.
8. _____. Where parents are unable or unwilling to rehabilitate themselves within a reasonable time, the best interests of the children require that parental rights be terminated without delay.

Appeal from the Separate Juvenile Court of Lancaster County: WILFRED W. NUERNBERGER, Judge. Affirmed.

Richard Douglas McClain for appellant.

Alicia B. Henderson, Deputy Lancaster County Attorney, for appellee.

David A. Battiato, of Burns & Associates, guardian ad litem.

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

WHITE, J.

The rights of A.W., the natural mother, to her minor

daughter, J.R.W., were terminated by an order of the Lancaster County Separate Juvenile Court, entered on January 16, 1990. The mother appeals the termination, assigning as error that the lower court did not require coordination of services by several governmental agencies, resulting in the placement of the mother, also a minor, "in various unsuitable and unlawful environments." The termination of the rights of the putative father, R.C., is not a part of this appeal.

In reviewing a termination of parental rights, the Supreme Court tries factual questions de novo on the record. This requires it to reach a conclusion independent of the trial court's findings. *In re Interest of K.M.S.*, 236 Neb. 665, 463 N.W.2d 586 (1990); *In re Interest of D.S. and T.S.*, 236 Neb. 413, 461 N.W.2d 415 (1990).

No complaint has been made here that the evidence is insufficient to support the termination. We note that termination " ' "is permissible when the basis for such termination is proved by clear and convincing evidence." ' " *In re Interest of K.M.S., supra* at 666, 463 N.W.2d at 588.

The child in question, J.R.W., was born on May 12, 1987, to A.W., who was born on December 3, 1972. The mother herself had been adjudicated a neglected child on three earlier occasions (January 1978, February 1982, and October 1983), and in October 1983, the juvenile court found that A.W.'s father, B.W., had had inappropriate sexual contact with her. The court ordered B.W. to have no contact with A.W., an order which remained in effect through all times relevant to this case. Between January 1978 and December 1985, A.W. was in and out of foster care, and was under either the custody or supervision of the Lancaster County division of public welfare or the Nebraska Department of Social Services (DSS).

Following two suspensions from school, A.W. was expelled on November 26, 1985, for kicking and threatening other students, using abusive language, and failing to turn in assignments. She was then placed at the Nebraska Center for Children and Youth (NCCY), where she continued her uncontrollable behavior, frequently running away and demonstrating verbal and physical aggression toward staff and other group members.

After an absence from NCCY between September 18 and October 3, 1986, A.W. returned, reporting that she was pregnant. She was moved to the Youth Service System's teaching and learning center (TLC), a residential facility for teen mothers during their pregnancies and following the birth of their children. On December 5, 1986, A.W. assaulted a resident and staff member at TLC, and was incarcerated at the Jennie B. Harrel Attention Center, a juvenile detention facility. After admitting the allegations in the juvenile court petition, she was placed on probation and returned to NCCY, which was the only setting available to a minor who exhibited assaultive behavior.

During A.W.'s high-risk pregnancy, she failed to follow medical advice and demonstrated no interest in learning parenting skills. She was moved to the behavioral medicine unit at Lincoln General Hospital during the last stages of her pregnancy.

Her daughter, J.R.W., was born on May 12, 1987. A petition was filed by the Lancaster County Attorney on May 14, alleging that J.R.W. was a child lacking proper parental care and support through no fault of her mother. The infant was placed in foster care, and A.W. returned to NCCY, where a plan was developed to allow daily visits with her child. In June, A.W. began running away from NCCY on a frequent basis, and she missed the scheduled visits with J.R.W. A plan to allow the baby to live on the NCCY campus with A.W. was terminated when A.W. continued to run away, and frequently returned in an intoxicated state.

The DSS caseworker developed a plan, including the provision of transportation, for daily visitation between A.W. and J.R.W. and for A.W.'s enrollment in Family Service's Parents and Children Together (PACT), a parenting skills program.

However, A.W.'s uncontrollable behavior continued. Between April 26, 1986, and August 25, 1987, 48 incident reports were filed at NCCY, including reports of physical threats, property destruction, running away, physical assaults, substance abuse, and possession of weapons. A supplemental petition and motion to revoke probation was filed in July 1987,

but before disposition could be entered, A.W. assaulted a police officer with a dangerous instrument and was placed at the attention center on August 25, 1987.

At the attention center, A.W. assaulted two staff members and damaged property. On September 22, 1987, the juvenile court found that A.W. was uncontrolled by DSS and that DSS had no program to meet A.W.'s needs. Following an evaluation at the Youth Development Center-Geneva, A.W. was committed on October 22, 1987, to the Nebraska Department of Correctional Services for placement at Geneva.

Continued efforts were made to reunite A.W. with her child. The foster parents took J.R.W. to the attention center weekly and to Geneva biweekly for visitations. The foster mother testified that the visits were not productive because A.W. spent only about 25 percent of the time interacting with the child.

At Geneva, A.W.'s behavior did not improve. She committed numerous violations, including using profanity, making verbal threats and outbursts, assaulting staff members and residents, fighting, and refusing to follow directions. Although she might have been eligible for parole in 4 1/2 months, A.W. remained at Geneva for 10 months, until August 22, 1988, when she was paroled by the Department of Correctional Services to her father's home, despite the juvenile court's order that he have no contact with her.

Before A.W.'s release from Geneva, she signed a reunification plan, which had been developed with input from the DSS caseworker. The plan provided that if A.W. successfully participated in it for 6 months after her release, she would be allowed to reside with J.R.W. in a supervised setting. As part of the plan, A.W. agreed to (1) successfully complete the PACT program, (2) successfully participate in the YWCA's teen mothers program, (3) maintain a regular visitation schedule with J.R.W., (4) cooperate with J.R.W.'s caseworker, (5) successfully participate in an education plan, (6) avoid involvement in any law violations, (7) attend Alcoholics Anonymous, (8) participate in counseling, and (9) cooperate with her parole officer.

On December 6, 1988, at the first juvenile court review hearing following her parole, A.W. failed to appear, and the

court gave her 30 days to present a written plan for reunification. On January 19, 1989, she presented a photocopy of the earlier plan.

The Lancaster County Attorney filed an amended supplemental petition on December 7, 1988, alleging that J.R.W. lacked proper parental care through the fault and habits of her mother, A.W., and father, R.C. or John Doe, real name unknown. The petition asked for an order terminating parental rights, alleging that termination would be in J.R.W.'s best interests because her parents had substantially and continuously or repeatedly neglected J.R.W. and abandoned her for 6 months or more. The adjudication hearing on this petition was held on February 21, 1989, and neither A.W. nor R.C. appeared in court. Additional hearings were then held on March 31, April 3, and April 10, 1989.

In an April 17, 1989, order, the court found that the allegations were true and that A.W. had not visited or cared for her child on a regular basis since the child's birth. However, the court stated that it could not find that there had been a coordination of services for A.W., as required by the family policy act, Neb. Rev. Stat. §§ 43-532 to 43-535 (Reissue 1988). The court gave A.W. additional time and continued the hearing to October 12, 1989. The parental rights of the father, R.C., were terminated. The court approved a modified rehabilitation plan on May 30, 1989.

Between her parole in August 1988 and the termination hearings, A.W. took little action to work toward meeting the requirements of the rehabilitation plan. She twice failed to appear for intake meetings for the PACT program, and she was eventually terminated for lack of participation, completing only 6 of 54 sessions scheduled during the 18-week program.

A.W.'s caseworker agreed that if A.W. remained in school and attended a family living class, she would not have to participate in the YWCA teen mothers program, but she attended neither school nor the YWCA program. She later withdrew from school, and she attended fewer than one-half of her GED classes and never took the GED test. She eventually attended three of the YWCA's parenting classes.

J.R.W.'s foster mother testified that between A.W.'s release from Geneva, in August 1988, and December 1989, A.W.

visited J.R.W. for only 23 of 135 scheduled visitations. Despite a twice-weekly visitation schedule with transportation available, A.W. did not visit J.R.W. until September 15, 1988, and then did not visit again until January 17, 1989. She next visited on April 24, 1989. Her visits were intermittent until July 31, 1989, and then A.W. did not visit her daughter again until October 19, 1989. A.W. visited only twice in November and once in December 1989.

A.W. also failed to cooperate with her caseworker. She missed four meetings with no explanation and did not respond to letters until February 13, 1989, when she went to the DSS office to obtain glasses.

A.W. was also ordered to participate in individual counseling, but never began a therapy program, nor did she provide the requested proof of her attendance at Alcoholics Anonymous meetings.

Although the terms of her parole required her to live with her father, in violation of a juvenile court order, she instead lived with a boyfriend. A.W. did not inform her caseworker. When the caseworker requested the court to determine A.W.'s custody, the court held that A.W.'s custody reverted to DSS. The caseworker attempted to make arrangements for a more appropriate placement for A.W., but could not locate A.W., and later attempted contacts with A.W. were all unsuccessful.

A.W. gave birth to a second child in September 1989. The caseworker and an aide attempted to arrange an independent living situation for A.W., because there was no other appropriate placement for a teenager and her child. A.W. did not cooperate in looking for an apartment until she was told that she would be placed at the TLC home unless she found an apartment.

The case aide also attempted to help A.W. obtain aid to dependent children (ADC) so that she could live independently. After the aide provided an application to A.W. and submitted it for her, A.W. appeared for an interview at the ADC office with her boyfriend, T.M. The ADC worker subsequently requested additional information about T.M.'s income, and when A.W. did not respond to the request, the application was rejected.

A second referral to ADC was made. A.W. admitted that she lied at the second ADC appointment when she stated that she

was not living with T.M. Again, the ADC worker told A.W. she would need additional income and work information from T.M. At the time of the termination hearing in January 1990, T.M. had not complied with that request and the application was still pending.

An initial request for emergency housing assistance was denied because A.W. failed to follow through with the application process.

Testimony was also elicited from Dr. Ross Thompson, a developmental psychologist at the University of Nebraska, who testified that the bonding process between an infant and the caregiver has been completed at the age of 12 months, and any move to a new set of caregivers would be distressing and disruptive to the child. A.W.'s caseworker testified that she believed termination was in J.R.W.'s best interests because J.R.W. had been in the same foster home since she was a few months old, and because A.W. had not committed herself to the child.

Even though no error was assigned as to the sufficiency of the evidence, we find that the evidence is more than sufficient to terminate the parental rights of A.W. What little conflict there may be in the evidence is disposed of by our rule that we consider and may give weight to the trial court's observation of the witnesses and acceptance of one version of the facts rather than another. *In re Interest of D.S. and T.S.*, 236 Neb. 413, 461 N.W.2d 415 (1990); *In re Interest of A.B. et al.*, 236 Neb. 220, 460 N.W.2d 114 (1990).

The mother's assignment of error seems to assert that her rights were wrongly terminated because the governmental agencies involved did not coordinate their services to her. The Nebraska family policy act was passed to "guide the actions of state government in dealing with problems and crises involving children and families." § 43-532(1). The act calls for state entities to provide assistance "in the least intrusive and least restrictive method," and it states that the policy shall be implemented through cooperative efforts. § 43-532(2). It is true that the Department of Correctional Services paroled A.W. to her father's home, which violated an order by the juvenile court requiring her father, B.W., to have no contact with A.W.

However, we do not find that this mistake had any significant impact on this case. The evidence indicates that A.W. lived with a boyfriend instead of living with her father and that as soon as the DSS caseworker discovered this fact, she took steps to find a more appropriate placement for A.W. It is clear that A.W. did not cooperate with the DSS staff, and she cannot now complain that any lack of coordination of agency effort resulted in the termination of her parental rights.

A.W. also complains about the timelag in providing her with benefits from ADC and emergency housing assistance so that she could live independently and attempt reunification with her daughter at an earlier stage. No evidence has been presented to show that better coordination among the agencies would have improved A.W.'s parental skills. On more than one occasion, A.W. failed to take advantage of the available services or to follow through and provide necessary information to DSS.

A.W. was given numerous opportunities to demonstrate her interest in becoming a good parent and in being reunited with her child. Nebraska statutes provide the juvenile court with the discretionary power to prescribe a reasonable parental rehabilitation plan. *In re Interest of L.K.Y. and A.L.Y.*, 235 Neb. 545, 455 N.W.2d 828 (1990). Noncompliance with a reasonable plan of rehabilitation is sufficient grounds for termination of parental rights. *In re Interest of A.B. et al., supra.*

Our primary concern must be the child, who " 'cannot, and should not, be suspended in foster care, nor be made to await uncertain parental maturity.' " *In re Interest of R.W.*, 236 Neb. 420, 429, 461 N.W.2d 545, 551 (1990). Where parents are unable or unwilling to rehabilitate themselves within a reasonable time, the best interests of the child require that parental rights be terminated without delay. *In re Interest of A.B. et al., supra.* While A.W.'s background shows that her own life has not been easy, the fact remains that her daughter, J.R.W., is now nearly 4 years old and has had only sporadic and intermittent contact with A.W., who has not yet demonstrated her interest in being a mother to J.R.W. The order of the juvenile court terminating A.W.'s parental rights to J.R.W. is affirmed.

AFFIRMED.

GAYLE E. HAMAN, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, PLAINTIFF, V. FRANK MARSH, TREASURER OF THE STATE OF NEBRASKA, ET AL., DEFENDANTS, AND SECURITY INVESTMENT COMPANY, INTERVENOR.

467 N.W.2d 836

Filed March 29, 1991. No. 90-474.

1. **Constitutional Law: Statutes: Proof.** The party claiming that a legislative act is unconstitutional has the burden of establishing such unconstitutionality, and all reasonable doubts will be resolved in favor of constitutionality.
2. _____: _____: _____. Unconstitutionality of a statute must be clearly demonstrated before a court can declare the statute unconstitutional.
3. **Constitutional Law: Legislature.** The Legislature cannot circumvent an express provision of the Constitution by doing indirectly what it may not do directly.
4. **Constitutional Law: Legislature: Statutes: Special Legislation.** The Legislature shall not pass local or special laws that grant to any corporation, association, or individual any special or exclusive privileges, immunity, or franchise whatever.
5. **Statutes: Special Legislation: Legislature.** By definition, a legislative act is general, and not special, if it operates alike on all persons of a class or on persons who are brought within the relations and circumstances provided for and if the classification so adopted by the Legislature has a basis in reason and is not purely arbitrary.
6. **Statutes: Special Legislation.** A legislative act that applies only to particular individuals or things of a class is special legislation.
7. **Constitutional Law: Statutes: Special Legislation.** General laws embrace the whole of a subject, with their subject matter of common interest to the whole state. Uniformity is required in order to prevent granting to any person, or class of persons, the privileges or immunities which do not belong to all persons.
8. **Constitutional Law: Special Legislation: Due Process.** It is because the legislative process lacks the safeguards of due process and the tradition of impartiality which restrain the courts from using their powers to dispense special favors that constitutional prohibitions against special legislation were enacted.
9. **Constitutional Law: Statutes: Special Legislation.** A legislative act can violate Neb. Const. art. III, § 18, as special legislation in one of two ways: (1) by creating a totally arbitrary and unreasonable method of classification, or (2) by creating a permanently closed class.
10. **Constitutional Law: Special Legislation: Words and Phrases.** The term "class legislation" is a characterization of legislation in contravention of Neb. Const. art. III, § 18. It is that which makes improper discrimination by conferring privileges on a class arbitrarily selected from a large number of persons standing in the same relation to the privileges, without reasonable distinction or substantial difference.
11. **Constitutional Law: Statutes: Liability: Negligence: States.** Only by general law, uniform in its application to persons, can a liability of the state be constitutionally created for the negligence of its agents and servants.

12. **Constitutional Law: Legislature: Special Legislation.** While the Legislature may make classifications, it cannot do so arbitrarily and unreasonably. A reasonable classification must operate equally on all within the class.
13. **Constitutional Law: Special Legislation: Public Policy.** A legislative classification, in order to be valid, must be based upon some reason of public policy—some substantial difference of situation or circumstances—that would naturally suggest the justice or expediency of diverse legislation with respect to objects to be classified. Classifications for the purpose of legislation must be real and not illusive; they cannot be based on distinctions without a substantial difference.
14. **Constitutional Law: Special Legislation.** Classification is proper if the special class has some reasonable distinction from other subjects of like general character, which distinction bears some reasonable relation to the legitimate objectives and purposes of the legislation. The question is always whether the things or persons classified by the act form by themselves a proper and legitimate class with reference to the purpose of the act.
15. **Constitutional Law: Special Legislation: Legislature: Intent: Public Purpose.** If the purpose of a legislative act is unclear and the Legislature declares a public purpose which is not invalid on its face, this court will give strong consideration to the intent of the Legislature, but if the act is clearly contrary to the Constitution, the court must declare the act unconstitutional regardless of the proclaimed legislative intent.
16. **Constitutional Law: Legislature: Statutes: Special Legislation: Public Purpose.** The Legislature may not, under the guise of public purpose, pass a law solely for the benefit of a select few.
17. **Constitutional Law: Equal Protection: Special Legislation.** In Nebraska, both equal protection and the prohibition against special legislation emanate from Neb. Const. art. III, § 18.
18. **Constitutional Law: Equal Protection: Legislature: Statutes.** Under equal protection, classifications that do not involve a suspect class or fundamental right are tested for rational basis. All that is required is that there be a rational relationship between a legitimate state interest and the statutory means selected by the Legislature to accomplish that purpose.
19. **Constitutional Law: Special Legislation.** The test of validity under the special legislation prohibition is more stringent than the traditional rational basis test. Classifications must be based on some substantial difference of situation or circumstances that would naturally suggest the justice or expediency of diverse legislation with respect to the objects to be classified.
20. _____: _____. There is no reasonable classification when the classes are based on historical facts alone.
21. **Constitutional Law: Statutes: Equal Protection: Special Legislation.** Under the equal protection clause, both state and federal courts will uphold state laws which make economic classifications unless the classification rests on grounds wholly irrelevant to the achievement of the state's objective, or unless the law is so unrelated to the achievement of a legitimate purpose that it appears irrational. On the other hand, the test for statutes challenged under the special-laws

prohibitions is that they must bear a reasonable and substantial relation to the object sought to be accomplished by the legislation.

22. **Statutes: States: Liability: Notice.** A moral obligation attaches when there is a law which is passed notifying and warning the taxpayer and the citizen generally that the state will undertake the burden of such damages.
23. **Statutes: Special Legislation.** If the evil to be corrected can be seen to be merely fanciful, the injustice or the wrong illusory, the courts may intervene and strike the special statute down.
24. _____: _____. Whether a classification is arbitrary depends upon the purpose and subject of the particular act and the circumstances and conditions surrounding its passage.
25. **States: Banks and Banking.** Clearly, it has not yet come to pass that the state, in its supervision of the banking business, has become an eleemosynary institution.
26. **Statutes: Special Legislation.** A classification which limits the application of the law to a present condition, and leaves no room or opportunity for an increase in the numbers of the class by future growth or development, is special.
27. _____: _____. In determining whether a class is closed, this court is not limited to the face of the legislation, but may consider the act's application.
28. _____: _____. In deciding whether a statute legitimately classifies, the court must consider the actual probability that others will come under the act's operation. If the prospect is merely theoretical, and not probable, the act is special legislation. The conditions of entry into the class must not only be possible, but reasonably probable of attainment.
29. **Constitutional Law: States: Debtors and Creditors: Guaranty.** Except for certain circumstances, the purpose of Neb. Const. art. XIII, § 3, is to prevent the state or any of its governmental subdivisions from extending the state's credit to private enterprise. It is designed to prohibit the state from acting as a surety or guarantor of the debt of another.
30. **States: Debtors and Creditors: Taxation.** The state's credit is inherently the power to levy taxes and involves the obligation of its general fund.
31. **States: Loans: Debtors and Creditors.** There is a distinction between the loaning of state funds and the loaning of the state's credit. When a state loans funds it is in the position of creditor, whereas the state is in the position of debtor upon a loan of credit.
32. **Legislature: Public Purpose: Public Health and Welfare.** What is a public purpose is primarily for the Legislature to determine. A public purpose has for its objective the promotion of the public health, safety, morals, security, prosperity, contentment, and the general welfare of all the inhabitants. No hard and fast rule can be laid down for determining whether a proposed expenditure of public funds is valid as devoted to a public use or purpose. Each case must be decided with reference to the object sought to be accomplished and to the degree and manner in which that object affects the public welfare.
33. **Legislature: Public Policy: Public Purpose.** It is the province of the Legislature to determine matters of policy and appropriate the public funds. If there is reason for doubt or argument as to whether the purpose for which the appropriation is made is a public or a private purpose, and reasonable men

might differ in regard to it, it is essentially held that the matter is for the Legislature.

34. **Attorney Fees: Costs.** Attorney fees and expenses may be recovered only in such cases as are provided for by statute, or where the uniform course of procedure has been to allow such a recovery.

35. **Actions: Supreme Court: Constitutional Law: Statutes: Legislature: Attorney Fees: Costs.** When an original action is instituted in the Supreme Court by or against the state, or any office, department, or officer thereof, involving the constitutionality of any act of the Legislature, no matter when such act was passed, attorney fees and costs may be allowed if the action challenges the constitutionality of an act which the Attorney General has previously ruled constitutional or unconstitutional or as to which he has made no ruling.

Original action. Judgment for plaintiff.

James T. Gleason and Donald J. Buresh, of Stalnaker, Becker, Buresh, Gleason & Farnham, P.C., for plaintiff.

Robert M. Spire, Attorney General, and Lisa D. Martin-Price for defendants.

Kim M. Robak and David A. Ludtke, of Rembolt Ludtke Parker & Berger, for intervenor.

Robert T. Grimit and Michael A. England, of Baylor, Evnen, Curtiss, Grimit & Witt, for amicus curiae receiver.

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

PER CURIAM.

In this original action, Gayle E. Haman, a resident Nebraska taxpayer, on behalf of herself and all others similarly situated, attacks the constitutionality of legislation which would pay $33.8 million of state tax money to depositors who have suffered losses due to the failure of industrial loan and investment companies in Nebraska.

Because 1990 Neb. Laws, L.B. 272A, passed by Nebraska's Ninety-first Legislature, Second Session, is (1) special legislation which creates (a) an unreasonable and (b) a closed classification, in contravention of Neb. Const. art. III, § 18, and (2) gives the state's credit to a private corporation, in contravention of Neb. Const. art. XIII, § 3, it is unconstitutional.

On November 1, 1983, the Nebraska Department of Banking and Finance (department) closed Commonwealth Savings Company (Commonwealth) and placed it in receivership. On January 4, 1985, the Nebraska Depository Institution Guaranty Corporation (NDIGC), a private corporation created to insure deposits up to $30,000 in industrial loan and investment companies and cooperative credit associations (industrial companies), turned over and surrendered all of its assets to the receiver of Commonwealth. The NDIGC thereafter has had no assets to fulfill its guaranty of any deposits in any depository institution.

On March 20, 1985, the receiver filed a tort claim lawsuit against the State of Nebraska in the district court for Lancaster County. The suit alleged numerous acts of wrongful and negligent conduct by the department in its supervision, regulation and examination of Commonwealth and in admitting Commonwealth as a member of the NDIGC. This suit ended with a court-approved settlement of $8.5 million as a full and complete compromise of any and all legal claims of the receiver, Commonwealth holders of certificates of indebtedness, and creditors against the state and its officials. See *Weimer v. Amen*, 235 Neb. 287, 455 N.W.2d 145 (1990).

After the closing of Commonwealth, all but two of the remaining industrial companies either merged with, or were purchased by, other financial institutions, received charters to operate as banks, or sought protection by reorganization under Chapter 11 of the U.S. Bankruptcy Code. The two remaining industrial companies which have continued to operate are First Commerce Savings of Lincoln, Nebraska, and Commerce Savings of Columbus, Nebraska. The stipulation of the parties indicates that the depositors of these two industrial companies are now insured by the FDIC. The only two industrial companies to seek bankruptcy protection were American Savings Company and State "Securities" Savings Company. Legal claims filed by these two companies against the state were dismissed by demurrer and then dismissed voluntarily on appeal, see *American Savings Co. v. State*, 230 Neb. xvii (case No. 87-492, Nov. 7, 1988), and by demurrer affirmed on appeal, see *Security Inv. Co. v. State*, 231 Neb. 536, 437

N.W.2d 439 (1989). Only Commonwealth was placed in receivership.

In 1984, Nebraska's Legislature provided that industrial loan and investment companies organized under state law must, within 6 months of March 13 of that year, obtain and continually maintain insurance of their savings or certificates of indebtedness by membership in the FDIC, merge with an institution holding such membership and insurance, or provide notice to their depositors that their deposits were not insured. Any industrial loan and investment company organized after March 13, 1984, was and is required to comply with the same requirements before commencing its operations. See Neb. Rev. Stat. § 8-407.03 (Reissue 1987).

As a response to the losses to specified depositors because of the demise of the NDIGC, Nebraska's Legislature passed L.B. 272A, and the Governor signed the act on April 2, 1990. This legislation authorized the department to fulfill the $30,000 guaranty of each and every deposit. The Legislature appropriated $16.9 million for each of two fiscal years, with the intent of future appropriations from time to time until the $30,000 guaranties are discharged.

The pertinent provisions of L.B. 272A read as follows:

> Section 1. For purposes of this act:
>
> (1) Company in receivership shall mean an industrial company which is being liquidated by a receiver or the department;
>
> (2) Department shall mean the Department of Banking and Finance;
>
> (3) Deposit shall mean a certificate of indebtedness . . . which was unpaid when a protected company filed bankruptcy pursuant to Chapter 11 of the United States Bankruptcy Code or when a company in receivership entered receivership;
>
> . . . .
>
> (5) Industrial company shall mean any industrial loan and investment company;
>
> . . . .
>
> (7) Protected company shall mean an industrial company that filed bankruptcy pursuant to Chapter 11

. . . after November 1, 1983 . . .

. . . .

Sec. 2. The Legislature hereby finds and declares that the [NDIGC] was formed with department approval to protect depositors of certain financial institutions. . . . [I]n 1977 the Legislature enacted what now appears as section 21-17,144 which requires every depository institution to display at each place of business maintained by it a sign or signs indicating that its member or depositor accounts are protected by the [NDIGC] and that it include in all of its advertisements a statement to the effect that its member or depositor accounts are protected by the [NDIGC].

The Legislature further finds and declares that prior to the department's approval of Commonwealth . . . as a member of the [NDIGC] the department knew or should have known that Commonwealth . . . was in unsatisfactory financial condition . . . . [B]eginning in 1982 the department knew that Commonwealth . . . was insolvent, but at no time prior to November 1, 1983, did the department report [Commonwealth's] insolvency to other industrial companies or to the public, and at no time did the department prior to November 1, 1983, take action against Commonwealth . . . or its officers. . . .

The Legislature further finds and declares that on November 1, 1983 . . . the department, without regard to whether other industrial companies were solvent, publicly ordered all other industrial companies to refuse to allow depositors to withdraw funds unless the depositors' certificates of indebtedness had matured. The publication of such an order caused depositors to lose confidence in industrial companies, to withdraw their deposits as soon as their certificates of indebtedness matured, and to decline to reinvest their money in any other industrial company. Therefor the assets of such industrial companies were continuously drained until all such companies were forced to merge with or be purchased by other financial institutions or to seek protection by reorganization under Chapter 11 . . . . Because of the above chain of events, after November 1, 1983, holders of certificates of

indebtedness in industrial companies which later became protected companies were paid in full if their certificates . . . matured before the industrial company filed bankruptcy, but those whose certificates . . . happened to mature afterwards received only partial payment.

. . . .

The Legislature further finds and declares that the enactment of the Nebraska Property and Liability Insurance Guaranty Association Act has allowed state funds by means of premium tax credits to be used to protect policyholders in insolvent insurance companies, and the same principle should be extended to depositors in insolvent industrial companies.

The Legislature further finds and declares that the actions of the department [and] the requirement passed by the Legislature in section 21-17,144, that is, that the thirty-thousand-dollar guaranty of each deposit by the [NDIGC] be displayed and advertised, and principles of fairness all require that the State of Nebraska fulfill the thirty-thousand-dollar guaranty of each and every deposit.

Sec. 3. In addition to the findings in section 2 of this act, the Legislature further finds and declares that the circumstances recited in such section have seriously impaired the confidence of the people of this state in the Legislature and in the enactments of the Legislature such as section 21-17,144 . . . the welfare and stability of this state and its financial institutions require that the people have confidence in the Legislature and in the financial institutions . . . and the redemption of the guaranty to depositors by the [NDIGC] will serve a necessary public purpose and will effect a sound and necessary public policy.

Sec. 4. The department shall, from money appropriated to it from time to time, distribute to depositors sums of money to be applied to the payment of deposits up to thirty thousand dollars. . . . To ensure fair and equitable distribution of the money appropriated and that all depositors will recover the guaranteed portions of

> their deposits at approximately the same time, the distributions shall be allocated so that, at any one point in time, all depositors shall be reasonably assured of recovering the same percentage of the guaranteed portions of their deposits . . . .
>
> . . . .
>
> Sec. 6. When payment has been offered to all depositors in the full amount of the thirty-thousand-dollar guaranty, then, but not before, the offer of such payment to each depositor shall (1) constitute a full satisfaction of the depositors' claims against the state based on the guaranty by the [NDIGC] . . . .

1990 Neb. Laws, L.B. 272A.

At the time L.B. 272A was passed, only depositors of Commonwealth, American Savings, and State Securities Savings fit within the defined class of recipients. Shortly after L.B. 272A was signed by the Governor, this suit was filed, and a temporary restraining order was issued by this court on June 29, 1990, halting any planned disbursements.

The plaintiff, a nondepositor Nebraska taxpayer and resident, prays that this court declare L.B. 272A unconstitutional, permanently enjoin its implementation, and award her attorney fees and costs.

The defendants were sued in their official capacities as officers of the State of Nebraska. Defendants, Frank Marsh, Treasurer; Deb Thomas, Director of Administrative Services; and Cynthia H. Milligan, Director of Banking and Finance, ask this court to find L.B. 272A constitutional as a legitimate exercise of police power, dismiss plaintiff's original action with prejudice, and tax all costs to the plaintiff.

Briefs were also submitted by Security Investment Company, as intervenor and successor in interest to and assignee of State Security "Investment" Co. (Intervenor), and the receiver of Commonwealth, as amicus curiae (Amicus), in support of the constitutionality of L.B. 272A.

The plaintiff makes four arguments attacking the constitutionality of L.B. 272A, as follows:

(1) The state had no preexisting legal duty to pay depositors. Any liability to the Commonwealth depositors was discharged

by the settlement between the receiver and the state and the appropriation of $8.5 million to consummate that settlement. The depositors of State Securities Savings and American Savings, the only other institutions covered by the legislation, had their claims dismissed. Legislation which acts retroactively to compensate private individuals is invalid because it violates due process of law, it effects an unreasonable classification, and it constitutes special legislation.

(2) Legislation which operates upon or affects a closed class constitutes special legislation and creates an unreasonable classification, in violation of Neb. Const. art. I, § 16, and Neb. Const. art. III, § 18. L.B. 272A operates upon a class consisting of Commonwealth, American Savings, and State Securities Savings depositors, which class is closed, leaving no room or opportunity for an increase in the members of the class.

(3) L.B. 272A violates Neb. Const. art. XIII, § 3, which prohibits the state, except in circumstances not relevant here, from giving or loaning its credit in aid of any individual, association, or corporation.

(4) Legislation which has no regulatory function, which bears no rational relationship to the welfare of the public, and which is contrary to the provisions of the Constitution cannot be justified as an exercise of police power.

Claims of unconstitutionality must be examined under the following rules of law: The party claiming that a legislative act is unconstitutional has the burden of establishing such unconstitutionality, and all reasonable doubts will be resolved in favor of constitutionality. *In re Application A-16642*, 236 Neb. 671, 463 N.W.2d 591 (1990). Unconstitutionality of a statute must be clearly demonstrated before a court can declare the statute unconstitutional. *State ex rel. Spire v. Beermann*, 235 Neb. 384, 455 N.W.2d 749 (1990). The Legislature cannot circumvent an express provision of the Constitution by doing indirectly what it may not do directly. *Banner County v. State Bd. of Equal.*, 226 Neb. 236, 411 N.W.2d 35 (1987).

SPECIAL LEGISLATION

We begin by addressing the plaintiff's first and second arguments, whereby she claims that L.B. 272A is special

legislation. The pertinent constitutional provision is as follows:

> The Legislature shall not pass local or special laws in any of the following cases, that is to say:
>
> . . . .
>
> Granting to any corporation, association, or individual any special or exclusive privileges, immunity, or franchise whatever . . . . In all other cases where a general law can be made applicable, no special law shall be enacted.

Neb. Const. art. III, § 18.

By definition, a legislative act is general, and not special, if it operates alike on all persons of a class or on persons who are brought within the relations and circumstances provided for and if the classification so adopted by the Legislature has a basis in reason and is not purely arbitrary. See *Bauer v. State Game, Forestation and Parks Commission*, 138 Neb. 436, 293 N.W. 282 (1940). A legislative act that applies only to particular individuals or things of a class is special legislation. See, *Jackson County v. Jackson Educ. Serv. D.*, 90 Or. App. 299, 752 P.2d 1224 (1988); *Madison Metropolitan Sewerage Dist. v. Stein*, 47 Wis. 2d 349, 177 N.W.2d 131 (1970); 1 W. Blackstone, Commentaries *86. General laws embrace the whole of a subject, with their subject matter of common interest to the whole state. Uniformity is required in order to prevent granting to any person, or class of persons, the privileges or immunities which do not belong to all persons. See 2 N. Singer, Statutes and Statutory Construction § 40.07 (4th ed. 1986). It is because the legislative process lacks the safeguards of due process and the tradition of impartiality which restrain the courts from using their powers to dispense special favors that such constitutional prohibitions against special legislation were enacted. See 2 N. Singer, *supra*, § 40.01.

A legislative act can violate Neb. Const. art. III, § 18, as special legislation in one of two ways: (1) by creating a totally arbitrary and unreasonable method of classification, or (2) by creating a permanently closed class. See *City of Scottsbluff v. Tiemann*, 185 Neb. 256, 175 N.W.2d 74 (1970).

UNREASONABLE CLASSIFICATION

The term "class legislation" is a characterization of legislation in contravention of Neb. Const. art. III, § 18. *State, ex rel. Taylor, v. Hall*, 129 Neb. 669, 262 N.W. 835 (1935). It is that which makes improper discrimination by conferring privileges on a class arbitrarily selected from a large number of persons standing in the same relation to the privileges, without reasonable distinction or substantial difference. 16B C.J.S. *Constitutional Law* § 682 (1985).

The plaintiff cites various cases, most notably *Cox v. State*, 134 Neb. 751, 279 N.W. 482 (1938), wherein the factual situation parallels the case at bar. In *Cox*, the Legislature created a liability in favor of an individual plaintiff for the tort of the state's agents and servants that resulted in injury to her while she was traveling a highway under the control of the state. The statute waived the sovereignty of the state and the statute of limitations. This court held that such a bill violated Neb. Const. art. III, § 18, as special legislation, since "only by general law, uniform in its application to persons, can a liability of the state be constitutionally created for the negligence of its agents and servants." 134 Neb. at 754, 279 N.W. at 484. While the Legislature may make classifications, it cannot do so arbitrarily and unreasonably. A reasonable classification must operate equally on all within the class. *Cox, supra*.

The defendants argue, without citation, the proposition that "legislative classifications will be upheld as long as there is some rational basis for establishing the classification or there is a valid public policy reason for establishing the legislative classification." (Emphasis omitted.) Brief for defendants at 14.

Contending that a rational basis exists for L.B. 272A, the defendants argue it was enacted in response to a unique situation involving a class of individuals who suffered a real difference in harm from those outside the class.

Based on the proposition that any act is permissible if it is reasonably designed for promotion of public health, safety, morals, security, prosperity, contentment, or the general welfare of a state's inhabitants, the defendants also contend that there was a valid public purpose for enacting the legislation. The defendants maintain that a moral obligation

existed on the part of the state and that L.B. 272A would extinguish this moral obligation and, in turn, instill confidence in the Legislature, its enactments, and the state banking system.

In essence, the defendants argue that there was a public purpose for L.B. 272A and that since what is accomplished under the act is rationally related to that purpose, this court should defer to the findings of the Legislature. Nothing in the briefs of the Intervenor or Amicus add to this contention.

We must first consider the applicable test for determining the constitutionality of legislative classifications, which test has been set out succinctly by prior case law.

> "A legislative classification, in order to be valid, must be based upon some reason of public policy, some substantial difference of situation or circumstances, that would naturally suggest the justice or expediency of diverse legislation with respect to objects to be classified. Classifications for the purpose of legislation must be real and not illusive; they cannot be based on distinctions without a *substantial* difference. . . ." . . . "Classification is proper if the special class has some reasonable distinction from other subjects of like general character, which distinction bears some reasonable relation to the legitimate objectives and purposes of the legislation. The question is always whether the things or persons classified by the act form by themselves a proper and legitimate class with reference to the purpose of the act."

(Citation omitted.) (Emphasis omitted.) *State ex rel. Douglas v. Marsh*, 207 Neb. 598, 609, 300 N.W.2d 181, 187 (1980).

From the foregoing, we are unpersuaded by the analysis of the defendants. Despite lengthy briefs by all those supporting L.B. 272A's constitutionality, their analysis is flawed by the use of a faulty proposition of law. Repeated again, they presuppose that "legislative classifications will be upheld as long as there is some rational basis for establishing the classification or there is a valid public policy reason for establishing the legislative classification."

The first and most obvious flaw is that the proposition is disjunctive. Under that flawed proposition, either a rational basis or public policy would support the constitutionality of

L.B. 272A. However, we have previously disposed of this argument. If the purpose of a legislative act is unclear and the Legislature declares a public purpose which is not invalid on its face, this court will give strong consideration to the intent of the Legislature, but if the act is clearly contrary to the Constitution, the court must declare the act unconstitutional regardless of the proclaimed legislative intent. See, *State ex rel. Spire v. Public Emp. Ret. Bd.*, 226 Neb. 176, 410 N.W.2d 463 (1987); *State ex rel. Douglas v. Nebraska Mortgage Finance Fund*, 204 Neb. 445, 283 N.W.2d 12 (1979) (Legislature may not, under the guise of public purpose, pass a law solely for the benefit of a select few). Therefore, despite the Legislature's proclamation of public purpose, if the act is otherwise violative of the Constitution, this court must declare it unconstitutional.

The second flaw in the defendants' presentation is that it relies upon an erroneous test. The defendants argue that rational basis is the appropriate test of legislation challenged as being in contravention of Neb. Const. art. III, § 18. In Nebraska, both equal protection and the prohibition against special legislation emanate from that constitutional provision. See *Distinctive Printing & Packaging Co. v. Cox*, 232 Neb. 846, 443 N.W.2d 566 (1989). Some states have found these theories to be similar, applying the rational basis test for both. However, the appropriate tests are clearly not the same.

Under equal protection, classifications that do not involve a suspect class or fundamental right are tested for rational basis. All that is required is that there be a rational relationship between a legitimate state interest and the statutory means selected by the Legislature to accomplish that purpose. See, *Distinctive Printing & Packaging Co. v. Cox, supra* (rational basis for parental liability statute holding parents liable for children causing intentional property damage); *Snyder v. IBP, inc.*, 229 Neb. 224, 426 N.W.2d 261 (1988) (no rational basis for workers' compensation statute denying modification of previous award); *Drennen v. Drennen,* 229 Neb. 204, 426 N.W.2d 252 (1988) (no rational basis for granting different court access to various classes of child support payors).

However, the plaintiff has not attacked L.B. 272A on equal protection grounds but, rather, attacks it as special legislation.

The narrower special legislation prohibition supplements the equal protection theory. *McRoberts v. Adams*, 60 Ill. 2d 458, 328 N.E.2d 321 (1975). The test of validity under the special legislation prohibition is more stringent than the traditional rational basis test. Classifications must be based on some *substantial* difference of situation or circumstances that would naturally suggest the justice or expediency of diverse legislation with respect to the objects to be classified. See, *State ex rel. Douglas v. Marsh, supra* (there is no reasonable classification when the classes are based on historical facts alone); *Prendergast v. Nelson*, 199 Neb. 97, 256 N.W.2d 657 (1977) (there are substantial reasons for legislative discrimination in regard to malpractice actions); *Dwyer v. Omaha-Douglas Public Building Commission*, 188 Neb. 30, 195 N.W.2d 236 (1972) (limiting application of building commission act and tax levy power to cities of the metropolitan class and the counties in which they are located was not a classification that was clearly arbitrary and without substantial basis founded upon real differences).

There has obviously been a judicial tendency to blur the difference between the two tests, leading to the present confusion. *Dover v. Imperial Cas. & Indem. Co.*, 133 N.H. 109, 575 A.2d 1280 (1990) (Souter, J., dissenting). The difference in these tests is more than semantical because it affects the burden of persuasion placed upon the plaintiff.

> [U]nder the Equal Protection clause, both state and federal courts will uphold state laws which make economic classifications "unless 'the classification rests on grounds *wholly* irrelevant to the achievement of the State's objective' " [citation omitted], or unless the law "is so unrelated to the achievement of a legitimate purpose that it appears irrational" [citation omitted]. On the other hand, the test for statutes challenged under the special-laws prohibitions . . . is that they must bear "a reasonable and substantial relation to the object sought to be accomplished by the legislation."

Benderson Development Co. v. Sciortino, 236 Va. 136, 147, 372 S.E.2d 751, 757 (1988). Contra *Bilyk v. Chicago Transit Authority*, 125 Ill. 2d 230, 531 N.E.2d 1 (1988).

Having determined the applicable test, we consider whether L.B. 272A contravenes Nebraska's Constitution, which prohibits special legislation. The inquiry is whether payments to a class of failed industrial company depositors bear a reasonable and substantial relation to instilling confidence in the Legislature, its enactments, and the state banking system.

The plaintiff initially argues that there is no legal obligation on the part of the state to these depositors. See *Weimer v. Amen*, 235 Neb. 287, 455 N.W.2d 145 (1990). The defendants concede this point, but argue that a moral obligation exists on the part of the state to make such payments because of the negligence of its employees, agents, and servants and that the classification forms a rational basis serving a legitimate state interest.

The plaintiff responds to this argument by stating that "legislative appropriations in response to what are deemed to be moral obligations, invites [sic] open-ended appeals from those claiming injury where there is an arguable connection between that injury and state governmental activity." Reply brief for plaintiff at 4-5.

Addressing the defendants' argument, we have already determined that a mere rational basis nexus is insufficient. In specific regard to the moral obligation found by the Legislature, we need not rule whether a moral obligation would provide reasonable and substantial support for the classification in question, for we find that no moral obligation existed. In *Wakeley v. Douglas County*, 109 Neb. 396, 400, 191 N.W. 337, 339 (1922), this court held that a moral obligation attaches when there is "a law [which] is passed notifying and warning the taxpayer and the citizen generally that the state . . . will undertake the burden of such damages." Nowhere in the NDIGC legislation was such a notification or warning present. In fact, the NDIGC act provides that "[n]o state funds of any kind shall be allocated or paid to the corporation." Neb. Rev. Stat. § 21-17,135(4) (Reissue 1987). As we have previously stated, the NDIGC was a private corporation. See *Weimer, supra*. Amicus argues that an average depositor would not know this and would understand that the manner and form of the guaranty notice meant that the NDIGC was backed by the

state. For this, we remind the defendants and Amicus of the maxims that ignorance of the law is no excuse and that everyone is presumed to know the law.

There is no reasonable and substantial relationship between the classification and the object sought to be accomplished by L.B. 272A. Payments of deposits in a now defunct private guaranty system can hardly be said to instill confidence in the state's banking depositors. All deposits are now federally insured or not insured at all. If not insured, notice is given to the depositor. It appears the opposite result of that intended by the Legislature in enacting L.B. 272A would occur. The act would instill fear rather than confidence, for it indicates that every time someone is injured, the state will rescue him or her. The result could be either economic bankruptcy or economic suffocation through taxation. The scheme outlined by L.B. 272A extends even further than the statute in *Cox v. State*, 134 Neb. 751, 279 N.W. 482 (1938). It not only would create a liability in favor of individual plaintiffs for the tort of the state's agents and servants, but would go further by conceding guilt and determining damages.

In the words of Justice Cardozo: "If the evil to be corrected can be seen to be merely fanciful, the injustice or the wrong illusory, the courts may intervene and strike the special statute down." *Williams v. Mayor*, 289 U.S. 36, 46, 53 S. Ct. 431, 77 L. Ed. 1015 (1933). This applies precisely to the classification in question. There is no reasonable and substantial relation between the classification and the stated objects of the legislation. "Whether a classification is arbitrary 'depend[s] upon the purpose and subject of the particular act and the circumstances and conditions surrounding its passage.' " *Etheridge v. Medical Center Hospitals*, 237 Va. 87, 102, 376 S.E.2d 525, 533 (1989). There is no question that L.B. 272A was enacted strictly on behalf of the Commonwealth, American Savings, and State Securities Savings depositors. We reiterate the words of this court from 60 years ago: "Clearly it has not yet come to pass that the state, in its supervision of the banking business, has become an eleemosynary institution." *Weaver v. Koehn*, 120 Neb. 114, 117, 231 N.W. 703, 704 (1930) (holding that the appropriation of money by the state to reimburse

depositors for losses sustained by them in failed banks clearly appears to be the taking of money belonging to one class to pay the claims of another class, and that is in violation of the due process provisions of the federal and state Constitutions).

CLOSED CLASS

Plaintiff also claims that the class of depositors is closed. Although the parties agree on the definition of a closed class, each party draws different conclusions as to the character of the statutory classification in question.

> "The rule appears to be settled by an almost unbroken line of decisions that a classification which limits the application of the law to a present condition, and leaves no room or opportunity for an increase in the numbers of the class by future growth or development, is special, and a violation of the clause of the constitution above quoted. . . ."

City of Scottsbluff v. Tiemann, 185 Neb. 256, 262, 175 N.W.2d 74, 79 (1970) (quoting *State v. Kelso*, 92 Neb. 628, 139 N.W. 226 (1912)).

The plaintiff argues that the group of recipients under the act is identified and fixed by historical circumstance to include only the depositors of Commonwealth, State Securities Savings, and American Savings.

The plaintiff describes what she deems a "highly unlikely (if not impossible)" sequence of events whereby the class of depositors could expand beyond the aforementioned industrial companies:

> First, new industrials would have to be chartered. Second, they would have to become members of the NDIGC (or the only two industrials which presently exist would have to renounce their FDIC coverage and become members of the NDIGC), and the deposits of those industrials would have to be guaranteed by the NDIGC. Third, those industrials would have to go into receivership or bankruptcy. And, fourth, the depositors of those institutions would have to suffer deposit losses.

Reply brief for plaintiff at 14.

With the plaintiff bearing the burden of proving the act

unconstitutional, the issue becomes, to what degree must the plaintiff prove that the class is closed? The defendants argue that

> [t]he plain language of LB 272A is open-ended. It does not name any industrial . . . companies which would benefit from its enactment. . . .
>
> . . . .
>
> The possibility for future growth or development in the class created by the Legislature need not be definite or certain. The possibility for future growth or development is sufficient to sustain a constitutional challenge on the basis of a closed class.

Brief for defendants at 43, 46. Amicus argues that

> [a] closed class is only present if, by the explicit language of the legislative act, the class is fixed and may never be increased. This standard is not satisfied by a probability, only by a certainty. . . . [T]he plaintiff must prove that the class defined by LB 272A is absolutely closed.

Brief for Amicus at 24.

In determining whether a class is closed, this court is not limited to the face of the legislation, but may consider the act's application. See, *Axberg v. City of Lincoln*, 141 Neb. 55, 2 N.W.2d 613 (1942); *Gossman v. State Employees Retirement System*, 177 Neb. 326, 129 N.W.2d 97 (1964) (court refused to follow form and ignore the substance). See, also, *State v. Stuht*, 52 Neb. 209, 71 N.W. 941 (1897); *In re Freygang*, 46 N.J. Super. 14, 133 A.2d 672 (1957); *Wrenn v. Portland Loan Co.*, 155 Or. 395, 64 P.2d 520 (1937); *Mason v. City of Paterson, et al.*, 120 N.J. Super. 184, 293 A.2d 460 (1972).

In the context in which L.B. 272A operates we are compelled to find that the act represents a closed classification. Despite Amicus' argument that the plaintiff must prove the class is absolutely closed, our case law does not impose such a burden. See *City of Scottsbluff v. Tiemann, supra* (legislation directing certain cities to establish municipal courts found unconstitutional because it assured that *in practical operation* the class was limited to two cities). In deciding whether a statute legitimately classifies, the court must consider the actual probability that others will come under the act's operation. If

the prospect is merely theoretical, and not probable, the act is special legislation. The conditions of entry into the class must not only be possible, but reasonably probable of attainment. *Republic Inv. Fund I v. Town of Surprise*, 166 Ariz. 143, 800 P.2d 1251 (1990); 2 N. Singer, Statutes and Statutory Construction § 40.09 (4th ed. 1986). The defendants cannot merely rest on the form of the act. The realities of the situation are that except for a highly improbable set of events the class is permanently closed to future members. All industrial companies must now be federally insured or post notice that they are not insured at all. See § 8-407.03. They cannot rely on the NDIGC. To force the plaintiff to disprove every possible contingency would be to accept artful draftsmanship over reality.

Having determined that the classification, as defined by L.B. 272A, was unreasonable and that there is no reasonable probability that the class will increase in members by future developments, we find the act unconstitutional in contravention of Neb. Const. art. III, § 18, as special legislation.

PUBLIC CREDIT TO CORPORATIONS

The plaintiff claims that L.B. 272A is also unconstitutional because it unlawfully pledges the credit of the state. The relevant constitutional provision reads as follows: "The credit of the state shall never be given or loaned in aid of any individual, association, or corporation . . . ." Neb. Const. art. XIII, § 3.

Except for certain circumstances not relevant here, the purpose of article XIII, § 3, of Nebraska's Constitution is to prevent the state or any of its governmental subdivisions from extending the state's credit to private enterprise. *United Community Services v. The Omaha Nat. Bank*, 162 Neb. 786, 77 N.W.2d 576 (1956). It is designed to prohibit the state from acting as a surety or guarantor of the debt of another. See *State ex rel. Jardon v. Ind. Dev. Auth., etc.*, 570 S.W.2d 666 (Mo. 1978). Similar provisions are found in most other state constitutions, the historical genesis of which was described in *City of Tempe v. Pilot Properties, Inc.*, 22 Ariz. App. 356, 360,

527 P.2d 515, 519 (1974), wherein the court stated:

> The purpose of this constitutional provision, which appears in some form in most states, was set forth in State v. Northwestern Mutual Insurance Co., 86 Ariz. 50, 340 P.2d 200 (1959), quoting from Thaanum v. Bynum Irr. Dist., 72 Mont. 221, 232 P. 528 (1925):
>
> " 'It represents the reaction of public opinion to the orgies of extravagant dissipation of public funds by counties, townships, cities and towns in aid of the construction of railways, canals, and other like undertakings during the half century preceding 1880, and it was designed primarily to prevent the use of public funds raised by general taxation in aid of enterprises apparently devoted to *quasi* public purposes, but actually engaged in private business.' 86 Ariz. at 53, 340 P.2d at 201. (Emphasis in original.)"

The plaintiff argues that L.B. 272A constitutes a promise by the state to make good on the future claims of new class members, as well as on the redemption of guaranties, on purported moral grounds, to those presently within the class.

The defendants, although arguing with respect to article III, § 18, claim that a public purpose existed for the enactment of L.B. 272A. Because public purpose alone will not save a statute otherwise in contravention of article III, § 18, and because we found L.B. 272A to be special legislation which is prohibited by article III, § 18, it was not necessary to determine under that section of the Constitution whether a public purpose existed in the enactment of L.B. 272A.

We begin our analysis by dissecting the components of article XIII, § 3. In order to establish L.B. 272A unconstitutional under article XIII, § 3, a plaintiff must prove each of the following elements: (1) The credit of the state (2) was given or loaned (3) in aid of any individual, association, or corporation.

The first question is whether L.B. 272A involves the "credit of the state." The state's credit is inherently the power to levy taxes and involves the obligation of its general fund. See *Tax Increment Fin. Com'n v. Dunn Const.*, 781 S.W.2d 70 (Mo. 1989). There is a distinction between the loaning of state funds and the loaning of the state's credit. When a state loans funds it

is in the position of creditor, whereas the state is in the position of debtor upon a loan of credit. *Utah Technology Finance Corp. v. Wilkinson*, 723 P.2d 406 (Utah 1986).

Here, there is no question that the credit of the state is unconstitutionally involved in L.B. 272A. In *State ex rel. Douglas v. Nebraska Mortgage Finance Fund*, 204 Neb. 445, 283 N.W.2d 12 (1979), this court upheld the constitutionality of a fund which assisted private mortgage lenders in providing mortgage financing for single-family residences at reduced interest rates. The statute did not violate article XIII, § 3, because only the fund was involved. The fund acquired the money through bond sales and was responsible for the payment of those bonds. If there were insufficient funds to make repayment, the state was neither obligated nor liable. See, also, *State v. City of Panama City Beach*, 529 So. 2d 250 (Fla. 1988). In contrast, under L.B. 272A the state would be forever liable for the losses of industrial company depositors if we accept, arguendo, that the class in L.B. 272A is open. The stated purpose of the act is redemption of the guaranties of a private corporation to depositors by obligating present and future taxes from the state's general fund. This is precisely the activity article XIII, § 3, was enacted to prohibit.

The next question is whether the state's credit was "given or loaned," as opposed to the state receiving valuable consideration. L.B. 272A provides that when payment is offered up to the full amount of the $30,000 guaranties, this (1) constitutes full satisfaction of the depositors' claims against the state and (2) constitutes an assignment of the depositors' claims against any other individual or entity. 1990 Neb. Laws, L.B. 272A, § 6. Neither of these represents valuable consideration. All legal claims against the state, its officers, and its employees were settled, see *Weimer v. Amen*, 235 Neb. 287, 455 N.W.2d 145 (1990), or were dismissed. As previously noted, no moral obligation exists. The assignment of the depositors' relatively worthless claims against other individual or entities does not change this conclusion. In *Labor & Indus. v. Wendt*, 47 Wash. App. 427, 735 P.2d 1334 (1987), the Washington Department of Labor and Industries received valuable consideration in paying workers' compensation benefits because it received the right to

recoup an amount equal to any benefits paid to the injured worker plus attorney fees and costs. The state could never come close to receiving an equal amount to the proposed disposition of funds by acquiring legal claims against industrial companies that had gone bankrupt or were in receivership. Looking beyond the wording of the statute, L.B. 272A, § 6, does not provide for valuable consideration, and thus we must conclude that the state's credit has been "given."

Next we address whether the state's credit was given "in aid of any individual, association, or corporation." This question is easily answered affirmatively by considering the act's stated purpose of fulfilling the NDIGC guaranties. The NDIGC, as we have stated, is a private corporation. See *Weimer v. Amen, supra*.

We reject the defendants' argument that public purpose necessarily saves the statute and avoids judicial scrutiny.

> "What is a public purpose is primarily for the Legislature to determine. A public purpose has for its objective the promotion of the public health, safety, morals, security, prosperity, contentment, and the general welfare of all the inhabitants. *No hard and fast rule can be laid down for determining whether a proposed expenditure of public funds is valid as devoted to a public use or purpose.* Each case must be decided with reference to the object sought to be accomplished and to the degree and manner in which that object affects the public welfare." [Citation omitted.]
>
> "It is the province of the Legislature to determine matters of policy and appropriate the public funds. If there is reason for doubt or argument as to whether the purpose for which the appropriation is made is public or a private purpose, and reasonable men might differ in regard to it, it is essentially held that the matter is for the Legislature." [Citation omitted.]

(Emphasis supplied.) *State ex rel. Douglas v. Thone*, 204 Neb. 836, 843, 286 N.W.2d 249, 253 (1979).

Closely related to the prohibition against the giving or lending of the state's credit, although technically not part of the prohibition due to the prohibition's narrow and specific

wording, is the principle of law that public funds cannot be expended for private purposes. *Utah Technology Finance Corp. v. Wilkinson*, 723 P.2d 406 (Utah 1986). As in our analysis of "unreasonable classifications," both principles emanate from the same constitutional provision. The distinction is the difference between expenditures and the extension of credit. Nowhere is this distinction more evident than in *Chase v. County of Douglas*, 195 Neb. 838, 241 N.W.2d 334 (1976), wherein we found a statute constitutional in part and unconstitutional in part. The statute provided for cities and counties (1) to expend funds for the purpose of encouraging immigration, new industries, and investments and to conduct a publicity campaign to support those goals and (2) to purchase real estate suitable for industrial development, to acquire options on real estate suitable for industrial development, and to renew or extend such options. In upholding the first part of the statute, we held that the expenditure of public funds for the general encouragement of growth and industry through such devices as advertising and publicity was a public purpose. Further, we found that this purpose was not vitiated by the disposition of the funds through private organizations because specific controls on the use of the funds were attached. See *Lenstrom v. Thone*, 209 Neb. 783, 311 N.W.2d 884 (1981).

In finding the second part of the statute unconstitutional, we held it involved an extension of credit of the governmental subdivision to some individual, association, or corporation for private use. If the real estate acquired decreased in value, the loss would be that of the subdivision.

The prohibition against the pledge of the state's credit does not hinge on whether the legislation achieves a "public purpose," when the pledge benefits a private individual, association, or corporation. *McGuffey v. Hall*, 557 S.W.2d 401 (Ky. 1977). The key is whether the state stands as a creditor through the expenditure of public funds or as a debtor by the extension of the state's credit to private corporations, associations, or individuals. The state is not empowered to become a surety or guarantor of another's debts. Since L.B. 272A attempts to do exactly that which is prohibited, there can be no question that it clearly contravenes Neb. Const. art. XIII,

§ 3.

Having held L.B. 272A unconstitutional in three separate particulars, any one of which is sufficient to declare the act void, we find no further discussion of either the plaintiff's or the defendants' position on constitutionality is necessary.

ATTORNEY FEES

In regard to the plaintiff's request for attorney fees and costs, the general rule in Nebraska is that attorney fees and expenses may be recovered only in such cases as are provided for by statute, or where the uniform course of procedure has been to allow such a recovery. *Gottsch Feeding Corp. v. Red Cloud Cattle Co.*, 229 Neb. 746, 429 N.W.2d 328 (1988); *Quinn v. Godfather's Investments*, 217 Neb. 441, 348 N.W.2d 893 (1984). Neb. Rev. Stat. § 24-204.01 (Reissue 1989) provides, as relevant here:

> When an original action is instituted in the Supreme Court by or against the state, or any office, department, or officer thereof, involving the constitutionality of any act of the Legislature no matter when such act was passed, attorney fees and costs may be allowed if any of the following conditions set forth in subdivision (1), (2), or (3) of this section are found to exist:
>
> (1)(a) The action challenges the constitutionality of an act which the Attorney General has previously ruled constitutional or unconstitutional or as to which he has made no ruling . . . .

In this instance, the Attorney General issued an advisory opinion ruling that L.B. 272A was constitutional. Att'y Gen. Op. No. 90002 (Jan. 18, 1990). Section 24-204.01 further provides that if certain conditions are met, the Supreme Court shall allow reasonable attorney fees and costs in such amounts as the court shall determine. As stated, the necessary conditions were met. Thus, the plaintiff is entitled to attorney fees.

This court having declared L.B. 272A unconstitutional, judgment is hereby entered for the plaintiff and against the defendants and each of them in their official capacities. The Treasurer of the State of Nebraska is hereby permanently enjoined from disbursing on behalf of the State of Nebraska

any funds appropriated by 1990 Neb. Laws, L.B. 272A, to depositors of any former industrial loan and investment companies, and the Director of Administrative Services of the State of Nebraska and the Director of Banking and Finance of the State of Nebraska are enjoined from implementing the provisions of L.B. 272A.

Plaintiff is hereby awarded $10,000 to apply on her attorney fees and costs of this action, which shall be paid in accordance with § 24-204.01.

JUDGMENT FOR PLAINTIFF.

STATE OF NEBRASKA, APPELLANT, V. ROBERT E. LEE, APPELLEE.

467 N.W.2d 661

Filed March 29, 1991. No. 90-1045.

1. **Sentences: Probation and Parole: Jurisdiction.** In probation cases, the jurisdiction to commit offenders to jail, or to release offenders from jail terms, rests solely with the trial court.
2. **Sentences: Jurisdiction.** The trial court may not delegate the authority to impose a jail sentence, or to eliminate a jail sentence, to a nonjudge.

Appeal from the District Court for Hall County: WILLIAM H. RILEY, Judge. Remanded for resentencing.

Susan M. Koenig, Hall County Attorney, for appellant.

David C. Huston, of Paine, Huston, Higgins & Martin, for appellee.

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

GRANT, J.

Defendant pled guilty to a charge of attempted first degree sexual assault, in violation of Neb. Rev. Stat. §§ 28-319(1)(c) and 28-201(1) (Reissue 1989). After the trial court found that defendant was not a mentally disordered sex offender, defendant was sentenced to 5 years' probation.

The trial court ordered that

> the defendant shall be placed on probation for a term of 5

> years under the usual terms of probation. In addition to the usual terms of probation, the defendant . . . is to serve the following Jail sentences: April 1, 1991, 30 days; January 1, 1992, 30 days; March 1, 1993, 30 days; January 1, 1994, 30 days; April 1, 1995, 30 days; and September 1, 1995, 30 days. Each of these jail terms may be waived by probation.

The State has appealed to this court, pursuant to the provisions of Neb. Rev. Stat. § 29-2320 (Reissue 1989), on the sole ground that the sentence is excessively lenient. We remand the cause for resentencing.

The point is not raised by the parties, but we determine that the sentence of probation, as pronounced by the trial judge, is invalid, and the cause is remanded for the imposition of a proper sentence.

The invalidity of the sentence rests on the provision in the court order that "[e]ach of these jail terms may be waived by probation."

Neb. Const. art. V, § 9, provides: "The district courts shall have both chancery and common law jurisdiction, and such other jurisdiction as the Legislature may provide; and the judges thereof may admit persons charged with felony to a plea of guilty and pass such sentence as may be prescribed by law." Neb. Rev. Stat. § 29-2262(2) (Cum. Supp. 1988) provides: "The court, as a condition of its sentence [of probation], may require the offender . . . (b) To be confined periodically in the county jail . . . ." Neb. Rev. Stat. § 29-2263(2) (Reissue 1989) provides: "During the term of probation, the court on application of a probation officer or of the offender, or its own motion, may modify or eliminate any of the conditions [of probation]."

It is clear that in probation cases, the jurisdiction to commit offenders to jail, or to release offenders from jail terms, rests solely with the trial court. Jail time is to be imposed by judges. The trial court may not delegate the authority to impose a jail sentence, or to eliminate a jail sentence, to a nonjudge.

The cause is remanded for the imposition of a proper sentence.

REMANDED FOR RESENTENCING.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. JAMES M. EDGAR, RESPONDENT.

467 N.W.2d 418

Filed March 29, 1991. No. 91-290.

Original action. Judgment of disbarment.

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

PER CURIAM.

Respondent, James M. Edgar, pursuant to Neb. Ct. R. of Discipline 15 (rev. 1989), has tendered his license for voluntary surrender, has knowingly admitted the truth of the indicated charges against him, and has "waive[d] all proceedings against him" in connection with the disciplinary complaint.

James B. Luers, special prosecutor, moves the court to accept the voluntary surrender and to issue an order of disbarment.

The respondent was indicted and found guilty in the U.S. District Court for the District of Nebraska of five counts of fraudulent concealment of assets in a bankruptcy case, all felonies.

Canon I, DR 1-102(A)(3), of the Code of Professional Responsibility provides that a lawyer shall not "[e]ngage in illegal conduct involving moral turpitude."

The motion to accept the voluntary surrender is sustained, and the respondent is barred from the practice of law.

JUDGMENT OF DISBARMENT.

WHITE, J., not participating.

FIRST CORPORATE FINANCE, INC., A NEBRASKA CORPORATION, APPELLANT, STANLEY MORRELL & COMPANY, A NEBRASKA CORPORATION, APPELLEE, V. THOMPSON H. ROGERS, AN INDIVIDUAL, ET AL., APPELLEES.

467 N.W.2d 853

Filed April 5, 1991. No. 89-003.

1. **Summary Judgment.** A party is entitled to summary judgment if the pleadings, depositions, and admissions on file, together with affidavits, show there is no genuine issue as to any material fact or as to the ultimate inferences which may be drawn from the material facts and the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Proof.** The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law if the evidence presented for summary judgment remains uncontroverted.
3. **Actions: Real Estate: Brokers.** No action or suit shall be instituted, nor recovery be had, in any court of this state by any person for compensation for any act done or service rendered, the doing or rendering of which is prohibited to other than licensed brokers, licensed associate brokers, or licensed salespersons. Neb. Rev. Stat. § 81-885.06 (Reissue 1987).

Appeal from the District Court for Douglas County: JOHN E. CLARK, Judge. Affirmed.

H. Daniel Smith, of Sherrets & Smith, for appellant.

Gerald P. Laughlin and Steven D. Davidson, of Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, for appellees Rogers and Rogdale.

HASTINGS, C.J., WHITE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ., and COLWELL, D.J., Retired.

WHITE, J.

This is an appeal from an order of the district court for Douglas County which sustained defendants' motion for summary judgment and dismissed plaintiffs' petition. We affirm.

> A party is entitled to summary judgment if the pleadings, depositions, and admissions on file, together with affidavits, show there is no genuine issue as to any material fact or as to the ultimate inferences which may be

> drawn from the material facts and the moving party is entitled to judgment as a matter of law. *Rosnick v. Dinsmore*, 235 Neb. 738, 457 N.W.2d 793 (1990); *Houska v. City of Wahoo*, 235 Neb. 635, 456 N.W.2d 750 (1990); *Muckey v. Dittoe*, 235 Neb. 250, 454 N.W.2d 682 (1990). The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law if the evidence presented for summary judgment remains uncontroverted. After the moving party has shown facts entitling it to judgment as a matter of law, the opposing party has the burden to present evidence showing an issue of material fact which prevents a judgment as a matter of law for the moving party. *Wilson v. F & H Constr. Co.*, 229 Neb. 815, 428 N.W.2d 914 (1988).

Mason State Bank v. Sekutera, 236 Neb. 361, 370, 461 N.W.2d 517, 523 (1990).

The plaintiffs alleged in their petition that the defendants, Thompson H. Rogers and Rogdale, Inc., a Nebraska corporation, engaged their services for the sale and purchase of an ongoing wholesale distribution business. Plaintiffs further alleged that through their effort, defendants acquired part of Truesdell Distributing, a wholesale distributor of "white goods and brown goods," presumably appliances and hardware items. These allegations are disputed by defendants.

The basis for defendants' motion for summary judgment is the Nebraska Real Estate License Act, Neb. Rev. Stat. §§ 81-885.01 et seq. (Reissue 1987). Sections 81-885.01 to 81-885.06 generally define real estate brokers, associate brokers, and salespersons. Section 81-885.02 provides as follows:

> After September 2, 1973, it shall be unlawful for any person, directly or indirectly, to engage in or conduct, or to advertise or hold himself or herself out as engaging in or conducting the business, or acting in the capacity, of a real estate broker, associate broker, or real estate salesperson within this state without first obtaining a license as such broker, associate broker, or salesperson, as provided in

sections 81-885.01 to 81-885.48, unless he or she is exempted from obtaining a license under section 81-885.04.

Section 81-885.06 provides that "[n]o action or suit shall be instituted, nor recovery be had, in any court of this state by any person for compensation for any act done or service rendered, the doing or rendering of which is prohibited . . . to other than licensed brokers, licensed associate brokers, or licensed salespersons."

It is established in the record that among the assets to be transferred from Truesdell to a prospective buyer was a leasehold interest in certain warehouse property, which asset's sale was actively negotiated by plaintiffs.

Section 81-885.01 provides that "[r]eal estate shall mean and include . . . leaseholds." It is also conceded that no principal or employee of plaintiffs who engaged in the negotiations was a person licensed under the act or a person exempt from the requirement of licensure.

This case is governed by *Ford v. American Medical International*, 228 Neb. 226, 422 N.W.2d 67 (1988). Therefore, the trial court was correct in sustaining the motion for summary judgment and in dismissing the petition.

AFFIRMED.

CAPORALE, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. THOMAS S. BALLARD, APPELLANT.

467 N.W.2d 662

Filed April 5, 1991. No. 89-438.

1. **Criminal Law: Trial: Witnesses: Testimony.** When a defendant in a criminal case testifies in his own behalf, he is subject to the same rules of cross-examination as any other witness and may be required to testify on his cross-examination as to any matter brought out or suggested by him on his direct examination.
2. **Trial: Witnesses: Testimony: Appeal and Error.** When the object of the cross-examination is to collaterally ascertain the accuracy or credibility of the

witness, some latitude should be permitted, and the scope of such latitude is ordinarily subject to the discretion of the trial judge, and, unless abused, its exercise is not reversible error.

3. **Trial: Witnesses: Testimony.** Cross-examination is proper as to anything tending to affect the accuracy, veracity, or credibility of the witness.
4. **Trial: Motions for Mistrial: Waiver.** When there occurs in the course of a trial a highly prejudicial event which is likely to materially affect the outcome of the trial, the party aggrieved must raise his objection then and move for mistrial. His failure to do so when he reasonably should know of the prejudicial occurrence constitutes a waiver of the objection.
5. **Appeal and Error.** In the absence of plain error, where an issue is raised for the first time in the Supreme Court, it will be disregarded inasmuch as the district court cannot commit error in failing to resolve an issue never presented and submitted for disposition.
6. **Trial: Jurors.** As a general rule, the retention or rejection of a venireperson as a juror is a matter of discretion with the trial court.
7. **Juror Qualifications: Waiver.** A party who fails to challenge prospective jurors for disqualification and does not use his or her peremptory challenges to remove such jurors from the panel waives any objections to their selection.
8. **Trial: Jurors.** If a party desires specific information on voir dire of a juror, he or she must ask specific questions.

Appeal from the District Court for Box Butte County: ROBERT R. MORAN, Judge. Affirmed.

Kirk E. Naylor, Jr., for appellant.

Robert M. Spire, Attorney General, and Sharon M. Lindgren for appellee.

HASTINGS, C.J., WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ., and COLWELL, D.J., Retired.

HASTINGS, C.J.

The defendant, Thomas S. Ballard, was found guilty following a trial by jury on two counts of first degree sexual assault, pursuant to Neb. Rev. Stat. § 28-319(1)(a) (Reissue 1989). He appeals, assigning as error (1) the overruling of objections to cross-examination of defendant, (2) the failure of the trial court to grant a mistrial concerning the cross-examination of defendant, and (3) the overruling of defendant's challenge for cause of an impaneled juror. We affirm.

The evidence was sufficient to support verdicts of guilty on both counts of sexual assault committed on November 17,

1988. No complaint as to the sufficiency of the evidence has been raised.

On direct examination, the defendant testified that his name was Thomas Sidney Ballard, but that in 1979 he changed his name to Shane J. Ballard. He also testified that he had previously used the name Jerry Taulbee in an effort to get employment by using connections with family members surnamed Taulbee. On cross-examination, the defendant was asked why he used an alias, and he explained that everyone called him Jerry or Shane and that Shane was not an alias. When the defendant explained that he used the surname of Taulbee to help get a job, the prosecution asked if that was the real reason the defendant used that name. The defendant replied affirmatively, and the prosecution asked if it was not true that the defendant was a fugitive from justice at the time he used the name of Taulbee. Defense counsel's objection that it was "an improper question" was overruled. The prosecution then asked, without objection, if the defendant was not a fugitive from justice on November 17, 1988. The defendant admitted that there was a warrant out for his arrest, but denied that was the real reason he was using the name Jerry Taulbee.

When a defendant in a criminal case testifies in his own behalf, he is subject to the same rules of cross-examination as any other witness and may be required to testify on his cross-examination as to any matter brought out or suggested by him on his direct examination. *State v. Pitts*, 212 Neb. 295, 322 N.W.2d 443 (1982). When the object of the cross-examination is to collaterally ascertain the accuracy or credibility of the witness, some latitude should be permitted, and the scope of such latitude is ordinarily subject to the discretion of the trial judge, and, unless abused, its exercise is not reversible error. *Id.* Cross-examination is proper as to anything tending to affect the accuracy, veracity, or credibility of the witness. *State v. Sutton*, 231 Neb. 30, 434 N.W.2d 689 (1989).

Defendant cites Neb. Rev. Stat. § 27-609 (Reissue 1989) as a means of determining the limits of cross-examination for impeachment. Section 27-609 provides that evidence that a witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during

cross-examination, but only if the crime (1) was punishable by death or imprisonment in excess of 1 year under the law under which he or she was convicted or (2) involved dishonesty or false statement regardless of the punishment. This section is not relevant in this case, however, as the cross-examination concerned an outstanding arrest warrant, rather than a conviction.

The case at bar is analogous to *State v. Sutton, supra*, where the defendant clearly testified on his direct examination on the subject of his personal use of cocaine. This court found that the trial court did not abuse its discretion in allowing the prosecutor to cross-examine the defendant regarding prior sales and use of cocaine, as the subjects of whether the defendant used cocaine and sold cocaine were within the scope of his direct examination and were proper subjects for impeachment or rebuttal.

There is nothing in the record to suggest that the defendant requested a mistrial. When there occurs in the course of a trial a highly prejudicial event which is likely to materially affect the outcome of the trial, the party aggrieved must raise his objection then and move for mistrial. His failure to do so when he reasonably should know of the prejudicial occurrence constitutes a waiver of the objection. *State v. Archbold*, 217 Neb. 345, 350 N.W.2d 500 (1984). In the absence of plain error, where an issue is raised for the first time in the Supreme Court, it will be disregarded inasmuch as the district court cannot commit error in failing to resolve an issue never presented and submitted for disposition. *Wagner v. City of Omaha*, 236 Neb. 843, 464 N.W.2d 175 (1991). There is no merit to defendant's second assignment of error.

Finally, we consider defendant's complaint that the court failed to strike juror Smith. The supplemental bill of exceptions shows that the jury voir dire was conducted on February 27, 1989, and the additional voir dire of juror Smith was conducted on February 22, 1989. Quite obviously these dates are in error, and the additional voir dire must have followed the original voir dire.

In any event, at the original voir dire examination, juror Smith, when asked if he knew anyone "in law enforcement work, or [who] work[ed] with a law enforcement agency,"

admitted to knowing one of the members of the Alliance Police Department. However, Smith claimed that this relationship would not affect his ability to judge the case, and he was passed for cause.

At some later time, before the trial actually commenced on February 28, 1989, information apparently came to the court's attention that juror Smith's wife was employed by the county attorney's office. Further voir dire was permitted. Juror Smith insisted that he had not discussed the case with his wife, that the fact that she worked for the county attorney would not affect Smith's ability to judge the evidence in this case, and that his wife had not told him anything about the evidence in the case. When asked why he had not disclosed this relationship when earlier asked if he had any friends or relatives in law enforcement, Smith replied that when defendant's counsel asked about law enforcement personnel he thought the attorney meant police officers and that he did not feel the county attorney's office was a law enforcement office. Defense counsel's motion to strike the juror for cause was denied.

As a general rule, the retention or rejection of a venireperson as a juror is a matter of discretion with the trial court. *State v. Bradley*, 236 Neb. 371, 461 N.W.2d 524 (1990).

A party who fails to challenge prospective jurors for disqualification and does not use his or her peremptory challenges to remove such jurors from the panel waives any objections to their selection. *State v. Green*, 236 Neb. 33, 458 N.W.2d 472 (1990).

In *Sayer Acres, Inc. v. Middle Republican Nat. Resources Dist.*, 205 Neb. 360, 287 N.W.2d 692 (1980), the appellants contended that the verdict must be set aside because it was discovered after the verdict had been rendered that one of the jurors had a brother who was a member of the board of directors of the condemner district. The appellants had not contended that they did not have full and ample opportunity to examine all the jurors at the time of voir dire. The court noted that the right to challenge a juror for cause may be waived or lost by a lack of diligence, and the failure to make appropriate inquiry as to the qualifications of prospective jurors on voir dire waives later objections based on the facts that might have

been disclosed by such inquiry. The court found that by passing the jurors for cause, the appellants waived any objection to their selection as jurors.

It is difficult to believe that defendant's trial counsel, who is not the same attorney representing defendant in this appeal and who practices law in Alliance and Box Butte County, did not know of the connection between juror Smith and the county attorney's secretary. However, be that as it may, counsel had the opportunity to elicit this information during the initial voir dire. The record does not disclose that the juror was untruthful. He simply did not understand the question. If counsel desires specific information on voir dire, he or she must ask specific questions. See, also, *McCamish v. Douglas Cty. Hosp.*, *ante* p. 484, 466 N.W.2d 521 (1991).

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. JOHN M. THOR, RESPONDENT.

467 N.W.2d 666

Filed April 5, 1991. No. 89-830.

1. **Disciplinary Proceedings: Appeal and Error.** A proceeding to discipline an attorney is a trial de novo on the record, in which the Supreme Court reaches a conclusion independent of the findings of the referee, 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 referee heard and observed the witnesses and accepted one version of the facts rather than another.
2. **Disciplinary Proceedings: Proof: Appeal and Error.** In its de novo review of the record in a disciplinary proceeding against an attorney, and to sustain a particular complaint against an attorney, the Supreme Court must find that the complaint has been established by clear and convincing evidence.
3. **Disciplinary Proceedings.** The basic issues in a disciplinary proceeding against an attorney are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances.
4. **Disciplinary Proceedings: Attorneys at Law.** The general purpose of the Nebraska Code of Professional Responsibility is to encourage and develop the conscience and ethics of lawyers in their professional and private lives so that the

institution of the law merits and receives the respect and trust of the public.

5. _____: _____. When an attorney takes an oath and receives a license to practice law, the attorney swears that established standards of professional ethics will be observed and, further, submits to the implied understandings that the attorney's conduct will be proper and that the attorney will abstain from practices that discredit the attorney, the courts, and the profession.
6. **Disciplinary Proceedings: Presumptions.** There is a presumption of the attorney's innocence in a disciplinary proceeding.
7. **Disciplinary Proceedings.** The purpose of a disciplinary proceeding is not so much to punish an attorney as it is to determine, in the public interest, whether the attorney should be permitted to continue to practice law.
8. _____. Violation of a disciplinary rule concerning the practice of law is a ground for discipline.
9. **Disciplinary Proceedings: Attorney and Client: Conflict of Interest: Proof.** To establish that a lawyer has violated Canon 5, DR 5-104, of the Code of Professional Responsibility, limiting business relations with a client, it is necessary to show (1) that the attorney and client had differing interests in the transaction, (2) that the client expected the lawyer to exercise his professional judgment for the protection of the client, and (3) that the client consented to the transaction without full disclosure.
10. **Disciplinary Proceedings: Attorney and Client.** An attorney representing a client must not knowingly do anything which is inconsistent with the terms of his employment or contrary to the best interests of his or her client.
11. **Bankruptcy: Property: Abandonment.** After abandonment of a property by the trustee in bankruptcy, the bankrupt holds title in the same manner as if title had never been in the trustee.
12. **Disciplinary Proceedings: Attorney and Client: Conflict of Interest.** An attorney may not represent adverse parties with conflicting interests except by express consent of all concerned, given after a full disclosure of all the facts.
13. **Fraud: Intent.** Fraud may consist of the omission or concealment of a material fact if accompanied by the intent to deceive under circumstances which create the opportunity and duty to speak.
14. **Disciplinary Proceedings.** In determining the appropriate discipline, consideration is given to the nature of the offense, the need for deterring others, the maintenance of the reputation of the bar as a whole, the protection of the public, the attitude of the offender generally, and his or her present or future fitness to continue in the practice of law.

Original action. Judgment of suspension.

Paul Schumacher for relator.

David A. Domina, of Domina & Copple, P.C., for respondent.

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

HASTINGS, C.J.

This is an original action brought by the Counsel for Discipline against a member of the Nebraska State Bar Association, John M. Thor, respondent. The respondent has been charged with violating Canon 1, DR 1-102, and Canon 5, DR 5-103 and DR 5-104, of the Code of Professional Responsibility.

The referee, Noyes W. Rogers, determined that the respondent had violated DR 1-102. The referee further concluded that the respondent had not violated DR 5-103 and DR 5-104. The referee recommended a suspension from the practice of law for 30 days. Both the relator and the respondent filed exceptions with this court.

A proceeding to discipline an attorney is a trial de novo on the record, in which the Supreme Court reaches a conclusion independent of the findings of the referee, 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 referee heard and observed the witnesses and accepted one version of the facts rather than another. *State ex rel. NSBA v. Douglas*, 227 Neb. 1, 416 N.W.2d 515 (1987), *cert. denied* 488 U.S. 802, 109 S. Ct. 31, 102 L. Ed. 2d 10 (1988); *State ex rel. NSBA v. Rhodes*, 234 Neb. 799, 453 N.W.2d 73 (1990); *State ex rel. NSBA v. Kirshen*, 232 Neb. 445, 441 N.W.2d 161 (1989). "In its de novo review of the record in a disciplinary proceeding against an attorney, and to sustain a particular complaint against an attorney, the Supreme Court must find that the complaint has been established by clear and convincing evidence." *Douglas, supra* at 8, 416 N.W.2d at 521; *Rhodes, supra*; *Kirshen, supra*.

Amended formal charges were filed against the respondent in this court on August 9, 1989, alleging that the respondent had violated DR 1-102(A)(1), (4), (5), and (6); DR 5-103(A)(1) and (2); and DR 5-104(A). Respondent was also charged with violating Neb. Rev. Stat. § 7-104 (Reissue 1987).

The referee appointed by this court, Rogers, held a formal hearing on the amended formal charges on February 26, 1990, and filed his report with this court on July 20, 1990. The referee found that the respondent had violated DR 1-102(A)(4). The

referee also found that the relator had not proven violations of DR 5-103 and DR 5-104 by clear and convincing evidence. The referee recommended that respondent be suspended from the practice of law for 30 days. The respondent has filed exceptions to the report of the referee, and the matter is now before this court for review.

The respondent was admitted to the practice of law in 1973. Since his admission to the bar, the respondent has engaged in the general practice of law in the Wisner, Nebraska, area. Five character witnesses, three attorneys and two laypersons, testified on behalf of the respondent at the hearing. These witnesses testified that the respondent was an honest man and a very capable attorney. Furthermore, over 50 attorneys wrote letters in support of Thor, stating generally that Thor is an honest and capable attorney.

The allegations in the amended formal charges center on a transaction for the purchase of 151 acres of real estate by respondent from his clients, Marilyn and Leon Rathke.

In early 1986, Thor was retained by the Rathkes, who were experiencing financial difficulty. The Rathkes had defaulted on a loan and mortgage held by Prudential Insurance Company (Prudential). During the time respondent represented the Rathkes in connection with the Prudential matter, the respondent expressed some interest in the land mortgaged to Prudential, but he did not purchase the land. The land was deeded over to Prudential in lieu of foreclosure and deficiency judgment. This transaction is not the subject of the complaint.

In early 1987, the First National Bank of Beemer, Nebraska, informed Mr. Rathke that it would no longer give him an operating loan, which he needed to continue farming. Mr. Rathke sought Thor's assistance in dealing with the Beemer Bank. At this same time the Rathkes were indebted to The Federal Land Bank and Farmers Home Administration (FmHA). The Rathkes' indebtedness was far in excess of the value of their assets and was secured by mortgages on the real estate and security interests in the personal property.

The Rathkes' financial situation made it obvious that bankruptcy was the only solution. The only consideration was whether to choose chapter 7 bankruptcy, liquidation, or chapter

12 bankruptcy, farm reorganization. The alternative chosen would affect their future tremendously because it would decide if the Rathkes would ever farm again.

The respondent explained both a chapter 7 and a chapter 12 bankruptcy to the Rathkes. The respondent advised Mr. Rathke that in a chapter 7 bankruptcy, a homestead exemption of $10,000 is available. The respondent further informed Mr. Rathke that annuities could be purchased which would be exempt in a chapter 7 bankruptcy.

Chapter 12 bankruptcy was a relatively new form of bankruptcy geared toward the family farmer. See 11 U.S.C. ch. 12 (1988). A chapter 12 bankruptcy involves reorganization. The financially distressed farmers could purchase back their assets from the secured creditors at the assets' fair market value; however, the farmers needed to have an operating plan confirmed which illustrated that they would have adequate cash-flow to service the debt at the fair market value. Thus, the basic question in utilizing a chapter 12 bankruptcy was whether the farming operations could produce a sufficient cash-flow to meet operating expenses and to make the necessary payments on the debt at the fair market value of the secured assets.

Chapter 12 bankruptcy had only been available for a few months at the time the Rathkes contacted the respondent about their financial difficulties. The respondent attended seminars given by the Nebraska Bankers Association and by Bankruptcy Judge Timothy Mahoney and U.S. chapter 12 Trustee Richard Lydick to prepare himself for representing clients who wished to use chapter 12 bankruptcy. The respondent used one of the outlines from these seminars as an interview tool to inform clients about chapter 12 bankruptcy.

The respondent went through some calculations to determine if the Rathkes could make a chapter 12 bankruptcy work. These calculations are contained in the record as exhibit 46. The figures indicate a large annual payment would be necessary to make the plan work. The respondent was convinced that these payments could not be made.

The Rathkes could not farm in the spring of 1987 because they did not have any operating capital. Mr. Rathke obtained a job in Platte Center, Nebraska, to pay for living expenses. On

May 29, 1987, the Rathkes purchased a home in Columbus, Nebraska. The Rathkes did this to utilize the homestead exemption under a chapter 7 bankruptcy; however, they had not yet decided whether they would be filing a chapter 7 or a chapter 12 bankruptcy.

The respondent consistently recommended a chapter 7 bankruptcy to the Rathkes. The respondent also recommended that the Rathkes get a second opinion with respect to the bankruptcy option. The Rathkes did seek a second opinion from another attorney, Charles Wagner. Mr. Rathke admitted that Wagner gave them the same information about the types of bankruptcy. Wagner also advised them that they would qualify for a chapter 12 bankruptcy.

Wagner told the Rathkes that annuities could be purchased in a chapter 7 bankruptcy and that these annuities would be exempt, but that the law was going to change on August 27, 1987. The respondent's interest in acquiring the 151 acres was not discussed at this meeting. The respondent had not yet expressed a serious interest in the real estate at this time.

The Rathkes returned to respondent, who once again recommended a chapter 7 bankruptcy. The Rathkes decided to follow the respondent's advice and file chapter 7 bankruptcy and, further, to do so before the law changed so that they could take advantage of the unlimited annuities. On July 15, 1987, Mr. Rathke visited with the respondent and informed the respondent that he and his wife wished to file a chapter 7 bankruptcy.

The respondent had represented only one other family farmer in a chapter 12 bankruptcy at this time, the Rabes. He represented the Rabes on a limited basis, engaging other attorneys to do a significant amount of the bankruptcy work. The Rabes had encouraged the respondent to purchase their farm and lease it back to them. The respondent declined to purchase the farm, testifying that he did so because he realized that the Rabes wanted to continue farming. However, the respondent realized that the Rabes needed a center pivot to make their plan work, so he purchased the irrigation system from the secured creditor and leased the irrigation system back to the Rabes at terms which were favorable to the Rabes. The

respondent stated that he remained cocounsel for the Rabes, but he permitted other attorneys to prepare the chapter 12 plan.

On August 1, 1987, the respondent encouraged the Rathkes to list the 151 acres with Thor Realty, which was also a client of the respondent's and owned by the respondent's father. The Rathkes signed an exclusive listing agreement which obligated Thor Realty to use its best efforts to obtain a buyer for the 151 acres in exchange for a 5-percent commission. The land was listed with Thor Realty at a price of $1,060 per acre. The Rathkes were interested in avoiding a foreclosure sale. The real estate was listed in an attempt to pacify The Federal Land Bank. The respondent testified that he informed the Rathkes of the possible conflict of interest, since Thor Realty was also a client, but did not inform them of such in writing. Mr. Rathke testified that the respondent did not advise him of the potential conflict of interest.

Thor Realty personnel never visited the farm, sent any prospective purchasers to view the farm, or advertised the farm for sale. Thor Realty did take a 5-percent commission when the farm was purchased by the respondent.

The Federal Land Bank held the first mortgage on the 151 acres and the FmHA held the second mortgage. The Federal Land Bank had indicated that the FmHA had the financial interest in the sale price of the 151 acres because the sale price would adequately cover the first mortgage.

The respondent expressed an interest sometime in August 1987 in purchasing the 151 acres. On August 21, 1987, the respondent offered $130,000 to the FmHA for the 151 acres, about $860 per acre. The respondent did not at this time nor at any time disclose to the FmHA that he was making the offer on his own behalf. The offer was rejected, but this set into motion the appraisal process. Once an offer is made, the FmHA has the property appraised to determine the minimum price it will accept per acre. The land was appraised at $1,100 per acre. This price was disclosed to Thor because he was the Rathkes' attorney. The Rathkes filed a chapter 7 liquidation bankruptcy action on August 26, 1987. This ensured that the annuities they had the respondent purchase would be exempt. The 151 acres were listed on the bankruptcy schedule at a value of $900 per

acre.

The respondent was contacted by John Wisnieski, who was interested in purchasing the 151 acres. He informed Wisnieski that the property was not yet for sale and might possibly be involved in the bankruptcy proceedings for some time. Wisnieski requested that the respondent notify him when the property was for sale. Wisnieski was also in the real estate business and wanted to list the property. However, sometime during the fall of 1987, he told the respondent that he would pay $1,500 per acre for the property. Wisnieski was quite definite in saying that he absolutely made an offer to purchase at that price.

There was also testimony from farmers from the area that the land was good farmland. Land across the road from the 151 acres had sold for $1,090 per acre in 1987. This land was not nearly as good as the Rathkes'. The testimony indicates that the Rathkes' land was irrigated, while the land across the road was not. Further, the Rathkes' land did not have water from other land running across it, while the other property did. These farmers testified that they would have bid on the land or purchased the land had they known it was for sale.

The respondent never informed the Rathkes, the bankruptcy court, or the secured creditors of the interest expressed by farmers in the area. In fact, the respondent requested the Rathkes refer anyone interested in the property to him. The respondent told the Rathkes that they should keep everything quiet and not give anyone information about the property. This was documented in a letter dated September 15, 1987, which instructed the Rathkes to refer all parties interested in purchasing the land to him and explicitly stated, "If anyone makes any inquiries concerning the land, please advise them to contact this office. Do not advise or tell them anything that is transpiring."

The Rathkes assumed that the respondent was looking after their best interests in instructing them, and thus they never pursued any of the other prospects. The respondent denied that this paragraph dealt with the sale of the property; rather, he testified that the paragraph dealt with the "CRP payments."

On August 20, 1987, the respondent advised Mr. Rathke that

he was giving serious consideration to purchasing the real estate. On October 12, 1987, the respondent contacted Mr. Rathke and stated that he was willing to purchase the land. The respondent sent a letter dated October 12, 1987, to the FmHA relaying a $1,100-per-acre offer, but did not disclose the identity of the purchaser.

On October 13, 1987, the respondent and the Rathkes attended the first meeting of creditors in bankruptcy court. The U.S. bankruptcy trustee, Richard Myers, abandoned the Rathkes' land, evidently because it was too heavily encumbered with secured debt for the trustee to attempt to sell the land and retain any of the proceeds for the unsecured creditors. The abandonment was filed on October 15, 1987. Mr. Rathke testified that he was present on October 13, 1987, when the trustee announced that he would abandon the land.

Prior to the first meeting of creditors, the respondent had prepared two contracts to purchase the land. One identified Charles Dake as the purchaser and the other identified the respondent as the purchaser.

After the first meeting of creditors was over, the Rathkes and the respondent went to have coffee and rolls and to discuss the events of the morning, as well as the sale of the land. The respondent showed the Rathkes the two contracts and went over the details of the contracts. The Rathkes and the respondent then went to a law office in Omaha to have the contracts signed and notarized. The respondent testified that he told the Rathkes that if they wanted to discuss the contracts with an attorney at the law office they could. The Rathkes did not consult with an attorney at that law office.

The respondent testified that he was using Dake for two reasons. First, he wanted his identity hidden from the public because he wanted to avoid talk in his small community. Second, he wanted to sell real estate he owned in Pierce County, Nebraska, or trade it in a tax-free exchange. Mr. Rathke testified that the respondent told him that Dake was being used to protect the transaction. The Rathkes further testified that the respondent never mentioned that he had to sell any land or trade any land to facilitate the transaction.

In December 1987, the sale documents were signed, the sale

transaction was closed, and the respondent went into possession of the property. Thor asked the person who picked up and listed the filings not to publish the conveyance in the newspaper. Apparently this is not an unusual request.

Thor Realty received the 5-percent commission for the sale of the property. There was some dispute before the commission was granted because the FmHA did not feel that Thor Realty had earned its commission. The FmHA did eventually pay the commission, but not before the transaction had closed and it learned that the respondent was the real purchaser. The FmHA county supervisor, Donald Kampschneider, testified that the identity of the purchaser did not make a difference as long as the minimum purchase price was paid. The respondent also received payment for preparing the documents necessary to sell the property.

Thomas D. Lambert, a licensed appraiser, was retained by the respondent to appraise the land for the purposes of the disciplinary proceedings. The land was appraised as of the day the respondent acquired an interest in it, October 13, 1987. Lambert valued the land at $1,050 per acre.

The respondent assigns as error the referee's determination that the respondent violated DR 1-102. The respondent further assigns as error the referee's recommendation that the respondent be suspended from the practice of law for 30 days.

Relator submits that the referee erred in finding that the respondent did not violate DR 5-103 and DR 5-104, and in recommending only a 30-day suspension.

The basic issues in a disciplinary proceeding against an attorney are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances. *State ex rel. NSBA v. Douglas*, 227 Neb. 1, 416 N.W.2d 515 (1987); *State ex rel. NSBA v. Rhodes*, 234 Neb. 799, 453 N.W.2d 73 (1990); *State ex rel. NSBA v. Kirshen*, 232 Neb. 445, 441 N.W.2d 161 (1989).

The general purpose of the Nebraska Code of Professional Responsibility is to encourage and develop the conscience and ethics of lawyers in their professional and private lives so that the institution of the law merits and receives the respect and trust of the public. *State v. Douglas*, 217 Neb. 199, 349 N.W.2d

870 (1984). When an attorney takes an oath and receives a license to practice law, the attorney swears that established standards of professional ethics will be observed and, further, submits to the implied understandings that the attorney's conduct will be proper and that the attorney will abstain from practices that discredit the attorney, the courts, and the profession. *State ex rel. NSBA v. Neumeister*, 234 Neb. 47, 449 N.W.2d 17 (1989); *State ex rel. NSBA v. Hahn*, 218 Neb. 508, 356 N.W.2d 885 (1984). There is a presumption of the attorney's innocence in a disciplinary proceeding. *State ex rel. NSBA v. Kelly*, 221 Neb. 8, 374 N.W.2d 833 (1985).

The purpose of a disciplinary proceeding is not so much to punish an attorney as it is to determine, in the public interest, whether the attorney should be permitted to continue to practice law. *State ex rel. NSBA v. Douglas, supra*; *Rhodes, supra*. Violation of a disciplinary rule concerning the practice of law is a ground for discipline. *State ex rel. NSBA v. Douglas, supra*; *Neumeister, supra*.

The Counsel for Discipline alleges that the actions of the respondent in the real estate transaction between the respondent and the Rathkes were a violation of the respondent's oath as an attorney licensed to practice law in the State of Nebraska, as provided in § 7-104, and were a violation of the Code of Professional Responsibility, to wit:

> DR 1-102 Misconduct.
>
> (A) A lawyer shall not:
>
> (1) Violate a Disciplinary Rule.
>
> . . . .
>
> (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.
>
> (5) Engage in conduct that is prejudicial to the administration of justice.
>
> (6) Engage in any other conduct that adversely reflects on his fitness to practice law.
>
> . . . .
>
> DR 5-103 Avoiding Acquisition of Interest in Litigation.
>
> (A) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation he is conducting for a client, except that he may:

> (1) Acquire a lien granted by law to secure his fee or expenses.
>
> (2) Contract with a client for a reasonable contingent fee in a civil case.
>
> . . . .
>
> DR 5-104 Limiting Business Relations with a Client.
>
> (A) A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his professional judgment therein for the protection of the client, unless the client has consented after full disclosure.

We discuss first the alleged violation of the oath. The alleged violation of DR 5-103(A)(1) and (2) will be reviewed second. Next, the alleged violation of DR 5-104(A) will be discussed. Finally, the alleged violation of DR 1-102(A)(1), (4), (5), and (6) will be considered.

Section 7-104 states:

> Every attorney upon being duly admitted to practice in the Supreme Court or district courts of this state, shall take and subscribe an oath substantially in the following form: You do solemnly swear that you will support the Constitution of the United States, and the Constitution of this state, and that you will faithfully discharge the duties of an attorney and counselor, according to the best of your ability.

The respondent violated his duties as an attorney and as a counselor when he entered into a contract to purchase land from his clients while failing to disclose his conflict of interest. A violation of the Nebraska Code of Professional Responsibility would be a violation of the oath. We analyze the alleged violations.

The respondent has been charged with the acquisition of property which was the subject of litigation. The respondent purchased property which had been abandoned by the trustee. The property was abandoned during the first meeting of creditors on October 13, 1987, after the trustee concluded that the secured interest was well in excess of the value of the real estate. The respondent acquired an interest in the property that same day.

The respondent negotiated for the purchase while the property was still in litigation. He technically did not acquire an interest in the property until after the property was abandoned by the trustee.

The order for the meeting of creditors provided:

> WITHIN 21 DAYS AFTER THE 341(a) MEETING, the Trustee will file with the Court a list of property to be abandoned. If no objections to the list is [sic] filed within 10 days after the 21 day dealine [sic], the property will be deemed abandoned without further action by the court.

The relator argues that this paragraph makes the real estate the subject of litigation for 10 days following the filing of the list of abandoned property, which in turn must be filed within 21 days of the meeting of creditors. The order abandoning the property was filed October 15, 1987, 2 days after the hearing. Thus, the property remained the subject of litigation for the 10 days following the order. At any time a creditor could have objected to the abandonment of the property and a hearing would have had to take place to determine if the property was burdensome to the estate. Although there were no objections to the abandonment, the property remained the subject of litigation until the time for objections to the abandonment had passed. Therefore, the respondent violated DR 5-103 when he acquired an interest in the property from the Rathkes.

The next allegation concerns the violation of DR 5-104(A), which limits business relations with clients. The Iowa Supreme Court stated in the case *Committee on Prof. Ethics, etc. v. Mershon*, 316 N.W.2d 895, 899 (Iowa 1982):

> Because of the fiduciary relationship which exists, the attorney "has the burden of showing that the transaction 'was in all respects fairly and equitably conducted; that he fully and faithfully discharged all his duties to his client, not only by refraining from any misrepresentation or concealment of any material fact, but by active diligence to see that his client was fully informed of the nature and effect of the transaction proposed and of his own rights and interests in the subject matter involved, and by seeing to it that his client either has independent advice in the matter or else receives from the attorney such advice as the

latter would have expected to give had the transaction been one between his client and a stranger.' "

Thus, to establish a violation of DR 5-104(A), it is necessary to show (1) that the attorney and client had differing interests in the transaction, (2) that the client expected the lawyer to exercise his professional judgment for the protection of the client, and (3) that the client consented to the transaction without full disclosure. *Mershon, supra.*

The first element which must be proved to show a DR 5-104(A) violation is differing interests. "Differing interests" are interests that are "conflicting, inconsistent, diverse, or otherwise discordant." See Canon 5, EC 5-14, of the Code of Professional Responsibility.

In *City of Hastings v. Jerry Spady Pontiac-Cadillac, Inc.*, 212 Neb. 137, 322 N.W.2d 369 (1982), the court held that it was fundamental law that an attorney representing a client must not knowingly do anything which is inconsistent with the terms of his employment or contrary to the best interests of his client. In that case, the attorney for the city purchased property he knew the city was interested in, without disclosing his interest in the land. Although that case was not a disciplinary proceeding, the principle of conflict of interest is the same.

When the Rathkes filed a chapter 7 bankruptcy, the property became property of the bankruptcy estate. The Rathkes no longer had an interest in the property. However, once the property was abandoned by the trustee, the property reverted back to the Rathkes. In *In re Roberts*, 460 F. Supp. 88 (N.D. Ga. 1978), the court held that after abandonment of land by the trustee, the bankrupt holds title in the same manner as if title had never been in the trustee. See, also, *Barletta v. Tedeschi*, 121 Bankr. 669 (N.D.N.Y. 1990) (holding that once the trustee knowingly and properly abandons the property of the estate, the abandonment is irrevocable and the title vests in the debtor in the same manner as before bankruptcy); *In re Strelsky*, 46 Bankr. 178 (E.D. Va. 1985) (concluding that title vests in the bankrupt in the same manner as title was held prior to bankruptcy). Thus, the Rathkes held title to the land in the same manner as it was before bankruptcy.

The respondent alleges that the FmHA was the real party of

interest in selling the land because the Rathkes would not receive any proceeds from the sale. The property of the Rathkes was heavily encumbered. The value of the secured interest in the real estate was far in excess of the purchase price. The proceeds from the sale of land would not be enough to cover the debt of the secured creditors, and thus the Rathkes would not receive any money from the sale. However, the Rathkes did have an interest in the real estate, an interest that was in conflict with the interest of the respondent. The Rathkes could choose whether to let the land be foreclosed by the FmHA or to enter into a voluntary sale. This clearly is something of interest to the Rathkes.

The respondent wished to purchase the Rathkes' land. As a purchaser, the respondent was interested in purchasing the land at the lowest possible price. The Rathkes, as sellers of the land, were interested in obtaining the highest possible price. In fact, Mr. Rathke testified that he wanted to see the land bring as much money as possible as a matter of pride and to make sure the creditors were not left "holding the bag." The Rathkes had been leaders in their community for years and wanted to pay off as many debts as possible. The more money the land brought, the more it would help their creditors.

The contrary interests of the respondent and the Rathkes were further evidenced by a letter written to the Rathkes. In the letter, the respondent informed the Rathkes that the FmHA did not want to pay the commission to Thor Realty for selling the 151 acres. The respondent continued in his letter, stating, "If it was not for my interest in the land, I would tell him to take a hike."

The interest of the respondent as purchaser and the interest of the Rathkes as sellers are clearly in conflict. This conflict prevented the respondent from giving the Rathkes the full and disinterested advice to which each client is entitled. The respondent's own interest in the real estate was bound to affect the exercise of his professional judgment.

The second element that must be established is that the client expected the attorney to exercise his professional judgment. The respondent testified that he advised the Rathkes to seek another attorney's advice with regard to the sale of the land.

This was not documented by a letter or even a memo to the file. The Rathkes testified that the respondent did not advise them to seek another attorney's advice and in fact did not even inform them that there was a possible conflict of interest.

The Rathkes had retained the respondent to assist them with their financial problems. They expected the respondent to assist them so that their financial problems were handled in such a way as to benefit them and not unnecessarily harm the creditors. They relied on the respondent's advice. In return, they expected the respondent to exercise his professional judgment in helping them out of their financial difficulty.

Finally, the bar must show that the client consented to the transaction without a full disclosure. A full disclosure is necessary when there is a conflict of interest between the attorney and the client. The client must be advised that there is a conflict of interest. The client must also be informed of the possible areas that this conflict of interest may affect. The respondent makes much of the fact that at all times the Rathkes knew that he was the party that was going to purchase the property. This is not full disclosure and does not relieve the respondent of his duty to inform the Rathkes of the effect the conflict of interest might have on his representation of the Rathkes.

In the case *Matter of Proceedings Against Sedor*, 73 Wis. 2d 629, 245 N.W.2d 895 (1976), the Wisconsin Supreme Court stated that full disclosure meant more than telling the client, a corporation, that the attorney was joining another shareholder, who was also a client, as a lender. Any consent given to such transaction was not informed consent. The court stated that an informed consent required disclosure of both the existence of the conflict of interest and the effect that conflict would have on the exercise of the attorney's professional judgment. The attorney in that case was suspended from the practice of law for 8 months.

In *State ex rel. Neb. State Bar Assn. v. Nelson*, 147 Neb. 131, 22 N.W.2d 425 (1946), this court stated that an attorney may not represent adverse parties with conflicting interests except by express consent of all concerned, given after a full disclosure of all the facts. This clearly did not happen in the case at bar. The

only fact disclosed to the Rathkes was that the respondent was the purchaser. Facts which remained undisclosed to the Rathkes were that others were interested in purchasing the property and these people were interested in paying more for the property than the respondent. Other undisclosed items were the effects of the conflicts of interest on the respondent's representation of the Rathkes, both the conflict in purchasing the land and the conflict in recommending another client as a realtor.

After reviewing the testimony and evidence, we find that it is clear respondent violated DR 5-104(A). First, the respondent had a conflict of interest with the Rathkes, his clients. Second, the Rathkes depended on the respondent to look after their best interests and to exercise his professional judgment in his role as their attorney. Finally, the Rathkes consented to the transaction with the respondent without a full disclosure. In entering into this transaction with the Rathkes, the respondent failed to limit his business relations with a client. Furthermore, the respondent failed to disclose to the Rathkes the nature of his interest and how that would affect his role as their attorney.

The final allegation is that the respondent is guilty of misconduct. The respondent's actions with regard to the real estate transaction involved dishonesty, fraud, misrepresentation, and deceit. The respondent did not disclose his interest in purchasing the property to the FmHA and in fact went to great lengths to conceal that fact.

The conduct that is in question is the active and intentional attempts by the respondent to restrict or limit anyone else from bidding on the Rathkes' property. The respondent did so by having the Rathkes list the property with his father's real estate firm, which firm made no effort to advertise or promote the sale of the farm to the public. The respondent also urged the Rathkes not to disclose that the farm would be sold in the near future. Further, the respondent informed people who made inquiries into the property that the property would not be sold for some time. Finally, during this same time, the respondent was actively pursuing the purchase at a lower price, concealing his identity, and in fact did purchase the property at the minimum price at which the FmHA would sell the property.

The respondent was using his position as attorney handling

the Rathkes' bankruptcy litigation to obtain knowledge and the inside track in his purchase of the property out of the bankruptcy estate, while excluding everyone else from having the opportunity to make offers. At the very least, the respondent was misleading the public to believe that the land would not be available for some time and thus discouraged several interested purchasers.

The respondent was so obsessed with secrecy to protect the transaction, he used a strawman to effectuate the purchase. In addition, he prevented the transaction from being published in the local newspaper.

In *State ex rel. NSBA v. Douglas*, 227 Neb. 1, 24, 416 N.W.2d 515, 530 (1987), the court stated that " '[a]n affirmative statement is not always required, however, and fraud may also consist of the omission or concealment of a material fact if accompanied by the intent to deceive under circumstances which create the opportunity and duty to speak.' " The court continued, stating that "conceal" means to " 'hide, secrete, or withhold from knowledge of others . . . .' " *Id.* at 25, 416 N.W.2d at 530, quoting *State v. Copple*, 224 Neb. 672, 401 N.W.2d 141 (1987). The court further stated that " 'the word *conceal* pertains to affirmative action likely to prevent or intended to prevent knowledge of a fact . . . .' " *Id.*

In the case *Committee on Prof. Ethics, etc. v. Baker*, 269 N.W.2d 463 (Iowa 1978), an attorney purchased property in another's name when he knew the seller was a client and further knew that the offer was well below market value. He also told another purchaser that the farm was already sold when it really was not. The attorney's license to practice law was revoked for violations of DR 5-104(A) and DR 1-102(A)(1) to (6).

The respondent concealed facts from the Rathkes. These facts are set out above. His concealment amounted to fraud and misrepresentation, in violation of DR 1-102(A)(4). Furthermore, by violating disciplinary rules, the respondent has violated DR 1-102(A)(1).

The final issue is the appropriate discipline. In determining the appropriate discipline, consideration is given to the nature of the offense, the need for deterring others, the maintenance of the reputation of the bar as a whole, the protection of the

public, the attitude of the offender generally, and his or her present or future fitness to continue in the practice of law. *State ex rel. NSBA v. Neumeister*, 234 Neb. 47, 449 N.W.2d 17 (1989); *State ex rel. NSBA v. Rhodes*, 234 Neb. 799, 453 N.W.2d 73 (1990); *State ex rel. NSBA v. Kirshen*, 232 Neb. 445, 441 N.W.2d 161 (1989).

The respondent has violated several disciplinary rules. In so doing, he has harmed the image of the legal profession. The appearance of impropriety, at the very least, is quite evident. Clients walked into his office looking for assistance in a financial crisis. The clients left his representation 1 year later, after paying a substantial fee, with the respondent owning a choice piece of the clients' real estate.

The respondent may actually have paid the fair market value as appraised by the FmHA and the independent appraiser hired for the trial; however, this does not excuse his conduct. The respondent concealed from the public the fact that he was purchasing the property. The respondent concealed from the Rathkes the fact that a higher offer had been made on the property. Also, the respondent concealed the effect of his conflict of interest from the Rathkes.

Conduct such as that which has been displayed by the respondent should be discouraged. The conduct has brought doubt into the minds of many as to the competence of the legal profession to represent a client's best interests. For this reason, something more than a reprimand is required. However, the respondent has exhibited great remorse for his conduct. Furthermore, the respondent was very diligent in seeking a workout for the respondents before the bankruptcy was filed. His competence as an attorney does not appear to be in question. Thus, disbarment is not necessary.

In determining the appropriate discipline, it is necessary to review other Nebraska cases dealing with disciplinary proceedings. In *State ex rel. NSBA v. Roubicek*, 225 Neb. 509, 406 N.W.2d 644 (1987), the attorney falsified estate tax records. The actions of the attorney did not benefit the attorney financially. This court stated that disbarment was not appropriate and suspended the attorney from the practice of law for 2 years.

State ex rel. NSBA v. Addison, 226 Neb. 585, 412 N.W.2d 855 (1987), involved an attorney who fraudulently misrepresented that only two insurance policies were involved when there were actually three. The attorney was suspended for 6 months.

State ex. rel. NSBA v. Neumeister, supra, was a case in which the respondent violated the advocate-witness rule. The attorney showed no remorse for his violation. This court suspended the attorney for 1 year.

In *State ex rel. NSBA v. Douglas*, 227 Neb. 1, 416 N.W.2d 515 (1987), Douglas, the Attorney General, had a duty to make a full and truthful disclosure to the interested state officials concerning the nature of his conflict. Douglas did not disclose the nature of the conflict. This court stated that "[h]is silence was a clear violation of the Code requiring disclosure, without regard to whether or not the outcome of pending or future official investigations would have been changed, and was tantamount to a false representation that there was no conflict." *Id.* at 61, 416 N.W.2d at 549. Douglas was suspended for 4 years.

From another jurisdiction, in *Conduct of L.B. Sandblast*, 210 Or. 65, 307 P.2d 532 (1957), the attorney of the administrator of an estate purchased property without telling anyone he was purchasing the property. None of the clients suffered any injury as a result of this. The court stated that the relationship existing between an attorney and a client is a sacred trust. The attorney was suspended for 1 year.

The attorney in *State ex rel. Nebraska State Bar Assn. v. McArthur*, 212 Neb. 815, 326 N.W.2d 173 (1982), was suspended for a period of 1 year. He had filed a final report in an estate proceeding representing that the deceased died possessed of an interest in specific property, and as a consequence the county court signed an order of discharge assigning the property in accordance with the will. As a matter of fact, the property had been sold some 2½ years earlier. Although the record failed to disclose that any specifically delineated injuries or other losses occurred as a consequence of that dereliction, this court nevertheless concluded that the attorney had acted in a lazily slipshod manner and had failed to

deal completely and honestly with the facts as they were known to him.

The facts in this case show that by his silence, Thor had failed to deal completely and honestly with the facts as they were known to him, had deliberately covered up some facts, and had not acted in the complete interest of his clients.

We conclude that the appropriate discipline in this case is suspension from the practice of law for a period of 1 year, commencing April 15, 1991. Costs of this proceeding are taxed to the respondent.

JUDGMENT OF SUSPENSION.

WHITE, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. CONRAD A. JASPER, APPELLANT.

467 N.W.2d 855

Filed April 5, 1991. No. 89-1456.

1. **Jury Instructions: Proof: Appeal and Error.** In an appeal based on the claim of an erroneous instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.
2. **Trial: Evidence: Proof: Directed Verdict: Words and Phrases.** "Prima facie evidence" means that proof presented on an issue is sufficient to submit the issue to the fact finder for disposition and precludes a directed verdict against the party with the burden of proof on the issue in a jury trial or exclusion of a particular issue from consideration in a nonjury trial.
3. **Presumptions: Words and Phrases.** A presumption is a fact inferred from another proved or established fact or facts.
4. **Constitutional Law: Criminal Law: Due Process: Proof: Presumptions: Directed Verdict.** As a result of the constitutional guarantee of due process, including the presumption of innocence and the State's burden of proof beyond a reasonable doubt, a verdict cannot be directed against a defendant in a criminal case.
5. **Criminal Law: Trial: Jury Instructions: Directed Verdict: Due Process.** An instruction which directs a verdict against a defendant, either on the issue of guilt for a crime charged or on an element of the crime, violates the defendant's due process right to a fair trial in a criminal case.
6. **Criminal Law: Trial: Jury Instructions: Due Process.** An instruction which

requires that a jury draw an inference adverse to a defendant in a trial of a criminal case deprives a defendant of, or denies a defendant, the due process right to a fair trial.

7. **Circumstantial Evidence: Words and Phrases.** "Circumstantial evidence" means facts or circumstances, proved or known, from which existence or nonexistence of another fact may be logically inferred or deduced through a rational process.
8. **Jury Instructions.** All instructions, read conjunctively, must correctly state the law, adequately state the issues, and not mislead the jury.
9. **Criminal Law: Trial: Jury Instructions: Due Process: Presumptions: Proof.** Due process in a trial of a criminal case prohibits an instruction which contradicts the presumption of a defendant's innocence or shifts to a defendant the burden of persuasion on an element of the crime charged against the defendant.

Appeal from the District Court for Douglas County: JOHN E. CLARK, Judge. Reversed and remanded for a new trial.

Thomas M. Kenney, Douglas County Public Defender, and Brian S. Munnelly for appellant.

Robert M. Spire, Attorney General, and Mark D. Starr for appellee.

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

SHANAHAN, J.

Conrad A. Jasper appeals his Douglas County jury conviction for possession of a short shotgun, a Class IV felony under Neb. Rev. Stat. § 28-1203(1) (Reissue 1989).

While on evening patrol in a police van, Adam Kyle, Mike Stewart, and Jeff Saalfeld, officers of the Omaha Police Division, observed a Buick driven by Jasper. Officer Kyle knew that Jasper had previously received a traffic citation for driving without an operator's license. Since Kyle believed that Jasper did not have a driver's license and the officers saw that the Buick lacked a front license plate, the officers stopped the Buick containing Jasper, who had been driving, and a passenger. In a radio communication with the officers, a police dispatcher reported that the Buick's rear license plate was stolen. The officers arrested Jasper for receipt of stolen property, namely, the stolen license plate, and commenced an inventory of the Buick's contents. During an inventory of the

Buick's trunk, the officers found an unzipped gym bag which contained an unloaded 12-gauge shotgun with an overall length of 20³/₄ inches, that is, a "short shotgun." See Neb. Rev. Stat. § 28-1201(6) (Reissue 1989) (definition of short shotgun). Nothing in the Buick indicated that Jasper owned the car. Later investigation failed to establish Jasper's fingerprints on the shotgun. During custodial interrogation, Jasper denied that he owned the shotgun and stated that he was unaware of the shotgun's presence in the Buick's trunk.

Jasper was charged with a violation of § 28-1203(1), which, in pertinent part, provides: "Any person or persons who shall transport or possess any . . . short shotgun commits [sic] a Class IV felony." Neb. Rev. Stat. § 28-1212 (Reissue 1989) states:

> The presence in a motor vehicle other than a public vehicle of any firearm . . . shall be prima facie evidence that it is in the possession of, and is carried by, all persons occupying such motor vehicle at the time such firearm or instrument is found, except this section shall not be applicable if such firearm or instrument is found upon the person of one of the occupants therein.

After Jasper declined to testify at his trial, the court, over Jasper's objection, gave instruction No. 6 to the jury:

> The presence in a motor vehicle of any firearm shall be prima facie evidence that it is in the possession of, and is carried by, all persons occupying such motor vehicle at the time such firearm is found, unless such firearm is found upon the person of one of the occupants.
>
> Prima facie evidence is evidence sufficient in law to raise a presumption of fact or establish the fact in question unless rebutted.
>
> You may accept any presumption raised by prima facie evidence, but you are not required to do so. The evidence of presence of the firearm in the vehicle must be shown beyond a reasonable doubt.

The court also instructed the jury that Jasper was presumed innocent until proved guilty beyond a reasonable doubt and that the burden of proof concerning all elements of the crime, including Jasper's control over a short shotgun and his "willful, intentional, and knowing" possession of the firearm, remained

with the State and never shifted to Jasper. The jury found Jasper guilty of possessing a short shotgun.

Jasper's sole assignment of error is that jury instruction No. 6 deprived him of due process by relieving the State of its burden to prove beyond a reasonable doubt each element of the crime charged and by shifting to Jasper the burden to disprove possession of the shotgun.

In rather astute observations, the State correctly and succinctly summarizes the situation in Jasper's case:

> There is some reason to believe that [§ 28-1212] was not designed for the purpose of creating a presumption to be used by the jury but instead was intended to be used as a guide for the court to know when there was enough evidence to place the case before the jury. . . .
>
> . . . .
>
> Given the potential constitutional problems involved when presumptions are employed, one may question the wisdom of using them.

Brief for appellee at 5 and 9.

APPELLANT'S BURDEN RE INSTRUCTIONS

"In an appeal based on the claim of an erroneous instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant." *Rose v. City of Lincoln,* 234 Neb. 67, 74, 449 N.W.2d 522, 528 (1989). Accord *State v. Harney, ante* p. 512, 466 N.W.2d 540 (1991).

> With the exception of an erroneous admission or exclusion of evidence, a defendant, as the appellant claiming reversible error in a criminal case, must demonstrate that a trial court's conduct, whether action or inaction during the proceeding against the defendant, prejudiced or otherwise adversely affected a substantial right of the defendant.

State v. Juhl, 234 Neb. 33, 45-46, 449 N.W.2d 202, 211 (1989). Accord *State v. Harney, supra.*

PRIMA FACIE EVIDENCE

The trial court used "prima facie evidence" in each paragraph of instruction No. 6. The State suggests that the first

paragraph of instruction No. 6 "was apparently derived from Neb. Rev. Stat. § 28-1212. . . ." Brief for appellee at 4.

"Prima facie evidence" means that proof presented on an issue is sufficient to submit the issue to the fact finder for disposition and precludes a directed verdict against the party with the burden of proof on the issue in a jury trial or exclusion of a particular issue from consideration in a nonjury trial. See, *State v. Kipf*, 234 Neb. 227, 450 N.W.2d 397 (1990); *State v. Copple*, 224 Neb. 672, 401 N.W.2d 141 (1987). Cf. *Dale v. Thomas Funeral Home, ante* p. 528, 529, 466 N.W.2d 805, 807 (1991): "A 'prima facie case' means that evidence sufficiently establishes elements of a cause of action and, notwithstanding a motion for a directed verdict in a jury trial or motion to dismiss in a nonjury trial, allows submission of the case to the fact finder for disposition."

Although "prima facie evidence" is found in § 28-1212 as a part of the Nebraska Criminal Code, the content of a statute within the criminal code is not necessarily and always proper information for a jury. While certain facts or circumstances expressed as "prima facie evidence" in a criminal statute may provide some guidance to a court in a judicial determination whether a particular issue is submissible to a jury, information about a judicial standard for evaluating evidence supplies nothing helpful for a jury's discharging its duty of factfinding and, consequently, only encumbers the deliberative process essential to proper determination of factual questions. Thus, "prima facie evidence," as a standard for a court's evaluation of evidence, was unnecessary and, was, therefore, inappropriately included in instruction No. 6.

PRESUMPTIONS IN CRIMINAL CASES

Nature of a Presumption.

A presumption is a fact inferred from another proved or established fact or facts. *State v. Kipf, supra*. "[A] presumption as employed in criminal matters corresponds to an inference in civil matters. Clarity would be fostered by reference to criminal instructed inferences rather than criminal presumptions." M. Graham, Handbook of Federal Evidence § 303.4 at 129 (3d ed. 1991).

> While the words "inference" and "presumption" are sometimes used interchangeably, they by no means are synonymous. An inference is a conclusion as to the existence of a particular fact reached by considering other facts in the usual course of human reasoning. . . . An inference is thus a deduction the factfinder may in its discretion draw, but is not required to draw as a matter of law. Under certain circumstances an inference may be so strong that no other conclusion may be reasonably reached. However, this is because of the compelling nature of the particular factual circumstances rather than that, as is the case with a presumption, a rule of law requires the conclusion to be drawn.

M. Graham, *supra*, § 301.7 at 103-04.

Constitutional Considerations in Jury Instructions on Presumptions.

As the U.S. Supreme Court noted in *Sandstrom v. Montana*, 442 U.S. 510, 514, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979):

> The threshold inquiry in ascertaining the constitutional analysis applicable to this kind of jury instruction is to determine the nature of the presumption it describes. . . . That determination requires careful attention to the words actually spoken to the jury . . . for whether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable juror could have interpreted the instruction.

Accord *Francis v. Franklin*, 471 U.S. 307, 105 S. Ct. 1965, 85 L. Ed. 2d 344 (1985). The presumption of innocence, although unarticulated in the U.S. and Nebraska Constitutions, is a basic component of a defendant's fair trial and, therefore, an aspect of due process in the criminal justice system. *Estelle v. Williams*, 425 U.S. 501, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976); *State v. Harney, ante* p. 512, 466 N.W.2d 540 (1991). "Due process in a criminal case requires that the prosecution prove, beyond a reasonable doubt, every factual element necessary to constitute the crime charged against a defendant." *State v. Harney, supra* at 514, 466 N.W.2d at 543 (1991). See, also, *In re Winship,* 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368

(1970). "As a result of the constitutional guarantee of due process, including the presumption of innocence and the State's burden of proof beyond a reasonable doubt, a verdict cannot be directed against the defendant in a criminal case." *State v. Harney, supra* at 516, 466 N.W.2d at 544. See, also, *Sandstrom v. Montana, supra.*

Regarding the presumption of innocence, W. LaFave & A. Scott, Criminal Law § 1.8 at 58 (2d ed. 1986), observed:

> The so-called "presumption of innocence" is actually not a presumption at all in the legal sense . . . that, once an underlying fact has been proved, another (ultimate) fact may (or must) be taken as proved. . . . It is more properly said that the innocence of the defendant is assumed, which is generally taken to mean no more than that the prosecution has the two burdens of proof . . . the burden of producing evidence of guilt in order to avoid a directed verdict; and of persuading the fact-finder of guilt beyond a reasonable doubt in order to secure a conviction. However, the customary statement to the jury when the trial court gives instructions is that the defendant is presumed innocent, that the mere fact of accusation is no evidence of his guilt, and that the prosecution must prove guilt beyond a reasonable doubt.

In *State v. Kipf*, 234 Neb. 227, 450 N.W.2d 397 (1990), this court examined a jury instruction concerning proof for the crime of intimidation by telephone call, specifically Neb. Rev. Stat. § 28-1310(2) (Reissue 1989), which provides: "The use of indecent, lewd, or obscene language or the making of a threat or lewd suggestion shall be prima facie evidence of intent to terrify, intimidate, threaten, harass, annoy, or offend." The *Kipf* instruction in question was a verbatim expression of the language in § 28-1310(2). In *Kipf*, we determined that "prima facie evidence," used in § 28-1310(2), actually resulted in a "mandatory and conclusive presumption of criminal intent, that is, factual establishment of the telephone call with its statutorily prohibited conduct necessarily ('shall') results in the conclusively established criminal intent of the caller." *State v. Kipf, supra* at 245, 450 N.W.2d at 410. In *Kipf*, after reviewing various U.S. Supreme Court decisions regarding

presumptions in criminal cases, decisions such as *Ulster County Court v. Allen*, 442 U.S. 140, 99 S. Ct. 2213, 60 L. Ed. 2d 777 (1979), *Sandstrom v. Montana*, 442 U.S. 510, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979), and *Francis v. Franklin, supra*, we noted that the Supreme Court,

> concerning presumptions, whether mandatory, conclusive, or rebuttable, concluded that the due process requirement of the State's burden of proof beyond a reasonable doubt in criminal cases "prohibits the State from using evidentiary presumptions in a jury charge that have the effect of relieving the State of its burden of persuasion beyond a reasonable doubt of every essential element of a crime." [Quoting from *Francis v. Franklin, supra* at] 471 U.S. at 313.

State v. Kipf, supra at 250, 450 N.W.2d at 413.

In view of U.S. Supreme Court decisions, we stated in *Kipf*:

> If we were to approve an instruction framed in the literal language of § 28-1310(2), which informs a jury about the function of prima facie evidence or proof of intent, such an instruction, in the absence of a defendant's presentation of evidence negativing intent established by the "prima facie evidence," would have the legal effect of a directed verdict on the issue of criminal intent as an element of the offense prohibited by § 28-1310: "[V]erdicts may not be directed against defendants in criminal cases. . . ." *Sandstrom v. Montana, supra* at 516 n.5.
>
> In accordance with *Sandstrom*, we conclude that a jury instruction founded on the presumption created by § 28-1310(2) is constitutionally impermissible because such an instruction deprives a defendant of the due process right that the State must prove beyond a reasonable doubt each element of the crime charged, and shifts the burden to the defendant to disprove the element of intent in the offense charged.
>
> Since the jury instruction given in this case informed the jury that based on § 28-1310(2), Kipf's criminal intent had been established, the instruction is erroneous and prejudicial because it deprived Kipf of his substantial right

> to a trial by jury on the issue of criminal intent necessary for the crime charged under § 28-1310. Such prejudicial error requires reversal of Kipf's conviction.

State v. Kipf, supra at 251, 450 N.W.2d at 413.

PRESUMPTUOUS PRESUMPTIONS IN JASPER'S CASE

Presumption from a Firearm's Presence.

The first paragraph of instruction No. 6 informed the jury that "[t]he presence in a motor vehicle of any firearm shall be prima facie evidence that it is in the possession of, and is carried by, all persons occupying such motor vehicle at the time such firearm is found . . . ."

In prosecutions for violation of statutes pertaining to controlled substances, " '[a] defendant possesses a controlled substance when the defendant knows of the nature or character of the substance and its presence and has dominion or control over the substance.' " *State v. Harney, ante* p. 512, 515, 466 N.W.2d 540, 543 (1991). Accord *State v. Lonnecker, ante* p. 207, 465 N.W.2d 737 (1991). The preceding possessory standard or test is equally applicable to a defendant's prohibited possession of a firearm in violation of § 28-1203(1). Hence, under § 28-1203(1), proof of possession is essential for a conviction. Yet, instruction No. 6 is unclear concerning the effect of a firearm's presence within a vehicle. Did the shotgun's presence within the vehicle completely establish Jasper's commission of the possessory crime, so that no other proof was required for a conviction? Or was the shotgun's presence sufficient proof of Jasper's knowledge about the presence of a prohibited firearm, an element of the possessory crime? The mandatory language in instruction No. 6, that is, the firearm's presence within the vehicle *shall* be evidence of possession, might lead a reasonable juror to conclude that the trial court was directing that an illegal firearm's presence, in and of itself, established Jasper's commission of the firearms crime. Also, a reasonable juror might conclude that the court was directing that from the shotgun's presence, the jury must infer that Jasper's knowledge, as a component of possessing an illegal firearm, had been established, so that no other proof of Jasper's knowledge was necessary. In either of the foregoing

situations, the instruction and its conclusive or mandatory result relieved the State of its burden to produce evidence on each element of the crime charged against Jasper and was tantamount to a directed verdict against Jasper, namely, presence of a firearm established Jasper's commission of the possessory crime or at least some of the elements of the crime. However, the crime charged was not "presence in a vehicle containing a short shotgun," but was "possessing a short shotgun." Based on mere presence of the firearm, there could be no constitutionally permissible instruction that the jury must infer Jasper's commission of the crime charged or any element of the crime charged. An instruction which directs a verdict against a defendant, either on the issue of guilt for a crime charged or on an element of the crime, violates the defendant's due process right to a fair trial in a criminal case. *State v. Harney, supra*; *State v. Kipf*, 234 Neb. 227, 450 N.W.2d 397 (1990). See, also, *Sandstrom v. Montana*, 442 U.S. 510, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979). An instruction which requires that a jury draw an inference adverse to a defendant in a trial of a criminal case deprives a defendant of, or denies a defendant, the due process right to a fair trial. *State v. Kipf, supra*; *Sandstrom v. Montana, supra*.

On the other hand, if a firearm's presence in a vehicle driven by a defendant may be a circumstance for consideration in determining whether the defendant was "in . . . possession of" the weapon, then instruction No. 6 simply informs the jury concerning correct use of circumstantial evidence, that is, a firearm's presence in a vehicle driven by a defendant may be a circumstance tending to prove the defendant's knowledge concerning presence of the weapon and dominion or control over the weapon. Cf., *State v. Oldfield*, 236 Neb. 433, 461 N.W.2d 554 (1990) (presence of a controlled substance within a vehicle; circumstantial evidence regarding defendant's possession of the substance); *State v. Harney, supra*. "Circumstantial evidence" means facts or circumstances, proved or known, from which existence or nonexistence of another fact may be logically inferred or deduced through a rational process. *State v. Loveless*, 234 Neb. 463, 451 N.W.2d 692 (1990); *State v. Lewis*, 177 Neb. 173, 128 N.W.2d 610

(1964).

True, the court, by instruction No. 5, set out the elements of "the crime of possession of a short shotgun," including (1) Jasper's possession of a short shotgun and (2) Jasper's willful, intentional, and "knowing" possession of the firearm. Nevertheless, instruction No. 6, in reference to the shotgun's presence within the vehicle and Jasper's possession of the firearm, was ambiguous and misleading. "All instructions, read conjunctively, must correctly state the law, adequately state the issues, and not mislead the jury." *State v. Pierce*, 231 Neb. 966, 975, 439 N.W.2d 435, 443 (1989). Accord *State v. Harney, ante* p. 512, 466 N.W.2d 540 (1991). The ambiguity in and from instruction No. 6 prevented Jasper's fair trial on the crime of possessing a short shotgun.

"Unless Rebutted."

The second paragraph of instruction No. 6 states that "[p]rima facie evidence is evidence sufficient in law to raise a presumption of fact or establish the fact in question unless rebutted."

In the preceding "Presumption from a Firearm's Presence," we discussed the effect of a court's constitutionally impermissible instruction which directs a mandatory inference by a jury in a criminal case. Additionally, the second paragraph of instruction No. 6, in substance, informed the jury that the shotgun's presence in the car driven by Jasper resulted in a presumption that Jasper was in possession of the firearm, a presumption which persisted "unless rebutted." As previously noted, "[d]ue process in a criminal case requires that the prosecution prove, beyond a reasonable doubt, every factual element necessary to constitute the crime charged against a defendant." *State v. Harney, supra* at 514, 466 N.W.2d at 543. However, the "unless rebutted" provision in instruction No. 6 shifted the burden of persuasion to Jasper, that is, possession, a presumed fact derived from the shotgun's presence in the car driven by Jasper, remained an established fact unless Jasper could persuade the jury otherwise. To meet the shifted burden of persuasion, Jasper might even find it necessary to produce evidence on the issue of possession, a

necessity which would shift to Jasper the burden to disprove an element of the crime. As pointed out in *Francis v. Franklin*, 471 U.S. 307, 313, 105 S. Ct. 1965, 1970, 85 L. Ed. 2d 344 (1985), the State is prohibited "from using evidentiary presumptions in a jury charge that have the effect of relieving the State of its burden of persuasion beyond a reasonable doubt of every essential element of a crime." While presence of a firearm in a vehicle driven by a defendant may be a relevant circumstance tending to prove the defendant's knowledge about a firearm's nature and presence, and dominion or control over the weapon, absence of the defendant's rebuttal concerning possession does not, and constitutionally cannot, establish the defendant's criminal possession of the firearm. See, *State v. Harney, supra*; *State v. Oldfield*, 236 Neb. 433, 461 N.W.2d 554 (1990). Thus, instruction No. 6 presented a presumption which shifted to Jasper the burden of persuasion regarding possession as an element of the firearms charge against Jasper. In view of the State's twofold burden for conviction, namely, the burden of producing sufficient evidence to avoid a directed verdict of acquittal and the burden of persuading the fact finder that Jasper was guilty beyond a reasonable doubt, the presumption of possession, expressed in instruction No. 6, came in direct conflict with the presumption of Jasper's innocence. The constitutionally required presumption of innocence must prevail; hence, the "unless rebutted" provision in instruction No. 6 must fail. Due process in a trial of a criminal case prohibits an instruction which contradicts the presumption of a defendant's innocence or shifts to a defendant the burden of persuasion on an element of the crime charged against the defendant. *State v. Harney, ante* p. 512, 466 N.W.2d 540 (1991). Consequently, the second paragraph of instruction No. 6 deprived Jasper of his constitutionally guaranteed due process right to a fair trial on a criminal charge.

Nebraska Evidence Rule 303(3).

The State tries to salvage instruction No. 6 by referring to Neb. Evid. R. 303(3), Neb. Rev. Stat. § 27-303(3) (Reissue 1989), which states:

Whenever the existence of a presumed fact against the

> accused is submitted to the jury, the judge shall give an instruction that the law declares that the jury may regard the basic facts as sufficient evidence of the presumed fact but does not require it to do so. In addition, if the presumed fact establishes guilt or is an element of the offense or negatives a defense, the judge shall instruct the jury that its existence must, on all the evidence, be proved beyond a reasonable doubt.

Even if there had been a recognizable and constitutionally acceptable presumption available in Jasper's case, the trial court failed to specifically instruct the jury that possession, which was the presumed fact, "must, on all the evidence, be proved beyond a reasonable doubt," as expressly required by Neb. Evid. R. 303(3).

Although we have previously referred to *Francis v. Franklin, supra*, concerning application of a presumption in a criminal trial, repetition of the Supreme Court's observation in *Francis* only emphasizes the pitfalls in presumptions:

> The Due Process Clause of the Fourteenth Amendment "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." . . . This "bedrock, 'axiomatic and elementary' [constitutional] principle," . . . prohibits the State from using evidentiary presumptions in a jury charge that have the effect of relieving the State of its burden of persuasion beyond a reasonable doubt of every essential element of a crime. . . .

Francis v. Franklin, supra at 471 U.S. at 313. See, also, *State v. Kipf*, 234 Neb. 227, 450 N.W.2d 397 (1990).

HARMLESS ERROR ARGUMENT

In a last-ditch effort, the State contends that any error in instruction No. 6 was harmless because the court's other instructions informed the jury that the State was required to prove that Jasper knew about the shotgun's presence within the trunk of the vehicle which he was driving.

As previously mentioned, however, all instructions, when read together, must not mislead the jury and must correctly state the law. *State v. Harney, supra*; *State v. Pierce*, 231 Neb.

966, 439 N.W.2d 435 (1989). Directly contradictory instructions obviously have the very real likelihood of misleading a jury. Instruction No. 6 incorrectly expressed the law and authorized the jury to disregard the presumption of Jasper's innocence and the State's burden to prove beyond a reasonable doubt each element of the possessory crime charged against Jasper. Because instruction No. 6 quite likely influenced the jury in its verdict, which is constitutionally suspect as a deprivation or denial of Jasper's due process right to a fair trial, we cannot conclude that the error was harmless.

CONCLUSION

Instruction No. 6 and its presumptions presented to the jury not only permitted disregard for the presumption of Jasper's innocence of the crime charged, but also effectively shifted to Jasper the burden to persuade the jury on elements of the crime charged and explain the circumstances surrounding the police discovery of the short shotgun in the trunk of the car driven by Jasper. That shift to Jasper relieved the State of its burden to prove, beyond a reasonable doubt, that Jasper knew about the short shotgun and controlled that illegal weapon. Thus, instruction No. 6 is inconsistent with the presumption of innocence which may be overcome by evidence of guilt beyond a reasonable doubt and is incompatible with the State's constant burden to prove, beyond a reasonable doubt, all elements of the crime charged against Jasper.

This brings us right back to the State's prior insightful comment: "Given the potential constitutional problems involved when presumptions are employed, one may question the wisdom of using them." Moreover, unless the State's requisite burden of persuasion is quietly sailing off, or drifting, into a constitutional sunset, the purely procedural approach to the State's burden of proof on the elements of a crime cannot be allowed to supersede the basic requirement of substantive fairness in the criminal justice system. See Jeffries & Stephan, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 Yale L.J. 1325 (1979).

Therefore, since instruction No. 6 deprived Jasper of a fair trial required under the constitutional guarantee of due process

in the trial of a criminal case, we reverse and set aside Jasper's conviction and remand this cause to the district court for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

STATE OF NEBRASKA, APPELLEE, V. ROY E. WILLIAMS, APPELLANT.

467 N.W.2d 679

Filed April 5, 1991. No. 90-258.

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

Thomas M. Kenney, Douglas County Public Defender, and Brian S. Munnelly for appellant.

Robert M. Spire, Attorney General, and Denise E. Frost for appellee.

HASTINGS, C.J., WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ., and COLWELL, D.J., Retired.

COLWELL, D.J., Retired.

Defendant, Roy E. Williams, was charged with burglary, see Neb. Rev. Stat. § 28-507 (Reissue 1989), convicted by a jury, and sentenced to 4 to 10 years' imprisonment. He appeals, claiming as error the following: (1) The evidence was insufficient to sustain the jury's finding of guilt, and (2) the sentence is excessive.

> " 'In determining whether evidence is sufficient to sustain a conviction in a jury trial, the Supreme Court does not resolve conflicts of evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence presented to a jury, which are within a jury's province for disposition. A verdict in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that verdict.' "

State v. Sherrod, ante p. 114, 115, 464 N.W.2d 809, 810 (1991).

From our review of the record, we find the evidence is sufficient to sustain Williams' conviction.

There is no merit to the claim that the sentence of 4 to 10 years is excessive. Burglary under § 28-507 is a Class III felony, carrying as a maximum a 20-year sentence, a $25,000 fine, or both, and as a minimum a 1-year sentence. The sentence imposed is clearly within these statutory guidelines. "[A] sentence imposed within the statutorily prescribed limits will not be disturbed on appeal absent an abuse of discretion." *State v. Hall, ante* p. 169, 174-75, 465 N.W.2d 150, 154 (1991).

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MARK S. COGSWELL, APPELLANT.

467 N.W.2d 680

Filed April 5, 1991. No. 90-272.

1. **Trial: Evidence: Motions to Suppress: Waiver: Appeal and Error.** A failure to object to evidence at trial, even though the evidence was the subject of a previous motion to suppress, waives the objection, and a party will not be heard to complain of the alleged error on appeal.
2. **Convictions: Appeal and Error.** In determining the sufficiency of the evidence to support a finding of guilt in a criminal case, the Supreme Court does not resolve conflicts in the evidence, determine the plausibility of explanations, or weigh the evidence. Those matters are for the finder of fact, whose findings must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support them.
3. **Verdicts: Appeal and Error.** On a claim of insufficiency of evidence, the Supreme Court will not set aside a guilty verdict in a criminal case where such verdict is supported by relevant evidence. Only where evidence lacks sufficient probative force as a matter of law may the Supreme Court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt.
4. **Sentences: Appeal and Error.** A sentence imposed within the statutory limits will not be disturbed on appeal in the absence of an abuse of discretion by the trial court.

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

Alan G. Stoler for appellant.

Robert M. Spire, Attorney General, and Kenneth W. Payne for appellee.

HASTINGS, C.J., WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ., and COLWELL, D.J., Retired.

WHITE, J.

Appellant, Mark S. Cogswell, was charged with the offense of unlawful possession of a controlled substance with intent to distribute, to wit: methamphetamine. After trial he was convicted and sentenced to a term of 3 to 5 years' imprisonment in the Nebraska Penal and Correctional Complex. He appeals. We affirm.

Three errors are assigned: (1) The court erred in overruling the motion to suppress evidence seized from the home of the appellant; (2) the evidence is insufficient to support the verdict; and (3) the sentence is excessive.

Two separate search warrants are involved. The first is for a search of a package from Jack's Video and Slides, Santa Rosa, California, based on the affidavit of Postal Inspector G.G. Vajgert. The package was addressed to "Cogsyell [sic] Drywall" at appellant's Omaha address. The affidavit declared that the mailings from Jack's Video and Jack Brophy of the same address fit a profile for mailings by suppliers of illicit drugs by Express Mail.

The second warrant was based on the postal inspector's affidavit and the affidavit of Officer Michael Terrell of the Omaha Police Division that the police had been told by a reliable confidential informant that Brophy was a drug dealer.

A search of the package by federal authorities disclosed the presence of a large quantity of a substance later identified as methamphetamine. After removal of a large amount of the drug, the package was resealed and delivered to the Cogswell address, where it was received by Mark Cogswell, the appellant.

The second warrant was executed immediately after delivery. Methamphetamine, together with drug paraphernalia, was seized. A motion attacking the validity of the two search warrants was overruled.

The briefs of both the appellant and the State contain learned discussions of the validity of warrants based on mail profiles

and on anticipated possession of drugs after delivery of intercepted contraband. The defense neglected, however, to object to the receipt at trial of the seized drugs and paraphernalia. The State does not discuss that omission in its brief. However, we are obliged to note that a failure to object to evidence at trial, even though the evidence was the subject of a previous motion to suppress, waives the objection, and a party will not be heard to complain of the alleged error on appeal. See, *State v. Cody*, 236 Neb. 69, 459 N.W.2d 195 (1990); *State v. Hill*, 233 Neb. 305, 444 N.W.2d 905 (1989); *State v. Carter*, 226 Neb. 636, 413 N.W.2d 901 (1987); *State v. Pointer*, 224 Neb. 892, 402 N.W.2d 268 (1987). The first assignment of error is without merit.

Evidence at the trial, examined in the light most favorable to the State, establishes that a considerable payment, $8,000, was transmitted by appellant to Jack Brophy. Thereafter, a considerable (larger than that normally held for individual consumption) amount of methamphetamine was sent to appellant by Brophy. Drug records and paraphernalia commonly used in drug distribution were found in his residence.

> "In determining the sufficiency of the evidence to support a finding of guilt in a criminal case, this court does not resolve conflicts in the evidence, determine the plausibility of explanations, or weigh the evidence. Those matters are for the finder of fact, whose findings must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support them." *State v. Badami*, 235 Neb. 118, 126, 453 N.W.2d 746, 751 (1990).
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> " 'On a claim of insufficiency of evidence, the Supreme Court will not set aside a guilty verdict in a criminal case where such verdict is supported by relevant evidence. Only where evidence lacks sufficient probative force as a matter of law may the Supreme Court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt.' " *State v. Zitterkopf*, 236 Neb. 743, 747, 463 N.W.2d 616, 620 (1990).

State v. Cortis, ante p. 97, 110-11, 465 N.W.2d 132, 142 (1991). The second assignment is also without merit.

As to the excessiveness of sentence assigned as error, we have uniformly held that a sentence imposed within the statutory limits will not be disturbed on appeal in the absence of an abuse of discretion by the trial court. *State v. Hall, ante* p. 169, 465 N.W.2d 150 (1991).

On examination of the record and the presentence report, we do not discern an abuse of discretion. The judgment and sentence are affirmed.

AFFIRMED.

ELLIS W. JACOBS, APPELLEE, V. CONSOLIDATED TELEPHONE COMPANY, DEFENDANT AND THIRD-PARTY PLAINTIFF, APPELLANT, AND STATE OF NEBRASKA, SECOND INJURY FUND, THIRD-PARTY DEFENDANT, APPELLEE.

467 N.W.2d 864

Filed April 5, 1991. No. 90-410.

1. **Workers' Compensation: Appeal and Error.** Factual findings made by the Workers' Compensation Court have the same force and effect as a jury verdict and will not be set aside unless clearly erroneous.
2. **Workers' Compensation: Proof.** A workers' compensation claimant must prove by a preponderance of the evidence that his claimed disability was caused by an accident arising out of and in the course of his employment.
3. **Workers' Compensation.** A trip which has both business and pleasure purposes is within the course and scope of employment for workers' compensation law purposes when the work of the employee either creates the necessity for travel or is a concurrent cause of the trip.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Walter E. Zink II, of Baylor, Evnen, Curtiss, Grimit & Witt, for appellant.

Roger G. Steele, of Luebs, Beltzer, Leininger, Smith & Busick, for appellee Jacobs.

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

GRANT, J.

Consolidated Telephone Company (Consolidated) appeals from an award by the Nebraska Workers' Compensation Court on rehearing in favor of plaintiff, Ellis W. Jacobs, for injuries he received in an automobile accident. The single error Consolidated assigns is that the workers' compensation court erred on rehearing when it found that the plaintiff's injuries "were sustained in an accident occurring within the course and scope of the plaintiff's employment with the defendant." We affirm.

The record shows that plaintiff had been employed by Consolidated since 1962. Consolidated was engaged in the telephone communications business in the west central part of Nebraska. At the time of the accident in this case, plaintiff was employed as Consolidated's superintendent of construction and maintenance and was generally in charge of Consolidated's business in the area. He lived in Mullen, Nebraska. Sometime in early August 1988, plaintiff had several telephone conversations with Charles Fast, an officer of Consolidated, and with Clifford Thompson, secretary of Consolidated. Both men worked in Lincoln, Nebraska, where Consolidated's corporate offices were located. The conversations concerned the need for a business meeting between the parties to discuss several business matters, including plaintiff's pending retirement, personnel problems concerning the transfer of an employee working in plaintiff's area, the purchase of a new truck, and establishing a cellular phone system in Kansas. Plaintiff and Consolidated officers agreed that a meeting would be held at Consolidated's headquarters in Lincoln sometime over the 1988 Labor Day weekend.

On Thursday, September 1, 1988, plaintiff and his wife left their home in Mullen and traveled on Highway 2 to Grand Island, then on U.S. Highway 281 south to Interstate 80, and on the Interstate to their daughter's home in Lincoln. They arrived in Lincoln on Thursday evening, and plaintiff telephoned Clifford Thompson to arrange a specific time for the meeting.

By agreement, the meeting was scheduled for Monday morning, September 5, 1988.

The day after he arrived, plaintiff saw his doctor, pursuant to an appointment plaintiff made after he knew he was coming to Lincoln on business, went to the Bureau of Vital Statistics to obtain a copy of his wife's birth certificate, and went to the Social Security office. On Saturday, plaintiff went to the State Fairgrounds, and on Sunday, he attended a tractor pull at the Nebraska State Fair. The tickets to the tractor pull were given to plaintiff as a birthday gift from his daughter after she learned plaintiff planned to be in Lincoln on business. Clifford Thompson testified that plaintiff met with him at Thompson's home on Sunday and discussed business for approximately 2 hours.

On Monday, the previously scheduled business meeting took place at Consolidated's offices. Plaintiff, Clifford Thompson, and Gilbert Scott Thompson, president of Consolidated, were at the meeting. Charles Fast was in the offices during the meeting. Testimony showed that the group discussed possible incentives plaintiff could offer a Consolidated employee who was under plaintiff's direction to aid in the employee's move from one location to another; the fact that the company truck used for transporting a "cable [plow] was not adequate for, or safe for the job"; the installation of fiber-optic cable; and plaintiff's upcoming retirement. The meeting lasted from approximately 8 a.m. until 1 or 2 p.m.

Plaintiff and his wife left for the return trip to Mullen early Tuesday morning, September 6, 1988, retracing the same route that brought them to Lincoln. While passing through Grand Island, plaintiff was injured in an automobile accident.

Factual findings made by the workers' compensation court have the same force and effect as a jury verdict and will not be set aside on appeal unless clearly erroneous. *Way v. Hendricks Sodding & Landscaping, Inc.*, 236 Neb. 519, 462 N.W.2d 99 (1990).

A workers' compensation claimant must prove by a preponderance of the evidence that his claimed disability was caused by an accident arising out of and in the course of his employment. *Id.* Whether an activity arises out of and in the

course of employment is a factual determination and, as such, may not be reversed unless clearly wrong. *Reynolds v. School Dist. of Omaha*, 236 Neb. 508, 461 N.W.2d 758 (1990).

The workers' compensation court found that "while engaged in the duties of his employment [plaintiff] suffered injuries . . . as a result of an accident arising out of and in the course of his employment by the said defendant . . . ." Consolidated disagrees and contends that plaintiff was not within the course and scope of his employment when the accident happened, since plaintiff "would have traveled to Lincoln for personal reasons even if no work-related activities were intended . . . ." Brief for appellant at 4. The record does not support this contention.

Under the dual purpose rule, as set out in *Matter of Marks v. Gray*, 251 N.Y. 90, 167 N.E. 181 (1929), if an employee is injured in an accident while on a trip which serves both a business and a personal purpose, the injuries are compensable as arising out of the course and scope of employment provided the trip involves some service to be performed on the employer's behalf which would have occasioned the trip, even if it had not coincided with the personal journey. See 1 A. Larson, The Law of Workmen's Compensation § 18.00 (1990).

The definitive case on the dual purpose doctrine is *Matter of Marks v. Gray, supra*. In that case, Justice Cardozo, writing for the New York Court of Appeals, sets out what has become the test in a majority of jurisdictions for determining when a trip which has both business and pleasure purposes can reasonably be said to be "within the course and scope of employment" for workers' compensation law purposes. The test as set forth by Cardozo and most often quoted is this:

> If the work of the employee creates the necessity for travel, he is in the course of his employment, though he is serving at the same time some purpose of his own . . . . If, however, the work has had no part in creating the necessity for travel, if the journey would have gone forward though the business errand had been dropped, and would have been canceled upon failure of the private purpose though the business errand was undone, the travel is then personal, and personal the risk.

Id. at 93-94, 167 N.E. at 183.

The *Marks* test is essentially a commonsense test. If an employee has plans to travel to a certain location and his employer asks him to drop something off on the way, business has not occasioned the trip, because the employee was going that way anyway. If the employer asks his employee to travel to the Bahamas for a business conference and the employee then decides to make the trip a vacation as well, it is still business which occasioned the trip. See 1 A. Larson, *supra*, § 18.13.

The *Marks* test has been adopted by a majority of jurisdictions but has never been formally adopted in Nebraska. Nebraska cases involving a "dual purpose" issue have stated the test in terms of the "major factor" or "primary purpose" of the trip. This approach has been widely criticized in that it requires the compensation court to determine the relative weight of personal versus business errands to determine which is "dominant." See 1 A. Larson, *supra*, § 18.13. The rule as set out in *Matter of Marks, supra*, makes clear that we need not engage in a weighing of errands performed after arrival at the destination to determine whether a trip is in the course of employment. It is clear that the *Marks* opinion, read as a whole, places the focus on what occasioned the trip in the first place. We adopt the rule in *Marks* as the rule in Nebraska. Cardozo correctly states that the concern is whether the risks of travel are also the risks of employment, and in that light, "the decisive test must be whether it is the employment or something else that has sent the traveler forth upon the journey or brought exposure to its perils." *Matter of Marks, supra* at 93, 167 N.E. at 182.

Under *Marks*, what plaintiff did with his spare time is largely irrelevant if his work either created the necessity for travel or was a concurrent cause of the trip. Business need not have been the "major factor" in inducing this particular trip if the trip would have been made at some time to accomplish the business.

This is not to say that the court may disregard the events which occurred on arrival, since the relative insignificance of the business errand may be an indicator of whether it would have occasioned the trip. However, we need not weigh the various activities in which plaintiff was engaged after he arrived in Lincoln. The only relevance plaintiff's spare-time activities

might have had would be to show that the business errand was not sufficiently urgent in itself to motivate the trip and, hence, could not have "created the necessity" or been a concurrent cause of the trip because the business task could have been accomplished another way or need not have been accomplished at all. The trip is a business trip if the service to be performed for the employer required the journey to be made, even if it had not coincided with the employee's personal journey. See 1 A. Larson, The Law of Workmen's Compensation §§ 18.12 to 18.14 (1990).

The facts show that the trip to Lincoln in this case was predicated on business for Consolidated. It is clear from the record in this case that plaintiff's work "created the necessity for the trip" to Lincoln and that his personal activities while in Lincoln were, at most, a concurrent cause of the trip. The facts in the record show that plaintiff's employer asked him to come to Lincoln. There is no proof that plaintiff would have made the trip had it not been for the meeting, and there is clear evidence that had his personal business been canceled, plaintiff still would have made the trip to Lincoln for the business meeting, either on the same weekend or at some point in the near future. Clearly, the Consolidated executives managing the business required plaintiff's presence in Lincoln for business reasons.

The testimony of Clifford Thompson is most persuasive on this issue. Clifford Thompson testified that he "asked [plaintiff] to come to Lincoln, so that we could look at pictures, draw diagrams, interact personally rather than over the phone," and that he asked plaintiff "when he would be in [the] general vicinity so [they] could have some time to talk." He further stated that plaintiff "might have suggested the Labor Day or state fair time frame as a time that he could get off and could be available." Because Clifford Thompson "was going to be in the area" at this time, they decided to meet sometime over the Labor Day weekend. He further stated that this meeting would have to have occurred at some point. These facts indicate that plaintiff made the trip to Lincoln at the behest of his employer at a time that happened to be mutually convenient and that if the trip had not been made at this time, it would have

been made eventually.

Plaintiff's testimony bolsters the showing that work created the necessity for travel to Lincoln. He stated that he made the appointment with his doctor after he knew he was coming to Lincoln and that he received tickets to the state fair tractor pull from his daughter sometime after his birthday, August 19, because she "knew [he] was coming to Lincoln for a business meeting." Consolidated tries to make an issue out of the fact that plaintiff knew of these personal plans before he left home. Under *Matter of Marks v. Gray*, 251 N.Y. 90, 167 N.E. 181 (1929), this is irrelevant, since plaintiff's work created the necessity for travel, and none of his personal plans were made until after he knew he was to attend a business meeting at defendant's headquarters in Lincoln. Plaintiff further testified that he would not have traveled to Lincoln to do his personal errands over the Labor Day weekend had there not been a meeting scheduled. This indicates that at most, plaintiff's personal plans were a concurrent cause of the trip.

Finally, plaintiff traveled back toward Mullen using the same route on which he had come. While plaintiff did plan to stop in Grand Island with the intention of looking at trucks for his employer, as well as to run a personal errand, this cannot be characterized as a wide departure from the route whereon his employer's business was to be conducted. In fact, Clifford Thompson testified that plaintiff was to look several places for new equipment and that Grand Island was one of the sources.

It is clear from the record that although the Workers' Compensation Court on rehearing used the language of the "major factor" test, it used the reasoning of the *Marks* test and did not err in finding that plaintiff was within the course and scope of his employment at the time of the accident. Plaintiff is awarded the sum of $2,000 to be paid by Consolidated to apply toward the fee for the services of his attorney in this court.

AFFIRMED.

HEATHER C. YOPP, APPELLANT, V. LAWRENCE I. BATT, ATTORNEY AT LAW, JOHN DOE AND MARY DOE, REAL NAMES UNKNOWN, PERSONS IN POSSESSION OF BABY GIRL YOPP, APPELLEES.

467 N.W.2d 868

Filed April 5, 1991. No. 90-593.

1. **Parental Rights: Adoption.** In the case of a private adoption, a natural parent who relinquishes his or her rights to a child by a valid written instrument gives up all rights to the child at the time of the relinquishment.
2. **Parental Rights.** A valid relinquishment of a parent's rights to a child is irrevocable.
3. **Parental Rights: Adoption.** The natural parent retains only the right to commence an action seeking the return of the child and the right to be considered as a prospective parent if the best interests of the child so dictate. The natural parent's rights are no longer superior to those of the prospective adoptive family.
4. **Adoption: Child Custody.** The prospective adoptive family is obligated to take custody of the child, to care for it, to keep it in good physical and mental health, and to pursue adoption of the child.
5. **Adoption: Child Custody: Standing.** The prospective adoptive parents have standing to contest custody of the child if they so desire.
6. **Parental Rights: Adoption: Child Custody: Standing.** The relinquishing parent and the prospective adoptive parents stand on equal ground with respect to determining custody.
7. **Parental Rights: Adoption.** In the event the prospective adoptive family decides not to adopt the child, or the state or agency determines the prospective adoptive parents unsuitable, the natural parent shall have the right to seek the return of the child and be considered as a prospective parent.
8. **Parental Rights: Adoption: Child Custody.** When a conflict over custody of the child arises, the court shall take custody of the child and conduct a hearing to determine whether the best interests of the child require the child to remain with the prospective adoptive family or be returned to the natural parent.
9. **Adoption: Guardians Ad Litem.** The court shall appoint an attorney to represent the child in the best interests proceeding.
10. **Adoption: Child Custody.** Physical custody of the child may remain with the prospective adoptive family if the court finds the child's situation suitable.
11. **Parental Rights: Child Custody.** If the relinquishment of rights by the natural parent is found to be invalid for any reason, a best interests hearing shall be held to determine custody of the child. The court shall not simply return the child to the natural parent upon a finding that the relinquishment was not a valid instrument.
12. **Trial.** A trial judge has broad discretion over the conduct of a trial.
13. **Child Custody: Habeas Corpus: Appeal and Error.** A decision in a habeas corpus case involving the custody of a child is reviewed by this court de novo on the record.
14. **Parental Rights: Adoption: Proof.** The burden is on the natural parent

challenging the validity of the relinquishment to prove it was not voluntarily given.

15. **Parental Rights: Adoption.** In the absence of threats, coercion, fraud, or duress, a properly executed relinquishment of parental rights and consent to adoption signed by a natural parent knowingly, intelligently, and voluntarily is valid.

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

John H. Kellogg, Jr., for appellant.

Thomas F. Hoarty, Jr., of McGowan & Hoarty, for appellees Doe.

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

WHITE, J.

Heather C. Yopp appeals the order of the Douglas County District Court denying her application for a writ of habeas corpus filed February 6, 1990. By the writ, Yopp attempted to recover possession of a baby girl born to her on January 3, 1990, in Omaha, Nebraska. At the time of the birth, Yopp was 15 years old and unmarried. On January 5, she relinquished by written instrument all rights to the child, and the baby was turned over to John and Mary Doe, real names unknown, a married couple referred to Yopp's attorney, Lawrence I. Batt, by Yopp's physician. The child has not yet been formally adopted by the Does pending this action. At no time during this action have the paternal rights of the natural father been at issue.

Yopp, a resident of Council Bluffs, Iowa, discovered she was pregnant in July 1989. At the time, Yopp was residing with her mother, Connie Howat. Yopp did not tell her mother or father she was pregnant at that time, but disclosed her pregnancy to the natural father and to several girl friends. One of her friends informed Yopp's mother of the pregnancy. Yopp and her mother discussed Yopp's pregnancy, and Yopp expressed her intent to have an abortion. Howat did not discuss with Yopp any alternatives to abortion because Yopp said she wished to terminate the pregnancy. Howat made an appointment for Yopp at Womens Services, P.C., in Omaha on October 14, 1989,

where Yopp was examined by Dr. C.J. LaBenz. LaBenz informed Yopp that she was 6 1/2 months pregnant and that her pregnancy was too advanced for abortion. LaBenz discussed payment for his services at this meeting. He said that a welfare program for obstetrical services was available at the University of Nebraska Medical Center. Yopp declined to use those services. LaBenz also said that in the case of adoption, the adoptive family usually paid the medical bills of the relinquishing mother. LaBenz also stated that Yopp would be responsible for the medical expenses as they were incurred and that reimbursement from insurance or from the adoptive family would occur only after the birth. Yopp continued seeing LaBenz for prenatal care and returned for another appointment approximately 1 week later.

During this appointment, LaBenz questioned Yopp about what she intended to do with the baby. Yopp told LaBenz that she intended to give up the baby for adoption. Howat was present with Yopp during this discussion. LaBenz then briefly explained the difference between closed and open adoptions. Yopp testified that LaBenz also expressed his dissatisfaction with certain adoption agencies in the area, but he did not name these agencies.

LaBenz also questioned Yopp about her arrangements for putting the baby up for adoption. Yopp said that she had made no arrangements and that she did not have an attorney. LaBenz then gave Yopp Batt's name and told her he was an attorney that could help her with the adoption. LaBenz did not give Yopp the names of any other attorneys. LaBenz contacted Batt and informed him he had referred Yopp to Batt for a private adoption.

During another appointment in early December, LaBenz again questioned Yopp about her adoption plans, and she said she still intended to put the baby up for adoption, but had not contacted Batt or any other attorney. LaBenz encouraged her to make some arrangements quickly because the baby was due in less than a month.

Howat and Yopp finally met with Batt on December 13, 1989. Batt testified he understood that his meeting with Yopp was for the purpose of legal representation with regard to the

relinquishment of a child to be born to Yopp in the beginning of January. Yopp testified at trial that she was never absolutely sure she wanted to give up the baby for adoption, but she went to Batt to learn "how adoption worked." Batt had previously represented LaBenz; Dr. George William Orr, another physician at Womens Services; and Womens Services itself in various other legal matters. Yopp was unaware of this prior representation.

Upon arriving in Batt's office, Yopp was asked to fill out a lengthy questionnaire concerning her medical history and her intentions with regard to the baby. In response to a question on the form, Yopp wrote that she intended to give up the baby for adoption because she was too young to raise it. During the meeting with Yopp and her mother, Batt talked to Yopp about her options, those being whether to keep the baby or give up the baby for adoption. Yopp informed him that previously she had intended to have an abortion, but she now wanted to put the baby up for adoption. Batt questioned her about her future and stated that Yopp indicated that having a baby would not fit into her plans for completing school. Batt testified that during this portion of the meeting, Yopp's mother seemed very supportive and nothing led him to believe that Yopp did not want to relinquish the baby.

Batt then outlined the procedures involved in relinquishing a child. He told her that after she gave birth, he would come to the hospital and have her sign the relinquishment papers. He then discussed each document that he would be bringing to the hospital. Batt also discussed the prospective adoptive family with Yopp and her mother. Yopp indicated that she wanted "a good family for it." He then explained the difference between open and closed adoptions, and Yopp indicated that she wanted a totally closed adoption. Finally, Batt discussed payment of his fees. He stated that generally the adoptive parents paid the pregnancy-related medical expenses and the attorney fees. At the conclusion of the meeting, Batt requested that he speak to Yopp privately. During the private meeting, Batt inquired about the natural father of the child, Yopp's drug and alcohol history, and whether or not anyone was influencing Yopp to make the decision to relinquish. Batt testified that he was confident that

Yopp had arrived at her decision to relinquish independently and without influence from anyone else. This was Yopp's only meeting with Batt prior to the signing of the relinquishment papers.

On January 3, 1990, Yopp gave birth to a baby girl. Following the delivery, Yopp did not touch or hold the baby and stated that she did not want to take any pictures of the baby. Later that evening a nurse asked Yopp if she wanted to see the baby, and she declined. The following day, Yopp visited the baby in the nursery. On the morning of January 5, Yopp telephoned her mother at work and told her she wanted more information about the adoptive parents. Shortly after she finished speaking with her mother, Batt called Yopp at the hospital to set up a time for her to sign the relinquishment papers. Yopp told him she wanted to know more about the adoptive family. Batt asked her what she wanted to know, and she said she wanted to know what state they lived in and if she could have yearly pictures of the child. Yopp testified that she told Batt during the call that she had changed her mind and now wanted an open adoption, but Batt told her it was too late for that. Yopp did not ask for any other information besides the state of residence of the adoptive parents and the yearly pictures of the child.

Prior to Batt's arrival at the hospital, a social worker stopped by Yopp's hospital room and asked her if she wanted to discuss the relinquishment of her child. Yopp told the social worker that her family was supportive of her and that she did not want counseling. The social worker gave Yopp her business card and told Yopp to call anytime if she needed anyone to talk to.

That afternoon Batt and another attorney from his firm, Thomas Kenny, arrived at the hospital with the relinquishment papers. Kenny was to act as a witness at the signing. When they arrived, the baby was in the room with Yopp and her mother. After a nurse took the baby back to the nursery, Batt told Yopp that the adoptive parents lived in Nebraska and that they had agreed to send yearly pictures of the child to Yopp through Batt. Batt then asked Yopp if she was ready to sign the relinquishment papers, and she said yes. Batt had with him two copies and the original of several documents. He presented Yopp with a copy

of each of the documents, which he instructed her to read. Batt testified that Yopp appeared to be calm and in control of herself. Yopp finished reading the documents, and Batt asked her if she had any questions. She said no. Batt then proceeded to explain each document to her. Batt testified that he explained the consent and relinquishment form to Yopp paragraph by paragraph, and indicated to her that she would be giving up all her rights to the child. Yopp testified that she knew she was relinquishing all rights to the child at that time. The consent and relinquishment form contained blanks where the names of the adoptive parents would later be inserted by Batt. Batt testified that Yopp understood that the relinquishment form would not contain the names of the adoptive parents. He said that Yopp never asked him for the names of the adoptive parents prior to the relinquishment.

Batt then concluded his explanation of all the forms and asked Yopp if she was ready to proceed. She indicated she was. Batt then presented the original of each of the documents to her, and she signed the documents, including the consent and relinquishment containing the blanks. As she signed, Batt identified each document, but did not offer any further explanation of the documents. Batt testified that Yopp did not hesitate in signing any of the documents.

After Yopp signed, Batt asked her if she wished Kenny to witness the documents, and she said yes. Kenny then questioned Yopp regarding her motivation for the relinquishment. He testified that Yopp said she understood each document, was signing them freely and voluntarily, and wished to proceed with the relinquishment. Kenny then signed the documents. Batt then took the documents and asked Yopp again if she still wished to proceed. She again replied yes, and then Batt affixed his notary seal to each of the documents. In addition to the documents signed by Yopp, Batt also requested that Howat read and sign a document affirming the facts that Yopp was a minor and that Yopp was making the decision to relinquish of her own free will. Howat signed the document, and Batt and Kenny left the hospital. Yopp was not given copies of the documents at that time.

On the morning of January 6, Batt turned the baby over to

the Does. The Does were referred to Batt by LaBenz. The Does had previously been seen by Dr. Orr at Womens Services and had expressed their desire to adopt a baby. At the time of their meeting with Orr, the Does filled out a form containing information about their employment and medical history. This form was kept on file at Womens Services. After Yopp had her baby, LaBenz asked Dr. Orr if he knew of a prospective adoptive couple, and Orr mentioned the Does. LaBenz contacted the Does and told them there might be an available baby and told them to contact Batt. The Does then contacted Batt, and he informed them of the birth of Yopp's baby and that the baby was in good health. Batt also testified that he questioned Mary Doe about the Does' reasons for adopting, employment, income, religion, other children, and demographic background, and determined that they were a suitable couple for Yopp's child. Following the relinquishment, he delivered the baby to the Does and has not had possession of the child since that time. Batt testified that he never acted as the Does' attorney at any time during the relinquishment.

Yopp left the hospital on the evening of January 5. Yopp testified that on the morning of January 6, she told her mother that she felt she did the wrong thing and that her mother told her to think about it for awhile. The following Tuesday, Yopp indicated to her mother that she wanted the baby back. Yopp then decided to contact her father, who until this time had not been told of her pregnancy. On January 17, Yopp, Howat, and Yopp's father and stepmother met with Batt at his office and told him Yopp wanted the baby back. Batt told Yopp that he could not represent her in her action to have the baby returned because he would be called as a witness during the proceedings and it would be a conflict of interest. Yopp asked Batt for the names of the Does, and Batt refused to give her that information. Yopp also asked for copies of all the documents she signed, and Batt told her that he needed to delete the names of the Does from the documents and that he would have the papers ready for her in about a week. Following the meeting with Batt, Yopp hired another attorney, who also demanded information about the Does from Batt. When Batt refused again, Yopp initiated this action.

In her action for writ of habeas corpus, Yopp named Batt, as well as the Does, as a party because Batt was the only person known to her to have information regarding the identity and whereabouts of the Does. The district court issued a protective order prohibiting disclosure of the Does' identity during discovery. The Does were also permitted, under the protective order, to testify at the proceedings without revealing their identity or location. The trial court bifurcated the proceedings, trying the issue of the validity of the relinquishment first. The court determined that a "best interests of the child" hearing was only necessary if the relinquishment was found invalid. The court found that the relinquishment was a valid instrument entered into voluntarily, knowingly, and intelligently by Yopp. The court also found that the Interstate Compact on the Placement of Children was inapplicable to this case and denied the writ of habeas corpus. Yopp's motion for new trial was overruled. The court granted Yopp 15 days to ask for a hearing on the best interests issue, but Yopp failed to ask for the hearing within the time period. Yopp filed this appeal, and the district court denied her motion for a stay of adoption pending the decision of this court.

Yopp assigns as error the following: the district court's finding that the Interstate Compact on the Placement of Children, Neb. Rev. Stat. § 43-1101 (Reissue 1988), did not apply to this case; the court's disregard of Yopp's claim that Batt, Womens Services, and Dr. LaBenz violated Neb. Rev. Stat. § 43-701 (Reissue 1988) by assisting in the placement of a child in Nebraska without first obtaining a license; the court's finding that Yopp's relinquishment of her baby was knowing, intelligent, and voluntary; the court's disregard of evidence showing that Yopp was not presented with a copy of the nonconsent form for the biological parent as required by Neb. Rev. Stat. § 43-146.06 (Reissue 1988); the court's refusal to permit evidence of Batt's invocation of the fifth amendment during a deposition; and finally, the court's decision to bifurcate the proceedings and prevent evidence on the best interests issue during the hearing.

In this case, we are concerned with a relinquishment for the purposes of a private, closed adoption. The Legislature, as well

as this court, has long recognized a distinction between agency adoptions and private adoptions. In the agency adoption situation, the relinquishing parent surrenders all rights to the child in favor of the state or a licensed child placement agency. Neb. Rev. Stat. § 43-106.01 (Reissue 1988) mandates that when a child is relinquished by written instrument to the Department of Social Services or to a licensed child placement agency and the agency has, in writing, accepted full responsibility for the child, the relinquishing parent is relieved of all parental duty and all responsibility for the child and shall have no rights over the child. Under § 43-106.01, the rights of the relinquishing parent are terminated when the agency accepts responsibility for the child in writing. It is the agency that finds and investigates the prospective adoptive parents. If the adoptive parents are unsuitable or decline to go through with the adoption, the agency retains custody over the child until such time as the child is adopted by another family.

In contrast, in the private adoption situation the child is relinquished directly into the hands of the prospective adoptive parents without interference by the state or a private agency. In the case of a closed adoption, the relinquishing parent surrenders his or her rights to unknown parties. Neb. Rev. Stat. § 43-111 (Reissue 1988) provides that, except in the agency adoption situation, after an adoption decree has been entered, the natural parents of the adopted child shall be relieved of all parental duties and responsibilities for the child and shall have no rights over the child. Under § 43-111, the relinquishing parent's rights are not totally extinguished until the child has been formally adopted by the prospective parents. Neb. Rev. Stat. § 43-109 (Cum. Supp. 1990) requires that in order for the adoption of a child to take place, a hearing on the best interests of the child must be held, the child must have lived with the prospective adoptive family for the previous 6 months, the medical history of the biological parent or parents must be made a part of the court record, and there must be in the court record an affidavit from the relinquishing parent swearing that prior to the relinquishment a nonconsent form was presented and explained to the biological parent or parents. Since under Nebraska law an adoption cannot take place until at least 6

months after the relinquishment of the child, in the case of a private adoption the question of who retains the legal right to the child during this time is unclear.

This issue becomes particularly troublesome in the case where the relinquishing parent decides he or she wants the child returned. This court has dealt with the rights of the respective parties in both private adoption cases and agency adoption cases on numerous occasions.

In *Batt v. Nebraska Children's Home Society*, 185 Neb. 124, 174 N.W.2d 88 (1970), and in *Kane v. United Catholic Social Services*, 187 Neb. 467, 191 N.W.2d 824 (1971), the appellants sought to have the relinquishments of their children to the child placement agencies invalidated on the grounds that the relinquishments were obtained through fraud, duress, and coercion. This court applied the strict language of § 43-106.01 in holding that a relinquishment, if voluntary, is not revocable. The court then went on to find that both relinquishments were entered into freely and voluntarily and therefore were valid.

In 1980, we decided *Gray v. Maxwell*, 206 Neb. 385, 293 N.W.2d 90 (1980), a private adoption case. The appellant sought to regain custody of a child she relinquished to the prospective adoptive parents. The trial court held in favor of Gray, and the Does, the adoptive parents, assigned as error the trial court's finding that Gray's relinquishment was not valid and therefore revocable. The Does cited in support of this proposition *Batt v. Nebraska Children's Home Society, supra*, and *Kane v. United Catholic Social Services, supra*. This court found that the relinquishment was involuntary and that revocation of the relinquishment was effected within a matter of hours. We concluded that because the relinquishment was involuntary, *Kane* and *Batt* were not applicable. We also determined that the Legislature had expressed a different intent in § 43-111, the statute governing private adoptions. Under § 43-111, we interpreted a relinquishment in a private adoption to be "less final" than one made to a licensed child placement agency under § 43-106.01, but did not make any findings of law on this issue. We then determined that since the relinquishment was invalid, the adoptive parents had no standing to contest the custody of the child, but ordered the district court to hold a best

interests hearing to determine the fitness of the natural parent before returning the child to her.

In 1981, we decided two cases on the same day, dealing with both a private adoption and an agency adoption. In *Kellie v. Lutheran Family & Social Service*, 208 Neb. 767, 305 N.W.2d 874 (1981), we considered the validity of a relinquishment in an agency adoption case. The natural parents sought the return of their daughter from the adoption agency by writ of habeas corpus. The agency took custody of the child after the natural mother relinquished her rights, but did not sign a written acceptance of the relinquishment until after the mother revoked, in writing, her consent to relinquish. The district court found that the relinquishment was valid, but also that the mother had validly revoked the instrument prior to acceptance by Lutheran Family and Social Service. The district court then held a best interests hearing and determined that it was in the best interests of the child to remain with the adoptive family. This court reversed the district court and held that an executed revocation to a consent and relinquishment delivered to a child placement agency within a reasonable period of time after execution of the relinquishment, and before acceptance in writing by the agency of the responsibility for the child, is effective to invalidate the original relinquishment and consent. This court stated that basic principles of offer and acceptance require that result. The court held that since the relinquishment was no longer valid, the fitness of the natural or adoptive parents was no longer an issue. We then remanded the cause with instructions to the district court to return the child to the natural mother.

In *Lum v. Mattley*, 208 Neb. 789, 305 N.W.2d 878 (1981), we considered the validity of a relinquishment in a private adoption case. The appellant also sought the return of her child through writ of habeas corpus. The trial court found for the Mattleys. This court affirmed the trial court and determined that the relinquishment was valid. This court then shifted its attention to the best interests of the child issue. The court held that following a valid relinquishment of rights to a child, the petitioner must show that the best interests of the child require that the child be returned to her. The court stated that the

natural mother's parental rights were no longer an issue, and the natural mother and the adoptive family stood on equal ground with respect to determining custody. The petitioner must make an affirmative showing that the child's best interests require that custody be returned to the natural parent. This court then affirmed the decision of the trial court in determining that no such showing had been made.

This court again dealt with the private adoption issue, in *Auman v. Toomey*, 220 Neb. 70, 368 N.W.2d 459 (1985), and *Gaughan v. Gilliam*, 224 Neb. 836, 401 N.W.2d 687 (1987). In both cases we followed our reasoning in *Lum v. Mattley, supra*, in finding the appellant's relinquishment of her child valid. We determined that the appellants in both cases failed to sustain their burden of proving that the best interests of the children required that they be returned to the natural parents.

Our earlier cases, *Batt v. Nebraska Children's Home Society*, 185 Neb. 124, 174 N.W.2d 88 (1970), and *Kane v. United Catholic Social Services*, 187 Neb. 467, 191 N.W.2d 824 (1971), held that a valid relinquishment is irrevocable by the relinquishing parent, at least in the case of an agency adoption. In *Gray v. Maxwell*, 206 Neb. 385, 293 N.W.2d 90 (1980), a private adoption case, we held that the relinquishment was invalid, thereby eliminating the need to determine if it was or was not revocable by the relinquishing parent. In that case, we stated in dicta that the Legislature did not intend for a relinquishment in a private adoption case to be final until the adoption decree was entered. However, in *Gray*, we did not simply return the child to the relinquishing parent, but ordered the district court to hold a best interests hearing for the benefit of the child.

In *Kellie*, we allowed the relinquishing parent, in an agency adoption, to revoke the relinquishment within a reasonable period of time before the agency had, in writing, taken responsibility for the child. We determined that a best interests hearing was not necessary because, under contract law, the relinquishing parent had revoked prior to acceptance by the agency and thus retained all legal rights to the child. We did not, however, apply these same contract principles in the private adoption case. In *Lum*, *Auman*, and *Gaughan*, we determined

that the relinquishments were valid, and the only way the relinquishing parent could achieve the return of her child was to prove, in a best interests hearing, that the best interests of the child required that the child be returned to her.

The Legislature has seen fit to distinguish between agency and private adoption, but has not made explicit the rights of the parties in the private adoption case. In the case of private adoptions, we hold that a natural parent who relinquishes his or her rights to a child by a valid written instrument gives up all rights to the child at the time of the relinquishment. A valid relinquishment is irrevocable. The natural parent retains only the right to commence an action seeking the return of the child and the right to be considered as a prospective parent if the best interests of the child so dictate. The natural parent's rights are no longer superior to those of the prospective adoptive family. See *Lum v. Mattley, supra.*

The prospective adoptive family is obligated to take custody of the child, to care for the child, to keep the child in good physical and mental health, and to pursue adoption of the child. The prospective adoptive parents have standing to contest custody of the child if they so desire. The relinquishing parent and the prospective adoptive parents stand on equal ground with respect to determining custody. In the event the prospective adoptive family chooses not to adopt the child, or the state or agency determines the prospective adoptive parents unsuitable, the natural parent shall have the right to seek the return of the child and be considered as a prospective parent. When a conflict over custody of the child arises, the court shall take custody of the child and conduct a hearing to determine whether the best interests of the child require the child to remain with the prospective adoptive family or be returned to the natural parent. The court shall appoint an attorney to represent the child in the proceeding. Physical custody of the child may remain with the prospective adoptive family during the pendency of the proceedings if the court finds the child's situation suitable. Additionally, if the relinquishment of rights by the natural parent is found to be invalid for any reason, a best interests hearing shall also be held to determine custody of the child. The court shall not simply return the child to the

natural parent upon a finding that the relinquishment was not a valid instrument. By these rules, we have sought to keep the best interests of the child at the forefront of the inquiry. We now turn to the merits of Yopp's case.

Yopp first assigns as error the district court's finding that § 43-1101, the Interstate Compact on the Placement of Children, did not apply to this case. We agree with the district court. Yopp's child was born in Omaha, Nebraska. The adoptive parents, John and Mary Doe, reside in Nebraska. The child was never taken from Omaha to Council Bluffs, Iowa, the residence of Yopp. The fact that Yopp is a resident of Iowa is not determinative in this case. The statute does not mandate that the residence of the mother is considered the residence of the child. The child was never a resident of Iowa and was not placed across state lines. Section 43-1101 is not applicable.

Yopp next claims the district court erred in disregarding her claim that Batt, LaBenz, and Womens Services violated § 43-701 by assisting in the placement of a child for adoption without obtaining a license. We assume that Yopp wishes to vitiate the relinquishment of her rights to the child through use of § 43-701. Neb. Rev. Stat. § 43-709 (Reissue 1988) provides that violation of § 43-701 is a Class III misdemeanor. Nowhere in § 43-709 does it state that any relinquishment or subsequent adoption of a child will be invalid if the party placing the child for adoption is in violation of § 43-701. Yopp may not make use of § 43-701 to invalidate her relinquishment. Yopp's second assignment of error is without merit.

We now turn to Yopp's fourth, fifth, and sixth assignments of error, leaving the issue of whether her relinquishment was valid until last. Yopp claims, in her fourth assigned error, that the district court disregarded evidence that she was not presented with a copy of the nonconsent form as required by § 43-146.06.

By definition, a nonconsent form is a notice filed by the biological parent stating that at no time prior to his or her death may any information on the adopted person's original birth certificate or any other identifying information except medical history be released to the adopted person. See § 43-146.06. Section 43-146.06 permits the biological parent to file a

nonconsent form at any time prior to his or her death. Failure of the biological parent to sign the form operates as a notice of consent by the parent to release the adopted person's original birth certificate and identifying information.

Neb. Rev. Stat. § 43-106.02 (Reissue 1988) mandates that the relinquishing parent be given the option of signing the nonconsent prior to the final relinquishment. Section 43-109(1)(c) specifies that an adoption decree will not be entered unless the court record includes an affidavit signed by the biological parent stating that he or she was presented with and given an explanation of the nonconsent form. Section 43-109(1)(c) does not state that the relinquishment itself will be invalid.

The purpose of the nonconsent form is to conceal the identity of the biological parent if that parent wishes to remain anonymous. The intent behind the legislation enacting these statutes was to prevent adoptive children from locating their biological parents if those parents did not wish to be contacted, while still allowing the adopted child access to medical history information. See Health and Human Services Committee Hearing, L.B. 372, 90th Leg., 1st Sess. (Feb. 12, 1987).

Yopp attempts to use what she alleges as technical noncompliance with the adoption statutes to vitiate the relinquishment of her child and to have the baby returned to her. This is not the purpose of the statutes. The goal of the nonconsent form laws was to safeguard the identity of the biological parent while giving the adoptive child access to needed medical history. The Legislature intended that relinquishing parents be informed of their right to safeguard this information prior to the actual relinquishment. It also intended that the fact that the biological parent was so informed was to be made a part of the court record. However, it is doubtful that the Legislature intended to invalidate all parental relinquishments simply because the biological parent was not presented with the form at the time of the actual relinquishment, or did not physically retain a copy of the form after signing the relinquishment papers. Section 43-109(1)(c) declares that an *adoption* decree will not be entered unless the relinquishing parent has viewed the nonconsent form and

attests to that fact. In this case, Yopp *was* presented with a nonconsent form before she signed the consent and relinquishment. She now claims that because she was not given a copy of the form to take with her when she left the hospital, somehow her relinquishment is defective. Sections 43-106.02 and 43-109(1)(c) require only that the biological parent be *presented* with the form prior to signing the relinquishment. Certainly the form was presented to Yopp. She read it and signed it before signing the relinquishment. The fact that she did not take a copy with her when she left the hospital is inconsequential. Her claim is meritless.

In her fifth assignment of error Yopp claims that the district court erred by refusing to allow testimony concerning Batt's invocation of the fifth amendment during a deposition scheduled in this case. Although Yopp assigns this as error in her brief, she has not felt it necessary to elaborate further on her claim other than to simply list it among the assigned errors. Consequently, she has also failed to enlighten us as to the relevance of this evidence to her case.

Only relevant evidence is admissible. Neb. Rev. Stat. § 27-402 (Reissue 1989). Neb. Rev. Stat. § 27-401 (Reissue 1989) defines relevant evidence as evidence tending to make the existence of any fact of consequence to the action more or less probable than it would be without the evidence. Batt, in his deposition, refused to answer questions put to him by Yopp's counsel on the grounds that it might incriminate him because during the deposition Yopp's counsel accused Batt of violations of the interstate compact on the Placement of Children, which carries with it a criminal penalty. This habeas corpus action is civil in nature. The fact that Batt may or may not have been in violation of the interstate compact has absolutely no bearing on whether Yopp's relinquishment of her child was valid. We agree with the district court's determination that this evidence was irrelevant. Yopp's fifth assignment of error is without merit.

Yopp next claims that the district court erred in bifurcating the trial into the relinquishment issue and the best interests issue. She also claims the district court prevented her from offering any evidence on the best interests issue. Again, she has neglected to expand her argument on this point beyond simply

listing it as an assigned error.

It is undisputed that the trial judge has broad discretion over the general conduct of a trial. *Misle Chevrolet Co. v. Kometscher*, 225 Neb. 804, 408 N.W.2d 713 (1987); *Kenyon & Larsen v. Deyle*, 205 Neb. 209, 286 N.W.2d 759 (1980). In this case, the district court determined that the validity of the relinquishment was first at issue and thus bifurcated the proceedings. If the relinquishment was found valid, then Yopp must go on to prove that despite her relinquishment of her child, it would be in the best interests of the child to be returned to her. Since no evidence concerning the best interests of the baby was heard at the proceeding on Yopp's writ, the district court gave Yopp an extra 15 days to gather such evidence and request a best interests hearing. Yopp declined to exercise this option. She can hardly claim at this late date that the district court failed to *allow* her to present her evidence. Furthermore, it was certainly reasonable, if not more efficient, for the court to split the proceedings in two. This assignment of error is totally meritless.

Finally, we reach the crux of this case—Yopp's claim that the relinquishment of her child was invalid.

A decision in a habeas corpus case involving the custody of a child is reviewed by this court de novo on the record. *Gaughan v. Gilliam*, 224 Neb. 836, 401 N.W.2d 687 (1987); *Auman v. Toomey*, 220 Neb. 70, 368 N.W.2d 459 (1985).

The burden is on the natural parent challenging the validity of the relinquishment to prove that it was not voluntarily given. *Lum v. Mattley*, 208 Neb. 789, 305 N.W.2d 878 (1981); *Auman v. Toomey, supra*.

In the absence of threats, coercion, fraud, or duress, a properly executed relinquishment of parental rights and consent to adoption signed by a natural parent knowingly, intelligently, and voluntarily is valid. *Lum v. Mattley, supra*; *Auman v. Toomey, supra*.

Yopp lists numerous allegations in support of her contention that her consent was involuntary. Among them are claims that she was under physical and mental distress at the time of the signing, that she did not receive any counseling or information concerning alternatives to adoption, that she suffered from

lack of independent counsel because Batt had earlier represented LaBenz and Womens Services and also had contact with the adoptive family, that she was told by Batt it was too late for an open adoption and was denied information about the adoptive family, that her mother was induced somehow by the information that the adoptive family would pay the attorney fees and medical bills for Yopp, that she received false information about agency versus private adoptions, that she signed documents falsely stating that she had selected the adoptive family, and that she was improperly induced to sign by the adoptive parents' promise to provide her with yearly pictures.

We find Yopp's allegations unpersuasive. At the outset, Yopp evidenced her desire not to keep the child. She initially intended to have an abortion. When that became impossible due to her advanced stage of pregnancy, she expressed her desire to give up the baby for adoption. She told her mother, her physician, and her lawyer that she did not wish to keep the child. She never, at any time, told anyone that she was in doubt over her decision or that she was considering keeping the child. It was only *after* she relinquished all rights to her baby that she changed her mind. A change of attitude subsequent to signing a relinquishment is insufficient to invalidate the relinquishment. *Auman v. Toomey, supra*. See *Batt v. Nebraska Children's Home Society*, 185 Neb. 124, 174 N.W.2d 88 (1970).

Yopp spoke to her mother about the pregnancy on numerous occasions prior to the birth of the child. Yopp testified that her mother was very supportive and told her if she decided to keep the baby, they would "make it work." Prior to the actual relinquishment, Yopp also had the opportunity to discuss her situation with a social worker. She refused counseling, stating that her family had been very supportive. The record is replete with evidence from Yopp's mother; the social worker; the nurse assigned to Yopp while she was in the hospital; Batt; Batt's associate, Kenny; and Yopp's physician, LaBenz, supporting our conclusion that Yopp knew what she was doing, made her decision independently and without influence from any other party, and had intended to give up the baby all along. There is no evidence in the record that Yopp was coerced or pressured to

give up her child. The fact that the adoptive parents agreed to pay Yopp's medical bills and attorney fees does not itself establish coercion.

Yopp's claim that somehow Batt's advice or service to her was defective because of his prior relationships with LaBenz and Womens Services is not supported by any evidence of wrongdoing on his part. The mere fact that he was in contact with the Does does not establish anything to support Yopp's claims. In the case of a private, closed adoption such as this, contact between the attorneys and the various parties is necessary to effectuate transfer of the child. We find Yopp's allegations as outlined above unsupported by the record. Her relinquishment and consent to adoption of the child are valid. She has waived her right to a best interests hearing by failing to request the hearing within the 15 days given her by the district court. The judgment of the district court is affirmed.

AFFIRMED.

HASTINGS, C.J., concurs.

IN RE INTEREST OF A.H., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. N.H., APPELLANT.

467 N.W.2d 682

Filed April 5, 1991. No. 90-596.

1. **Parental Rights: Juvenile Courts.** A juvenile court has the discretionary power to prescribe a reasonable plan for parental rehabilitation to correct the conditions underlying the adjudication that a child is a juvenile within the Nebraska Juvenile Code.
2. **Parental Rights.** When a parent fails to make reasonable efforts to comply with a court-ordered rehabilitative plan, the parent's failure presents an independent reason justifying termination of parental rights.
3. **Parental Rights: Words and Phrases.** Within Neb. Rev. Stat. § 43-292(6) (Reissue 1988), "reasonable efforts, under the direction of the court" means efforts in relation to a court-ordered plan for parental rehabilitation, not an extrajudicial agreement between a parent and an administrative agency regarding the parent's lifestyle.
4. _____: _____. A rehabilitation plan, within the purview of Neb. Rev. Stat. § 43-292(6) (Reissue 1988), is a court-ordered plan, that is, a judicially fashioned

and determined plan, for parental rehabilitation.

5. **Parental Rights.** A plan for rehabilitation is not a prerequisite or condition precedent to termination of parental rights.
6. **Parental Rights: Rules of Evidence: Due Process: Proof.** While the Nebraska Evidence Rules, Neb. Rev. Stat. §§ 27-101 to 27-1103 (Reissue 1989), are not applicable in a dispositional hearing, including a hearing to terminate parental rights, the requirements of due process control a proceeding to terminate parental rights and the type of evidence which may be used by the State in an attempt to prove that parental rights should be terminated.
7. **Parental Rights: Evidence: Appeal and Error.** Because factual questions concerning a judgment or order terminating parental rights are tried by the Supreme Court de novo on the record, impermissible or improper evidence is not considered by the Supreme Court.

Appeal from the County Court for Merrick County: GARY F. HATFIELD, Judge. Affirmed.

Kathryn L. Mesner, of Mesner & Mesner, for appellant.

Dale M. Shotkoski, Merrick County Attorney, for appellee.

Steven M. Curry, of Sampson, Curry & Hummel, guardian ad litem.

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

SHANAHAN, J.

STANDARD OF REVIEW

"In an appeal from a judgment terminating parental rights, the Supreme Court tries factual questions de novo on the record, which requires the Supreme Court to reach a conclusion independent of the findings of the trial court, but, where evidence is in conflict, the Supreme Court considers and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts rather than another. [Citations omitted.] In the absence of any reasonable alternative and as the last resort to dispose of an action brought pursuant to the Nebraska Juvenile Code . . . termination of parental rights is permissible when the basis for such termination is proved by clear and convincing evidence. [Citations omitted.] A juvenile's best interests are one of the primary considerations in determining whether parental rights

should be terminated as authorized by the Nebraska Juvenile Code."

In re Interest of C.A., 235 Neb. 893, 894-95, 457 N.W.2d 822, 824 (1990). Accord, *In re Interest of J.L.M. et al.*, 234 Neb. 381, 451 N.W.2d 377 (1990); *In re Interest of T.C.*, 226 Neb. 116, 409 N.W.2d 607 (1987). See, also, Neb. Rev. Stat. § 25-2728(4) (Reissue 1989) (direct appeal to Supreme Court from a judgment of a county court sitting as a juvenile court).

ASSIGNMENTS OF ERROR

N.H. contends that the court erred (1) by improperly admitting documentary evidence regarding N.H.'s "lifestyle and parenting problems that took place in a different state as much as eight years prior to the birth of the juvenile named in this case," (2) by concluding that there was clear and convincing evidence of her parental unfitness as a basis to terminate her parental rights in her daughter, A.H., and (3) by determining that the termination of N.H.'s parental rights was in A.H.'s best interests.

PROCEEDINGS IN THE JUVENILE COURT

Adjudication Hearing.

In accordance with the Nebraska Juvenile Code, Neb. Rev. Stat. §§ 43-245 et seq. (Reissue 1988), the county court for Merrick County, sitting as a juvenile court on December 5, 1988, conducted an adjudication hearing attended by A.H.'s biological mother, N.H.; the mother's lawyer; the guardian ad litem for A.H.; and the county attorney of Merrick County. On that date, the court determined that A.H. was a juvenile within § 43-247(3)(a) (a child whose parent neglects or refuses to provide proper or necessary subsistence, education, or other care necessary for the health, morals, or well-being of such juvenile) and, subsequently, placed A.H. in the temporary custody of the Department of Social Services (DSS).

Rehabilitation Plans.

Although the record fails to disclose any court-ordered rehabilitation plan, from January 9 to September 22, 1989, N.H. and DSS entered into three separate written rehabilitation "agreements," whereby N.H. agreed, among other things, to

participate in a program of inpatient treatment for drug and alcohol abuse, find employment and housing, live without roommates unless approved by DSS, and visit A.H. DSS agreed to assist N.H. and monitor her progress toward the goal of reuniting the mother and child.

Petition to Terminate Parental Rights.

After interim review hearings concerning the relationship between A.H. and her mother, the county attorney, on February 14, 1990, petitioned for termination of N.H.'s parental rights in A.H. and alleged that N.H. substantially and repeatedly neglected the child, refused to supply necessary parental care and protection for the child, habitually consumed liquor, and pursued a life which was seriously detrimental to A.H.'s health and well-being. See § 43-292(4). Also, the county attorney alleged that "reasonable efforts, under the direction of the court, have failed to correct the conditions leading to the determination" that A.H. was a child within the jurisdiction of a juvenile court under the Nebraska Juvenile Code. See § 43-292(6).

Basis for Termination of Parental Rights.

As mentioned above under the heading "Rehabilitation Plans," there were agreements between N.H. and DSS concerning the manner in which N.H. would conduct her life. Under § 43-292(6), a ground to terminate parental rights exists when "reasonable efforts, under the direction of the court, have failed to correct the conditions leading to the determination" and adjudication that a child is a juvenile under the Nebraska Juvenile Code and, therefore, is within the jurisdiction of a juvenile court. The record reflects no court order containing a plan for N.H.'s rehabilitation. As we very specifically and clearly stated in reference to § 43-292(6) as a basis to terminate parental rights: "A juvenile court has the discretionary power to prescribe a reasonable plan for parental rehabilitation to correct the conditions underlying the adjudication that a child is a juvenile within the Nebraska Juvenile Code." *In re Interest of L.H.*, 227 Neb. 857, 863, 420 N.W.2d 318, 321 (1988). Accord, *In re Interest of J.L.M. et al.*, 234 Neb. 381, 451 N.W.2d 377 (1990); *In re Interest of T.C.*, 226

Neb. 116, 409 N.W.2d 607 (1987). Also, in express reference to § 43-292(6), we have recognized that "when a parent fails to make reasonable efforts to comply with a court-ordered rehabilitative plan, the parent's failure presents an independent reason justifying termination of parental rights." *In re Interest of J.S., A.C., and C.S.*, 227 Neb. 251, 266, 417 N.W.2d 147, 158 (1987). Accord, *In re Interest of J.L.M. et al., supra*; *In re Interest of L.H., supra*. Consequently, within § 43-292(6), "reasonable efforts, under the direction of the court" means efforts in relation to a court-ordered plan for parental rehabilitation, not an extrajudicial agreement between a parent and an administrative agency regarding the parent's lifestyle. Presently, we need not elaborate on legal implications and problems inherent in leaving rehabilitation plans to the dictates of an administrative agency rather than the judicial direction contemplated by § 43-292(6). Inasmuch as it is unclear that the trial court in N.H.'s case utilized parental noncompliance with the N.H.-DSS agreements as a basis to terminate N.H.'s parental rights, we do not consider those extrajudicial agreements in our de novo review for disposition of N.H.'s appeal. However, we again emphasize through repetition: A rehabilitation plan, within the purview of § 43-292(6), is a court-ordered plan, that is, a judicially fashioned and determined plan, for parental rehabilitation. Also, in *In re Interest of J.S., A.C., and C.S., supra*, we prescribed a procedure, including an evidential hearing, precedent to a plan for parental rehabilitation and then pointed out the necessity for careful thought reflected in a rehabilitation plan in view of the serious consequences from a parent's willful noncompliance with the plan. "Serious consequences" is an understatement, since noncompliance with a rehabilitation plan may lead to termination of parental rights in a child. We encourage courts and counsel to review *In re Interest of J.S., A.C., and C.S.* regarding plans for parental rehabilitation. Implicit in the foregoing is the assumption that *In re Interest of J.S., A.C., and C.S.* has previously been viewed, which we hope is not an unjustified assumption.

Nevertheless, a plan for rehabilitation is not a prerequisite or condition precedent to termination of parental rights. *In re*

Interest of M.B., R.P., and J.P., 222 Neb. 757, 386 N.W.2d 877 (1986); *In re Interest of M. W.M.*, 221 Neb. 829, 381 N.W.2d 134 (1986).

In April 1990, at a hearing attended by all interested parties, their counsel, the guardian ad litem, and a DSS representative, the court received information concerning the State's petition to terminate N.H.'s parental rights in A.H.

At that hearing and over N.H.'s objections (relevancy, hearsay, and denial of cross-examination), the State introduced written reports from the Illinois Department of Children and Family Services on the investigation of N.H.'s lifestyle in Illinois from 1972 to the early 1980's and also introduced files from an Illinois court regarding N.H.'s involvement in events which occurred years before A.H.'s birth.

In *In re Interest of J.S., A.C., and C.S., supra* at 262-63, 417 N.W.2d at 155, we stated: "Regarding adduction of evidence at a dispositional hearing, we have consistently held that the Nebraska Evidence Rules do not apply at a dispositional hearing, including an action to terminate parental rights, under the Nebraska Juvenile Code." However, in *In re Interest of J.S., A.C., and C.S.*, this court recognized and considered constitutional aspects of evidence in a hearing to terminate parental rights and concluded:

> [W]hile the Nebraska Evidence Rules, §§ 27-101 to 27-1103, are not applicable in a dispositional hearing, including a hearing to terminate parental rights, the requirements of due process control a proceeding to terminate parental rights and the type of evidence which may be used by the State in an attempt to prove that parental rights should be terminated. See, Neb. Const. art. I, § 3; U.S. Const. amend. XIV.
>
> . . . .
>
> The trial court's consideration of improper evidence does not, by itself, require reversal of a judgment terminating parental rights under the Nebraska Juvenile Code. Because factual questions concerning a judgment or order terminating parental rights are tried by the Supreme Court de novo on the record, impermissible or improper evidence is not considered by the Supreme

> Court. [Citations omitted.] In an appeal from a judgment or order terminating parental rights, the Supreme Court, in a trial de novo on the record and disregarding impermissible or improper evidence, determines whether there is clear and convincing evidence to justify termination of parental rights under the Nebraska Juvenile Code.

In re Interest of J.S., A.C., and C.S., 227 Neb. 251, 265-66, 417 N.W.2d 147, 157 (1987). See, also, *In re Interest of J.L.M. et al.*, 234 Neb. 381, 451 N.W.2d 377 (1990).

Consequently, in deciding *In re Interest of J.S., A.C., and C.S., supra*, this court expressly refused to consider a DSS report, not because the report was hearsay, but because the report

> effectively eliminated P.L.'s right to cross-examination regarding the contents of the departmental written report, which included prejudicial information embodied in entries by unidentified persons and which covered events outside the personal knowledge of any witness at the termination hearing. In proceedings to terminate parental rights under the Nebraska Juvenile Code, a parent has the due process right to cross-examine an adverse witness.

227 Neb. at 265, 417 N.W.2d at 157.

Thus, while the trial court's reception of the documentary evidence in N.H.'s case is questionable, in our de novo review we disregard that documentary evidence which N.H. sought to exclude.

N.H. was 39 years old and unmarried at the time of the hearing to terminate her rights in A.H., who was born on May 25, 1988. A.H.'s biological father is not a party to the proceedings underlying this appeal. In July 1988, N.H., with her 15-year-old daughter, B.J.B., and A.H., moved into an apartment with two adult males. N.H. slept with one male, while B.J.B. slept with the other. Neither N.H. nor B.J.B. was employed; hence, the only income for the family was Social Security payments. N.H. used most of the Social Security payments to buy clothes, shoes, and tapes for her two male roommates and to frequently patronize bars. Since N.H. seldom took care of A.H., the child's care was almost

exclusively provided by B.J.B. Virtually every night, N.H. took B.J.B. and 2-month-old A.H. to bars, where N.H. remained until she concluded a night of drinking.

In late July 1988, N.H. went to the Hall County jail to visit an inmate and left A.H. unattended in an automobile parked near the jail. One evening in August 1988, N.H. and one of her boyfriends became intoxicated during a night out and returned to the apartment where A.H. and B.J.B. were staying. According to B.J.B., N.H.'s boyfriend

> got really drunk and I was tryin' to carry him into the house and my mom was laughin', thinkin' it was real funny. He was sittin' there throwin' up and then I finally got him into the house, but not really into the house and he fell and hit his head. I told my mom I was gonna get my sister and take her over to grandma's just for the night . . . [b]ecause I was gettin' sick of my mom getting drunk and always leaving me with my sister, because my sister was not my responsibility. . . . [N.H.] got mad. I went to get [A.H.'s baby] bottles and take them out to the car and [N.H.] locked the door on me so I couldn't get [A.H.] out.

As the result of the preceding episode, B.J.B. went to her grandmother's house, gathered several family members, and returned to retrieve A.H. B.J.B. and several members of her family awakened A.H. and took A.H. to her grandmother's house.

N.H. testified that she had been involved in prostitution, had played alcoholic drinking games with B.J.B., and, on one occasion, had sexual relations with a man in the presence of several people, including B.J.B. Further detail of N.H.'s sexual conduct serves no useful purpose. Although N.H. spent a brief time in treatment for alcohol abuse, she never completed any program to eliminate or lessen her dependency on alcohol and lost employment as a result of her alcoholism.

At the conclusion of the hearing, the court determined that the State, by clear and convincing evidence, had established that N.H. failed in her parental obligations to A.H. as the result of "a general serious lack of responsibility, failure to nurture, alcohol addiction, and sexual habits and proclivities that endanger [A.H.]" Additionally, the court found no indication

that N.H.'s parental problems toward A.H. "will be resolved within a reasonable time in the future." After finding that termination of N.H.'s parental rights in A.H. was in the best interests of the child, the court, pursuant to § 43-292, terminated N.H.'s parental rights in A.H.

TERMINATION OF N.H.'S PARENTAL RIGHTS

Among the bases for termination of parental rights, § 43-292 includes: "(4) The parents are unfit by reason of debauchery, habitual use of intoxicating liquor or narcotic drugs, or repeated lewd and lascivious behavior, which conduct is found by the court to be seriously detrimental to the health, morals, or well-being of the juvenile."

N.H. claims that the State has failed to establish a factually sufficient basis to terminate her parental rights in A.H. N.H. argues that the "State's allegations regarding debauchery and lewd and lascivious behavior were the apparent result of isolated instances in which Appellant exhibited inappropriate sexual behaviors." Brief for appellant at 25. However, the evidence establishes that N.H.'s detrimental activities occurred weekly, if not daily, over an extended period. After a thorough de novo review of the record, we find that the record clearly and convincingly demonstrates that N.H.'s conduct is seriously detrimental to A.H.'s health and well-being, conduct which justifies termination of parental rights pursuant to § 43-292(4). What is painfully clear is the fact that N.H. placed on B.J.B. virtually all responsibility for taking care of A.H. so that N.H. could pursue and satisfy her personal pleasures. As manifested in the present case, adolescence exists for a few years, but immaturity may last a lifetime.

From our de novo review and based on clear and convincing evidence, we conclude, as did the trial court, that the best interests of A.H. require termination of N.H.'s parental rights in A.H. Accordingly, we affirm the trial court's judgment terminating N.H.'s parental rights in A.H.

AFFIRMED.

IN RE INTEREST OF L.P.B., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. T.B., APPELLANT.

467 N.W.2d 687

Filed April 5, 1991. No. 90-734.

1. **Parental Rights: Appeal and Error.** In an appeal from a judgment terminating parental rights, the Supreme Court tries the factual issues de novo on the record and reaches a conclusion independent of the findings of the trial court. However, where the evidence is in conflict, the Supreme Court considers and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts rather than another.
2. **Parental Rights: Proof.** In the absence of any reasonable alternative and as the last resort to dispose of an action brought pursuant to the Nebraska Juvenile Code, termination of parental rights must be by clear and convincing evidence.
3. **Parental Rights.** A juvenile's best interests are one of the primary considerations in determining whether parental rights should be terminated as authorized by the Nebraska Juvenile Code.

Appeal from the Separate Juvenile Court of Douglas County: JOSEPH W. MOYLAN, Judge. Affirmed.

Elizabeth C. Schrock for appellant.

Ronald L. Staskiewicz, Douglas County Attorney, and Terri J. Nutzman for appellee.

Karen L. Vervaecke, Assistant Douglas County Public Defender, guardian ad litem.

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

HASTINGS, C.J.

This is an appeal from the termination of the parental rights of T.B. in her child, L.P.B. Following a petition filed on October 11, 1988, the court found that the child was a child within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1988) (a child who is without proper support or who is abandoned). On July 16, 1990, a hearing was held on the termination of parental rights. The court found that the child was a child within the meaning of Neb. Rev. Stat. § 43-292(1) (Reissue 1988) (had been abandoned for 6 months or more) and terminated the parental rights.

The mother, on appeal, assigns as error that there was not

sufficient clear and convincing evidence to find the child to be within the meaning of § 43-292(1) and that the evidence did not support a finding that termination of the parental rights was in the best interests of the minor child. We affirm.

In an appeal from a judgment terminating parental rights, the Supreme Court tries the factual issues de novo on the record and reaches a conclusion independent of the findings of the trial court. However, where the evidence is in conflict, the Supreme Court considers and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts rather than another. *In re Interest of K.M.S.*, 236 Neb. 665, 463 N.W.2d 586 (1990). In the absence of any reasonable alternative and as the last resort to dispose of an action brought pursuant to the Nebraska Juvenile Code, termination of parental rights must be by clear and convincing evidence. *In re Interest of K.M.S., supra.* A juvenile's best interests are one of the primary considerations in determining whether parental rights should be terminated as authorized by the Nebraska Juvenile Code. *In re Interest of K.M.S., supra.*

On September 29, 1988, M.B., the grandmother of the minor child, contacted the Omaha Police Division, requesting foster placement for the child. The mother had left the child with the grandmother on September 14 and had not returned for the child. The grandmother already was caring for the mother's two oldest children. The grandmother requested foster placement for the child because she was unable to care for her. The child was, pursuant to that request, removed from the grandmother's care.

The record painstakingly details the many attempts to aid the mother in discharging her parental responsibilities and in assuming the care of this child. These attempts failed to bear fruit.

The child was provided temporary care by the Nebraska Department of Social Services. Visitation rights were granted the mother, with little acceptance of these rights by her. The mother failed to abide by the reunification plan, which required her to establish reasonable visitation; receive a psychological evaluation; maintain adequate and stable employment; secure adequate, independent, and stable housing; attend and

participate in parenting classes; and notify the court of any change of residence, employment, or situation.

At the review hearing scheduled for September 19, 1989, the mother failed to appear, and her whereabouts were unknown. A report by a probation officer indicated that the mother had moved out of the grandmother's home in June 1989, when the mother's boyfriend was released from jail.

The grandmother testified that the mother had visited the child once between June 9, 1989, and December 27, 1989. She also testified that the mother did not provide any emotional, moral, or financial support during that period of time.

The petition alleging abandonment and seeking termination of parental rights was filed on December 27, 1989. The record fully supports a finding of abandonment. The evidence is clear and convincing as to that and that it is in the best interests of the minor child that the parental rights of her mother be terminated. The situation is hopeless.

The judgment of the separate juvenile court is affirmed.

AFFIRMED.

IN RE INTEREST OF L.B. AND S.B., CHILDREN UNDER 18 YEARS OF AGE.

STATE OF NEBRASKA, APPELLEE, V. T.B., APPELLANT.

467 N.W.2d 689

Filed April 5, 1991. No. 90-735.

Appeal from the Separate Juvenile Court of Douglas County: JOSEPH W. MOYLAN, Judge. Affirmed.

Elizabeth C. Schrock for appellant.

Ronald L. Staskiewicz, Douglas County Attorney, and Terri J. Nutzman for appellee.

Karen L. Vervaecke, Assistant Douglas County Public Defender, guardian ad litem.

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

HASTINGS, C.J.

This is an appeal from the termination of the parental rights of T.B. in her minor children, L.B. and S.B. The children involved, 12 and 8 years of age, are the older brother and sister of L.P.B., and this case is controlled by *In re Interest of L.P.B., ante* p. 806, 467 N.W.2d 687 (1991). We affirm.

Both of these children were born out of wedlock. The grandmother testified that she had taken care of L.B. all his life and that S.B. had been in her care since she was about 6 weeks old.

The record discloses that the same facts and, of course, the same law are applicable in this case as those in *In re Interest of L.P.B., supra*, and it will not be necessary to again set them out.

We do find from a de novo review of that record, however, that the evidence is clear and convincing that the mother had abandoned both of these children for a period in excess of 6 months prior to the filing of the petition for termination, and the evidence, further, is clear and convincing that the best interests of the children will be served by terminating the parental rights of T.B.

The judgment of the separate juvenile court is affirmed.

AFFIRMED.

PAUL A. HECKER, APPELLANT, V. THE RAVENNA BANK, A BANKING CORPORATION, ET AL., APPELLEES.
ARNOLD C. HECKER, APPELLANT, V. THE RAVENNA BANK, A BANKING CORPORATION, ET AL., APPELLEES.

468 N.W.2d 88

Filed April 12, 1991. Nos. 88-866, 88-867.

1. **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.
2. **Contracts: Consideration.** Sufficient and valid consideration is essential to an enforceable express contract.
3. **Actions: Breach of Contract: Consideration.** For a cause of action based on a breach of express contract, there must be an unconditional and absolute acceptance of a definite offer constituting an agreement supported by sufficient and valid consideration.
4. **Corporations: Liability: Debtors and Creditors.** Generally, a corporation's directors or officers are not liable to the corporation's creditors or third persons for corporate acts or debts, simply by reason of an official relation with the corporation.
5. **Corporations: Contracts: Liability.** As a general rule, concerning liability on a corporate contract, a corporation's directors or officers are in the same position as agents of private individuals and are not personally liable on a corporation's contract unless the corporate directors or officers purport to bind themselves, or have otherwise bound themselves, to performance of the contract.
6. **Banks and Banking: Negotiable Instruments: Words and Phrases.** A cashier's check is a bill of exchange drawn by a bank on itself; hence, issuance of a cashier's check constitutes acceptance by the issuing bank.
7. **Negotiable Instruments: Conversion.** A negotiable instrument can be the subject of conversion.
8. **Property: Conversion: Words and Phrases.** Conversion is the unauthorized and wrongful dominion over personal property owned by another, which is exerted as a denial of or inconsistent with the owner's rights in the property or is asserted in derogation, exclusion, or defiance of another's ownership or title in personal property.
9. **Uniform Commercial Code: Negotiable Instruments: Conversion.** Neb. U.C.C. § 3-419 (Reissue 1980) supplies examples of ways in which a negotiable instrument may be converted, and does not list the elements which constitute tortious conversion of a negotiable instrument.
10. _____: _____: _____. Neb. U.C.C. § 3-419 (Reissue 1980) does not displace the common-law action for conversion of a negotiable instrument, but coexists with Nebraska's common law.

11. **Corporations: Liability: Conversion.** A corporation's officer or agent is personally liable if the officer or agent causes a conversion of another's property, and it is no defense that such officer or agent converted the property while acting for the corporation.
12. **Uniform Commercial Code: Banks and Banking: Negotiable Instruments: Liability.** Neb. U.C.C. § 4-402 (Reissue 1980) provides that a payor bank is liable to its customer for damages proximately caused by the wrongful dishonor of an item.
13. **Uniform Commercial Code: Negotiable Instruments: Words and Phrases.** Generally, payees of a cashier's check are not "customers" under Neb. U.C.C. § 4-104(1)(e) (Reissue 1980).
14. **Banks and Banking: Negotiable Instruments: Words and Phrases.** Wrongful refusal to honor a cashier's check occurs when a payee of a cashier's check delivers or negotiates the check for payment, and the issuing bank refuses to honor the check.
15. **Actions: Parties: Joinder.** Causes of action involving different defendants cannot be joined unless each cause affects them all and they have a joint or common liability or interest.
16. **Actions: Parties: Joinder: Contracts.** Joint obligees must sue jointly in actions ex contractu.
17. **Motions to Strike: Pleadings.** A motion to strike a petition, pursuant to Neb. Rev. Stat. § 25-913 (Reissue 1989), is not a substitute for a demurrer under Neb. Rev. Stat. § 25-806 (Reissue 1989) or for a motion to strike or make more definite and certain as authorized by Neb. Rev. Stat. § 25-833 (Reissue 1989).
18. _____: _____. A motion to strike a petition, pursuant to Neb. Rev. Stat. § 25-913 (Reissue 1989), may be directed only to a petition filed in violation of a court's order or a rule of practice or procedure prescribed either by statute or by the court in which the petition is filed.

Appeals from the District Court for Buffalo County: DEWAYNE WOLF, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

John S. Mingus, of Mingus & Mingus, for appellants.

Wesley C. Mues, of Knapp, Mues, Beavers & Luther, for appellees.

HASTINGS, C.J., WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ., and COLWELL, D.J., Retired.

SHANAHAN, J.

In March 1986, Paul A. Hecker and Arnold C. Hecker commenced actions against The Ravenna Bank; Dale E. Pohlmann, the bank's president; and James H. Oliver, chairman of the bank's board of directors. The actions related,

first, to an oral agreement between Heckers and Ravenna Bank for credit and financing and, second, to a cashier's check payable to "Paul Hecker and Arnold Hecker and John Mingus." After a series of amended petitions, Heckers, in March 1988, each filed a "Fifth Amended Petition." When the district court for Buffalo County sustained demurrers to the amended petitions, Heckers elected to stand on their pleadings. The court dismissed Heckers' actions; hence, these appeals. We affirm in part, and in part reverse.

STANDARD OF REVIEW

" 'In reviewing an order sustaining a demurrer, the Supreme Court accepts the truth of facts well pled and the factual and legal inferences which may be reasonably deduced from such facts, but does not accept conclusions of the pleader.' " *Security Inv. Co. v. State*, 231 Neb. 536, 538, 437 N.W.2d 439, 442 (1989).

> 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.

Schuyler State Bank v. Cech, 228 Neb. 588, 593, 423 N.W.2d 464, 468 (1988). Accord *Parrett v. Platte Valley State Bank*, 236 Neb. 139, 459 N.W.2d 371 (1990).

THE HECKERS' LAST AMENDED PETITIONS

Factual Background.

According to Heckers, all activities and conduct in question occurred in response to Ravenna Bank's "policies concerning loans and business dealings" with Heckers. At all times in any transaction related to Heckers' lawsuits, Pohlmann and Oliver were acting in their official bank capacities and at the "Ravenna Bank's behest." Such "behesting" was alleged in each of the four "causes of action" contained in Heckers' fifth, and last, amended petitions, "causes of action" which will be designated and discussed after our review of facts which, under the particular standard of review, "are true as alleged [with] the

benefit of any reasonable inference from the facts alleged . . . ." *Schuyler State Bank v. Cech, supra* at 593, 423 N.W.2d at 468.

Heckers own a farm and livestock operation. In 1975, Ravenna Bank orally agreed to loan money or extend credit to Heckers for their operating expenses and advise them regarding financial matters pertinent to their business. Heckers agreed that Ravenna Bank would be their "sole lending institution" and that they would abide by the bank's determinations and business directives based on semiannual reviews of the Hecker operations.

During a semiannual review meeting in January 1982 and as a condition for further bank credit, Ravenna Bank required that Heckers' mother guarantee part of Heckers' debt to the bank. After Heckers supplied the guaranty, Ravenna Bank promised to "pay for" agricultural expenses subsequently incurred by Heckers, including their fertilizer, chemical, and fuel bills, but then reneged on that promise. On March 18, 1983, Ravenna Bank

> wrongfully convert[ed] a cashier's check # 25783 in the sum of $ 93,442.66, the maker thereof being the Ravenna Bank, Remitter, Mike Dobish, payees being Paul Hecker, Arnold Hecker and John Mingus, by stopping payment of said cashier's check and applying it to the outstanding loan of Arnold C. Hecker and Paul A. Hecker in lieu of honoring the payment of the same to the aforesaid designated payees thereon . . . .

Without Heckers' consent, proceeds from the cashier's check were applied on Heckers' debt to Ravenna Bank.

Causes of Action.

Heckers alleged four "causes of action." The first cause of action was based on a breach of the oral contract for an extension of credit or a bank loan to Heckers, the second was "wrongful conversion" of the cashier's check, the third was "wrongful dishonor" of the cashier's check under Neb. U.C.C. § 4-402 (Reissue 1980), and the fourth was "wrongful refusal" to honor the cashier's check. Heckers claimed several items of damage, but did not seek judgments for recovery of the proceeds from the cashier's check.

Appellees' Pleadings.

In response to demurrers directed to each "Fourth Amended Petition" of the Heckers, the court, on February 26, 1988, granted Heckers 20 days to file additional amended petitions. Within the 20 days, each of the Heckers filed a "Fifth Amended Petition." Pursuant to Neb. Rev. Stat. § 25-913 (Reissue 1989) (pleadings stricken), the appellees requested that the Heckers' fifth amended petitions, in their entirety, be stricken because those petitions were "filed in direct violation of this Court's order of February 26, 1988 . . . ." Also, the appellees demurred to Heckers' amended petitions and claimed, among other things, that Heckers improperly joined several causes of action and that their petitions failed to state facts sufficient to constitute a cause of action. See Neb. Rev. Stat. § 25-806(5) (Reissue 1989) (causes of action improperly joined) and § 25-806(6) (factual failure to state a cause of action).

Judgments.

The district court sustained the demurrers and motions to strike Heckers' fifth amended petitions in their entirety, but granted Heckers leave to amend their petitions. When Heckers declined to replead and stood on the allegations in their fifth amended petitions, the court dismissed Heckers' actions.

ASSIGNMENTS OF ERROR

Most of Heckers' assignments of error are repetitive or not discussed in their briefs. See, Neb. Ct. R. of Prac. 9D(1)d and g (rev. 1989); *Federal Land Bank of Omaha v. Victor*, 232 Neb. 351, 440 N.W.2d 667 (1989) (for appellate consideration, appellant must assign and argue errors claimed for reversal). Nevertheless, Heckers contend that the district court erred (1) in sustaining the demurrers and (2) in striking their entire amended petitions.

DISMISSAL OF THE AMENDED PETITIONS

The first question is whether Heckers stated facts sufficient to constitute a cause of action.

Breach of Oral Agreement to Extend Credit.

> " 'To establish an express contract, there must be shown what amounts to a definite proposal and an

> unconditional and absolute acceptance thereof. . . .
>
> " 'Further, in order that a binding contract may result from an offer and acceptance, it is essential that the minds of the parties meet at every point, and that nothing be left open for a future arrangement.' "

Professional Recruiters v. Oliver, 235 Neb. 508, 513, 456 N.W.2d 103, 107 (1990) (quoting from *Zimmerman v. Martindale*, 221 Neb. 344, 377 N.W.2d 94 (1985)).

Moreover, sufficient and valid consideration is essential to an enforceable express contract. *Blanchard v. White*, 217 Neb. 877, 351 N.W.2d 707 (1984). See, also, 17A Am. Jur. 2d *Contracts* § 117 (1991). In *Buckingham v. Wray*, 219 Neb. 807, 809, 366 N.W.2d 753, 756 (1985), we stated:

> [C]onsideration is sufficient to support a contract if there is any detriment to the promisee or benefit to the promisor. Generally, a court will not inquire into the adequacy of consideration for a contract, inasmuch as consideration based on value of property or performance of a promise is a matter of personal judgment by parties to a contract. Ordinarily, a contract will not be held invalid for inadequacy of consideration alone, unless inadequacy is so great as to furnish of itself evidence of fraud.

Thus, for a cause of action based on a breach of express contract, there must be an unconditional and absolute acceptance of a definite offer constituting an agreement supported by sufficient and valid consideration. Cf. *Garsick v. Dehner*, 145 Neb. 73, 79, 15 N.W.2d 235, 238 (1944):

> Speaking generally, mutuality of obligation is an essential element of every enforceable agreement. However, "Mutuality of contract consists in the obligation of each party to do, or to permit something to be done, in consideration for the act or promise of the other. . . . Mutuality is absent when one only of the contracting parties is bound to perform, and the rights of the parties exist at the option of one only."

Accord *De Los Santos v. Great Western Sugar Co.*, 217 Neb. 282, 348 N.W.2d 842 (1984).

Heckers alleged that Ravenna Bank offered to extend credit or make a loan to Heckers and provide them with financial

advice in exchange for Heckers' use of the bank as their sole source of credit. Heckers further alleged their compliance with all bank instructions and requests, such as the maternal guaranty, thereby satisfying a condition precedent to Ravenna Bank's obligation to extend credit or loan money to the Heckers. See *Frenzen v. Taylor*, 232 Neb. 41, 48, 439 N.W.2d 473, 478 (1989): "When a contractual duty is subject to the occurrence of a specific contingency or event as a condition, the condition must occur before a party is obligated to perform the contractual duty unless nonoccurrence is excused." See, also, Neb. Rev. Stat. § 25-836 (Reissue 1989) (pleading performance of conditions precedent). Heckers then alleged that Ravenna Bank refused to keep its promise to "pay for" Heckers' 1982 business expenses. Therefore, Heckers alleged facts sufficient to state a breach of contract cause of action against Ravenna Bank. Consequently, the district court's judgments, sustaining demurrers for failure to state a breach of contract cause of action against Ravenna Bank, are incorrect.

Generally, a corporation's directors or officers are not liable to the corporation's creditors or third persons for corporate acts or debts, simply by reason of an official relation with the corporation. See, *Hilzendager v. Skywarok*, 335 N.W.2d 768 (N.D. 1983); *A. B. Corporation v. Futrovsky*, 259 Md. 65, 267 A.2d 130 (1970); *Stratton v. West States Construction*, 21 Utah 2d 60, 440 P.2d 117 (1968); *Kiel v. Frank Shoe Mfg. Co.*, 245 Wis. 292, 14 N.W.2d 164 (1944).

As a general rule, concerning liability on a corporate contract, a corporation's directors or officers are in the same position as agents of private individuals and are not personally liable on a corporation's contract unless the corporate directors or officers purport to bind themselves, or have otherwise bound themselves, to performance of the contract. See, *Wyatt v. Union Mortg. Co.*, 24 Cal. 3d 773, 598 P.2d 45, 157 Cal. Rptr. 392 (1979); *Staffco, Inc. v. Maricopa Trading Co.*, 122 Ariz. 353, 595 P.2d 31 (1979); *A. B. Corporation v. Futrovsky, supra*; *Revere Press, Inc. v. Blumberg*, 431 Pa. 370, 246 A.2d 407 (1968). See, also, 18B Am. Jur. 2d *Corporations* § 1829 (1985). In *Edwin Bender & Sons v. Ericson Livestock Comm. Co.*, 228 Neb. 157, 164, 421 N.W.2d 766, 771 (1988), we said:

" ' "[W]here an obligation is that of a principal, a court cannot enforce the obligation against the agent as long as he is merely acting as agent.". . .' " See, also, *Savorelli v. Stone*, 168 Neb. 419, 428, 96 N.W.2d 222, 227 (1959): " 'Where one acting as the agent of a corporation makes a contract on its behalf, which is binding upon it, his acts in that behalf create no individual or personal liability against him.' " (Quoting from *Fremont Carriage Mfg. Co. v. Thomsen*, 65 Neb. 370, 91 N.W. 376 (1902).)

Heckers failed to allege facts, either as an express statement or as a basis for the inference, that Pohlmann and Oliver personally and in their individual capacities bound themselves to the credit or loan agreement involving Ravenna Bank. Consequently, Heckers failed to state a cause against Pohlmann and Oliver for breach of the credit or loan agreement in question. The district court correctly sustained the Pohlmann-Oliver demurrers to the breach of contract cause of action.

Conversion of the Cashier's Check.

A cashier's check is a bill of exchange drawn by a bank on itself; hence, issuance of a cashier's check constitutes acceptance by the issuing bank. See, *Thompson Poultry, Inc. v. First Nat. Bank of York*, 199 Neb. 8, 255 N.W.2d 856 (1977); *John Deere Co. v. Boelus State Bank*, 233 Neb. 818, 448 N.W.2d 163 (1989); 6 J. Reitman, H. Weisblatt, W. Schlichting, T. Rice & J. Cooper, Banking Law §§ 123.04 and 120.02 (1991) (hereinafter 6 Banking Law); 10 Am. Jur. 2d *Banks* § 544 (1963).

A cashier's check is a "negotiable instrument" in accord with Neb. U.C.C. § 3-104 (Reissue 1980). "A negotiable instrument can be the subject of conversion." *Bryant Heating v. United States Nat. Bank*, 216 Neb. 107, 113, 342 N.W.2d 191, 195 (1983). Accord *State v. Omaha Nat. Bank*, 59 Neb. 483, 81 N.W. 319 (1899). See, also, Neb. U.C.C. § 3-419 (Reissue 1980), which provides that

> [a]n instrument is converted when
>
> (a) a drawee to whom it is delivered for acceptance refuses to return it on demand; or

(b) any person to whom it is delivered for payment refuses on demand either to pay or to return it; or

(c) it is paid on a forged indorsement.

In Nebraska's common law, conversion "is the unauthorized and wrongful dominion over personal property owned by another, which is exerted as a denial of or inconsistent with the owner's rights in the property or is asserted in derogation, exclusion, or defiance of another's ownership or title in personal property." *Mason v. Schumacher*, 231 Neb. 929, 944, 439 N.W.2d 61, 71 (1989).

Section 3-419 supplies examples of ways in which a negotiable instrument may be converted, and does not list the elements which constitute tortious conversion of a negotiable instrument. *Fuscellaro v. Industrial Nat'l Corp.*, 117 R.I. 558, 368 A.2d 1227 (1977); *Yeager & Sullivan, Inc. v. Farmers Bank*, 162 Ind. App. 15, 317 N.E.2d 792, 797 (1974). See Neb. U.C.C. § 3-102 (Reissue 1980) ("instrument" means "negotiable instrument").

Neb. U.C.C. § 1-103 (Reissue 1980) states: "Unless displaced by the particular provisions of this act, the principles of law and equity . . . shall supplement its provisions." Therefore, § 3-419 does not displace the common-law action for conversion of a negotiable instrument, but coexists with Nebraska's common law. See *PWA Farms v. North Platte State Bank*, 220 Neb. 516, 371 N.W.2d 102 (1985). See, also, *Bryant Heating v. United States Nat. Bank, supra* (common-law principles simultaneously applied with § 3-419). Cf. *Brown v. United States Nat. Bank*, 220 Neb. 684, 371 N.W.2d 692 (1985) (material elements of common-law fraud must be established before any relief is available for "fraud" contemplated by Neb. U.C.C. § 5-114(2) (Reissue 1980), which does not specifically identify the elements of fraud).

The payee of a cashier's check is the rightful "owner" of the check, which is "property" that may be the subject of tortious conversion. See § 3-419, comment 2:

> A negotiable instrument is the property of the holder. It is a mercantile specialty which embodies rights against other parties, and a thing of value. This section adopts the generally recognized rule that a refusal to return it on

> demand is a conversion. The provision is not limited to drafts presented for acceptance, but extends to any instrument presented for payment, including a note presented to the maker. The action is not on the instrument, but in tort for its conversion.

See, also, 1 J. White & R. Summers, Uniform Commercial Code § 15-4 (3d ed. 1988).

Heckers alleged that Ravenna Bank refused Heckers' demand to pay the cashier's check on which Heckers were designated as payees, a refusal which resulted in Heckers' damages. Moreover, without Heckers' consent, Ravenna Bank applied the proceeds of the cashier's check on Heckers' indebtedness to the bank. An issuing bank's refusal on demand to pay a cashier's check is not only a distinct act of dominion wrongfully asserted over the payee's property in denial of or inconsistent with property rights of the payee, but is also specifically listed as a conversion defined in § 3-419(1)(b). Heckers alleged facts sufficient to constitute a cause of action for Ravenna Bank's conversion of the cashier's check. For that reason, the court improperly sustained Ravenna Bank's demurrers based on a failure to state a cause of action for conversion.

A corporation's officer or agent is personally liable if the officer or agent causes a conversion of another's property, and it is no defense that such officer or agent converted the property while acting for the corporation. See, *Lyon v. Bennington College Corp.*, 137 Vt. 135, 400 A.2d 1010 (1979); *Bush v. Hayes*, 286 Mich. 546, 282 N.W. 239 (1938); *Clark v. Groger*, 102 Wash. 188, 172 P. 1164 (1918). See, also, 18 Am. Jur. 2d *Conversion* § 73 (1985). Cf., *Morfeld v. Bernstrauch*, 216 Neb. 234, 239, 343 N.W.2d 880, 883 (1984) ("[a]n agent is personally liable to third persons for his own misfeasances and positive wrongs"); *Standard Grain Co. v. State Bank*, 106 Neb. 73, 182 N.W. 507 (1921).

Heckers alleged that Pohlmann and Oliver, although acting for Ravenna Bank, nonetheless refused to pay the cashier's check after Heckers had delivered the check to Ravenna Bank for payment and that Pohlmann and Oliver, after "stopping payment" on the check, applied the check proceeds on Heckers'

unpaid loan from the bank. Thus, Heckers alleged sufficient facts to constitute a cause of action against Pohlmann and Oliver for conversion of the cashier's check. Consequently, the court improperly sustained the Pohlmann-Oliver demurrers based on a failure to state a cause of action for conversion.

Wrongful Dishonor of the Cashier's Check.

Heckers' cause of action for "wrongful dishonor" is based on § 4-402, which provides that a "payor bank is liable to its customer for damages proximately caused by the wrongful dishonor of an item." A customer is statutorily defined as "any person having an account with a bank or for whom a bank has agreed to collect items and includes a bank carrying an account with another bank." Neb. U.C.C. § 4-104(1)(e) (Reissue 1980). A cashier's check is the primary obligation of an issuing bank, which, as drawer and drawee of the cashier's check, is the bank's own customer. See, *Maddox v. First Westroads Bank*, 199 Neb. 81, 256 N.W.2d 647 (1977); § 4-104(1)(e); 10 Am. Jur. 2d *Banks* § 544 (1963); 6 Banking Law § 133.10 (1991). Generally, payees of a cashier's check are not "customers" under § 4-104(1)(e). See *First Amer. Nat. Bank v. Commerce Union Bank,* 692 S.W.2d 642 (Tenn. App. 1985).

Heckers alleged only that they were payees of the cashier's check, but failed to allege that they had an account pertaining to the cashier's check, or that Ravenna Bank had agreed to collect items for Heckers. Thus, Heckers failed to allege that they were "customers" of Ravenna Bank within § 4-104(1)(e). Accordingly, Heckers failed to state facts sufficient to constitute a cause of action under § 4-402 against Ravenna Bank, Pohlmann, or Oliver. The demurrers to the "wrongful dishonor" cause of action were correctly sustained.

Wrongful Refusal to Honor the Cashier's Check.

Although a bank accepts a cashier's check by issuing it, such acceptance does not become operative until delivery or notification. Neb. U.C.C. § 3-410(1) (Reissue 1980). Wrongful refusal to honor a cashier's check occurs when a payee of a cashier's check delivers or negotiates the check for payment, and the issuing bank refuses to honor the check. See, *John Deere Co. v. Boelus State Bank*, 233 Neb. 818, 448 N.W.2d 163

(1989); *Thompson Poultry, Inc. v. First Nat. Bank of York*, 199 Neb. 8, 255 N.W.2d 856 (1977); Neb. U.C.C. § 1-201(14) (Reissue 1980) (" 'Delivery' with respect to instruments, documents of title, chattel paper or securities means voluntary transfer of possession"); Neb. U.C.C. § 3-202(1) (Reissue 1980) ("Negotiation is the transfer of an instrument in such form that the transferee becomes a holder. If the instrument is payable to order it is negotiated by delivery with any necessary indorsement; if payable to bearer it is negotiated by delivery").

From the facts alleged by Heckers, we draw the inference that the necessary endorsements appeared on the cashier's check which Heckers delivered to Ravenna Bank. Heckers then alleged that they were payees for the cashier's check and that Ravenna Bank, the issuing bank, refused to honor the check. Hence, Heckers stated sufficient facts to constitute a cause of action for Ravenna Bank's wrongful refusal to honor the cashier's check drawn on the bank. However, Heckers failed to allege that Pohlmann and Oliver bound themselves, individually and outside their official capacities with Ravenna Bank, to honor the cashier's check. For that reason, Heckers failed to state sufficient facts to constitute a cause of action against Pohlmann and Oliver for "wrongful refusal" to honor the cashier's check.

MISJOINDER OF CAUSES OF ACTION

Section 25-806 provides that the "defendant may demur to the petition only when it appears on its face . . . (5) that several causes of action are improperly joined . . . ." Neb. Rev. Stat. § 25-702 (Reissue 1989) provides that "[e]xcept for product liability actions, the causes of action so united must affect all the parties to the action, and not require different places of trial." In *Ravenna Bank v. Custom Unlimited*, 223 Neb. 540, 545, 391 N.W.2d 557, 561 (1986), we stated, " '[C]auses of action involving different defendants cannot be joined unless each cause affects them all and they have a joint or common liability or interest.' " Accord, *Fuchs v. Parsons Constr. Co.*, 166 Neb. 188, 88 N.W.2d 648 (1958); *Sickler v. City of Broken Bow*, 143 Neb. 542, 10 N.W.2d 462 (1943).

Heckers have misjoined some causes of action against

Ravenna Bank, Pohlmann, and Oliver because neither the cause of action for breach of the credit or loan agreement nor the cause of action for wrongful refusal to honor a cashier's check legally relates to Pohlmann and Oliver. The district court's judgments on the issue of a misjoinder of causes of action are correct.

DEFECT OF PARTIES

Section 25-806(4) provides that a "defendant may demur to the petition only when it appears on its face . . . (4) that there is a defect of parties, plaintiff or defendant . . . ." Neb. Rev. Stat. § 25-318 (Reissue 1989) states: "Of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants; but if the consent of one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason being stated in petition." This court stated that "parties jointly liable must be joined as defendants . . . and of course the same rule would apply as to plaintiffs. . . . [J]oint obligees must sue jointly in actions *ex contractu* . . . ." *Harker v. Burbank*, 68 Neb. 85, 89, 93 N.W. 949, 950 (1903).

Payees of the cashier's check were Paul Hecker, Arnold Hecker, and John Mingus. Heckers failed to join Mingus as a plaintiff or, in accord with § 25-318, as a defendant. Thus, Heckers' petitions contain a defect of parties regarding an action based on the jointly payable cashier's check. The district court's judgments regarding a defect of parties are correct.

MOTION TO STRIKE

Section 25-913 provides that "[m]otions to strike pleadings and papers from the files may be made with or without notice, as the court or judge shall direct." In *Ferson v. Armour & Co.*, 109 Neb. 648, 192 N.W. 125 (1923), the plaintiff filed a 400-page petition followed by three amended petitions over a 4-year period. This court characterized the *Ferson* pleading as

> inflammatory language, conclusions of fact and law, redundant allegations, unnecessary repetitions, scandal, private chat, personal episodes, evidence, criminal charges and other extraneous matters having no legitimate relation to the stating of a cause of action for damages. These flagrant violations of the rules of pleading stand out

> conspicuously on the face of the petition. . . .
>
> . . . .
>
> . . . Litigants and counsel alike are answerable to the court for violating established rules of procedure and orders made in regard to pleadings. Plaintiffs' fourth petition not only violated established rules, but it was filed in contempt of court. In a situation like this defendants are not limited to the statutory method of attacking the petition by motion to strike out improper matter or to make allegations more definite and certain. . . . It may be stricken from the files, if fatal defects extend to the pleading as a whole, or if plaintiffs in filing it ignored an order of the court. . . . [However, this power to strike pleadings and papers] should be sparingly exercised. Otherwise innocent suitors may suffer from the mistakes or the contumacy of attorneys whom the court itself has licensed to practice law.

Ferson, supra at 649, 651, 192 N.W. at 126-27.

The *Ferson* court declared that a trial court properly struck an entire petition as a violation of a court order and a rule of pleading, namely, a petition must contain "[a] statement of the facts constituting the cause of action, in ordinary and concise language, and without repetition." Comp. Stat. § 8608 (1922). See, also, Neb. Rev. Stat. § 25-804 (Reissue 1989).

In *Lewin v. Lewin*, 174 Neb. 596, 119 N.W.2d 96 (1962), this court held that a motion to strike a petition should be treated as a demurrer, and added that "[a] petition which shows on its face that a cause of action could not be stated by amendment appears to be [vulnerable to a motion to strike the pleading]." 174 Neb. at 602, 119 N.W.2d at 100. We now limit the preceding expression in *Lewin* and declare that a motion to strike a petition, pursuant to § 25-913, is not a substitute for a demurrer under § 25-806 or a motion to strike or make more definite and certain as authorized by Neb. Rev. Stat. § 25-833 (Reissue 1989). A motion to strike a petition, pursuant to § 25-913, may be directed only to a petition filed in violation of a court's order or a rule of practice or procedure prescribed either by statute or by the court in which the petition is filed.

In the present case, the appellees moved to strike Heckers'

fifth amended petitions as violations of the court orders, issued on February 26, 1988, which provided that Heckers were "hereby granted twenty (20) days from this date to file his Fifth Amended Petition or may stand on his Fourth Amended Petition . . . ." Heckers complied with the orders by filing their amended petitions within 20 days. Yet, the district court sustained the motions to strike. Although Heckers each filed five amended petitions over 2 years, we are not directed to any rule of practice or procedure, prescribed by statute or by rule of the district court, which prohibited Heckers' repetitive pleading. Therefore, Heckers' last amended petitions violated neither a court order nor a rule of practice or procedure. Thus, Hecker's fifth amended petitions were not subject to a motion to strike pursuant to § 25-913. Hence, the district court improperly struck Heckers' fifth amended petitions.

CONCLUSION

For the reasons expressed above, we affirm the district court's judgments sustaining Ravenna Bank's demurrers concerning misjoinder of the breach of contract actions against the bank with the breach of contract actions against Pohlmann and Oliver, sustaining the demurrers concerning a defect of parties for the conversion actions, sustaining the demurrers regarding misjoinder of the causes of action for breach of contract and "wrongful refusal" to honor the cashier's check, and sustaining the demurrers relative to a defect of parties regarding the "wrongful refusal" actions. Accordingly, we sustain the district court's dismissal of the "wrongful dishonor" actions against Ravenna Bank.

Further, we affirm the district court judgments sustaining the Pohlmann-Oliver demurrers pertaining to the breach of contract actions, the "wrongful dishonor" actions, and the "wrongful refusal" actions and, thus, affirm dismissal of those actions against Pohlmann and Oliver. Additionally, we affirm the district court's judgments sustaining the Pohlmann-Oliver demurrers regarding a defect of parties for the conversion action.

However, we reverse the district court's dismissal of Heckers' breach of contract actions against Ravenna Bank; the

conversion actions against the bank, Pohlmann, and Oliver; and the "wrongful refusal" against the bank; hence, we remand these particular causes, immediately aforementioned, for further proceedings. We do not decide the propriety of joining the specific causes of action mentioned in this paragraph because the issue, as far as we are able to glean from the record, was never presented to the district court.

Finally, we reverse the district court's judgments striking Heckers' fifth amended petitions in their entirety, that is, Heckers' "last amended petitions," which eventually may become actuality or simply be an expression of hope by this court.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

TUTTLE & ASSOCIATES, INC., APPELLANT, V. H. LEE GENDLER, TRUSTEE, ET AL., DEFENDANTS AND THIRD-PARTY PLAINTIFFS; CHADSEY ARCHITECTS, INC.; AND AMERACORP, INC., ET AL., THIRD-PARTY DEFENDANTS, APPELLEES.

467 N.W.2d 881

Filed April 12, 1991. No. 88-934.

1. **Summary Judgment: Appeal and Error.** In considering evidence on a motion for summary judgment, both this court and the trial court must determine whether there is any genuine issue as to any material fact, whether the ultimate inferences to be drawn from those facts are clear, and whether the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment.** Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record show that no genuine issue exists as to any material fact or as to the ultimate inferences that may be drawn from any material fact and that the moving party is entitled to judgment as a matter of law.
3. **Summary Judgment: Proof.** A party moving for summary judgment has the burden of showing that no genuine issue as to any material fact exists. Thereafter, the burden of producing contrary evidence shifts to the party opposing the motion.
4. **Summary Judgment: Real Estate: Vendor and Vendee: Liens: Foreclosure:**

Proof. A vendor of real estate is entitled to summary judgment in a construction lien foreclosure if the vendor shows that an essential element of the plaintiff's cause of action is nonexistent.

5. **Summary Judgment: Appeal and Error.** In appellate review of an order granting a summary judgment, the Supreme Court views the evidence in a light most favorable to the party against whom the judgment is granted.
6. **Contracts.** The construction of a written contract, if needed, is a question of law for the court.
7. **Agency: Words and Phrases.** An agency relationship is a fiduciary relationship, resulting from one entity's manifested consent that another entity may act on behalf and subject to the control of the entity manifesting such control and, further, resulting from the other entity's consent to so act.

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

Daniel W. Evans, of Domina, Gerrard, Copple & Stratton, P.C., for appellant.

Irving B. Epstein, of Gross & Welch, for appellees Gendler and trust.

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

FAHRNBRUCH, J.

Tuttle & Associates, Inc. (Tuttle), appeals a summary judgment wherein the district court for Douglas County dissolved a construction lien Tuttle had placed on real estate for its engineering services.

After finding there was no issue of material fact existing relative to an alleged agency relationship between the owner vendor of the real estate involved and the purchaser which had contracted for Tuttle's engineering services, the trial court entered summary judgment in favor of the owner vendor. A construction lien Tuttle had filed against the vendor's real estate was dissolved. We affirm.

In considering the evidence on a motion for summary judgment, both this court and the trial court must determine whether there is any genuine issue as to any material fact, whether the ultimate inferences to be drawn from those facts are clear, and whether the moving party is entitled to judgment as a matter of law. *R.A.S., Inc. v. Crowley*, 217 Neb. 811, 351

N.W.2d 414 (1984). See, also, *De Los Santos v. Great Western Sugar Co.*, 217 Neb. 282, 348 N.W.2d 842 (1984).

Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record show that no genuine issue exists as to any material fact or as to the ultimate inferences that may be drawn from any material fact and that the moving party is entitled to judgment as a matter of law. Neb. Rev. Stat. § 25-1332 (Reissue 1989); *Joseph Heiting & Sons v. Jacks Bean Co.*, 236 Neb. 765, 463 N.W.2d 817 (1990); *First Nat. Bank of Omaha v. Chadron Energy Corp.*, 236 Neb. 199, 459 N.W.2d 736 (1990).

A party moving for summary judgment has the burden of showing that no genuine issue as to any material fact exists. Thereafter, the burden of producing contrary evidence shifts to the party opposing the motion. *West Town Homeowners Assn. v. Schneider*, 231 Neb. 100, 435 N.W.2d 645 (1989). A vendor of real estate is entitled to summary judgment in a construction lien foreclosure if the vendor shows that an essential element of the plaintiff's cause of action is nonexistent. See *Bone International, Inc. v. Brooks*, 304 N.C. 371, 283 S.E.2d 518 (1981).

In appellate review of an order granting a summary judgment, the Supreme Court views the evidence in a light most favorable to the party against whom the judgment is granted. *Joseph Heiting & Sons, supra.*

In the light most favorable to Tuttle, the record reveals the following: H. Lee Gendler is the president of Marathon Realty Corporation, which is engaged in the business of buying and selling real estate. In 1974, Gendler and his brother, as individuals, bought 170 acres of land located in Douglas County, Nebraska. They subsequently sold an interest in this property to a group of investors and retained a one-third interest. Gendler became trustee of the property. In the late 1970's through the early 1980's, the investors subdivided and sold a majority of the acreage as single-family lots. By 1984 only five large individual lots remained, three of which were owned by the trust and all of which were suited and zoned for multifamily dwellings. Various negotiations for the sale of these lots were initiated in 1978. Written proposals were made and

plans drawn up, but no proposal was accepted until 1984.

On October 3, 1984, Gendler, as trustee, sold one lot and a portion of three others, comprising approximately 21 acres, to Ameracorp, Inc., a Texas corporation, by a land contract. The sale's closing was to be no later than April 3, 1985. The contract further provided:

> SECTION IV - CONDITIONS OF CLOSING:
>
> (A) Closing shall be subject to the approval of Purchaser of the following:
>
> . . . .
>
> 2. ZONING: Seller warrants and represents that the property is being zoned for multi-family residential development under which 20.1 units of the configuration intended to be built by Purchaser and disclosed to Seller on attached Schedule D can be built per acre, with total density to be not less than 424 units. Purchaser agrees to a reduced site plan with a minimum of 18 units per acre should city require lower density than the attached plat. Purchaser shall submit complete documentation for a planned unit development [PUD] no later than October 16, 1984. Purchaser shall simultaneously file Application with the City of Omaha for approval of planned unit development, and pursue with due diligence.

A PUD entails a legal description, a topographic map, a general site plan, and a utility site plan. It is essentially a "footprint" of the buildings and is required by the city of Omaha whenever multiple buildings are to be built on a single lot. The developer is required to build exactly as the plans indicate. One of the zoning changes involved was a change from R-7 to R-8 PUD. Both R-7 and R-8 are residential multidwelling zoning, but vary slightly as to setbacks and front yard requirements.

The rezoning and PUD applications were filed by Ameracorp on October 17, 1984. Ameracorp's earnest money had been received upon execution of the contract and in December 1984. On April 5, 1985, an addendum to the contract was executed, wherein the closing date was extended to August 3, 1985. For delaying the closing and for keeping the property

off the market, Ameracorp paid additional earnest money plus three monthly installments of $5,000. The addendum further provided that Ameracorp's failure to meet the new closing date would result in forfeiture of all funds it had paid to Gendler as trustee.

Although the closing date passed without Ameracorp acting, Ameracorp continued the monthly payments for September and October 1985. On October 14, Gendler notified Ameracorp that if it did not close by October 31, the contract would be canceled because of Ameracorp's failure to perform. The contract was subsequently terminated. Thereafter, Gendler, who regarded the PUD designation received by Ameracorp as an encumbrance, took steps in 1988 to have it removed. According to Gendler, the particular plan was not highly regarded because it was the same plan as another Ameracorp project which had been a poor market performer. The existence of the PUD represented a stumbling block to prospective buyers of the property.

From the early to mid-1980's, Ameracorp was building, in the process of building, or negotiating projects totaling 3,000 apartment units in seven states, including Nebraska. Chadsey Architects, Inc. (Chadsey), of Oklahoma, was the architect for all of Ameracorp's projects, including the project in question, known as Apple Creek of Omaha II, or Apple Creek Blondo (Blondo). Chadsey was employed and was to be paid by Ameracorp.

In late 1984, Chadsey, together with Al C. Young & Associates (Young), civil engineers, entered into a joint agreement with Ameracorp for architectural and engineering services for various multifamily projects. Between June 5 and August 31, 1985, pursuant to the agreement, Young's successor in interest, Tuttle, an Oklahoma corporation, performed boundary surveying, topographic surveying, and civil engineering design for the Blondo project. Based upon the Chadsey/Young-Ameracorp agreement fee schedule, Tuttle billed Ameracorp $42,522.04 for its services. Upon failing to receive any money for the Blondo project, Tuttle, on October 2, 1985, filed a construction lien against the Blondo property. Thereafter, Tuttle sued Ameracorp and its president, Steve

Holsey. Although Tuttle obtained judgments against Ameracorp and Holsey, it was unable to collect them because, in September 1986, Ameracorp filed a petition in bankruptcy and Holsey could not be located.

On September 28, 1987, Tuttle filed a petition in equity in the district court for Douglas County against Gendler, as trustee; the trust; and Chadsey to foreclose the construction lien, alleging, inter alia, that (1) Ameracorp was required to obtain a zoning designation change under the real estate contract; (2) Ameracorp, acting as agent for Gendler, requested Tuttle to perform engineering services which were subsequently ratified by Gendler; and (3) the real estate was improved and benefited through the provision of the engineering services. Chadsey disclaimed and disavowed any interest in the real estate. Depositions were taken of Gendler; Jeffrey Tuttle, owner of Tuttle & Associates; and Brent Baker, former vice president of Ameracorp.

On September 1, 1988, Gendler and the trust moved for summary judgment, which motion was granted on October 7. The district court dissolved the construction lien and dismissed Tuttle's petition. Tuttle timely appealed to this court.

Tuttle's three assignments of error combine to allege that the district court erred (1) in finding that the existence of an agency relationship between Ameracorp and Gendler was not a question of material fact and (2) in setting the amount of the supersedeas bond.

In support of its first assignment of error, Tuttle claims that Section IV of the Gendler-Ameracorp written contract contained a requirement imposed by Gendler upon Ameracorp to obtain a PUD zoning designation for the real estate sold by Gendler to Ameracorp. Tuttle maintains that "requirement" constituted Ameracorp as Gendler's agent to obtain engineering services in connection with the PUD zoning.

The Nebraska Construction Lien Act, Neb. Rev. Stat. §§ 52-125 et seq. (Reissue 1988), under which Tuttle's cause of action is premised, provides for the attachment and enforceability of a lien against real estate in favor of a person furnishing services or materials under a real estate improvement contract. § 52-126. A real estate improvement

contract includes an agreement to perform services such as the preparation of plans, surveys, and engineering plans for any change in the physical condition of the land whether or not used incident to producing a change in physical condition of the real estate. § 52-130(1)(f). Under the act, a "claimant" is a person having a right to a lien upon real estate and includes his or her successor in interest, and a "contracting owner" is a person who owns real estate and who, personally or through an agent, enters into a contract, express or implied, for the improvement of the real estate. § 52-127(1) and (3).

The construction of a written contract, if needed, is a question of law for the court. *International Harvester Credit Corp. v. Lech*, 231 Neb. 798, 438 N.W.2d 474 (1989). As applied to the facts of this case, an agency relationship is a fiduciary relationship, resulting from one entity's manifested consent that another entity may act on behalf and subject to the control of the entity manifesting such control and, further, resulting from the other entity's consent to so act. See *Dunn v. Hemberger*, 230 Neb. 171, 430 N.W.2d 516 (1988).

Contract Section IV(A)2 can be divided into four parts:

> ZONING: [1] Seller warrants and represents that the property is being zoned for multi-family residential development under which 20.1 units of the configuration intended to be built by Purchaser and disclosed to Seller on attached Schedule D can be built per acre, with total density to be not less than 424 units. [2] Purchaser agrees to a reduced site plan with a minimum of 18 units per acre should city require lower density than the attached plat. [3] Purchaser shall submit complete documentation for a planned unit development no later than October 16, 1984. Purchaser shall simultaneously file Application with the City of Omaha for approval of planned unit development, and [4] pursue with due diligence.

The first portion is for the benefit of Ameracorp. The condition precedent to closing is that the property will be zoned for Ameracorp's intended use and configuration. The second portion is for the benefit of both parties, wherein Ameracorp will still purchase the property even if the approved density drops to 18 units per acre, but will not be required to purchase

the property if the density drops below this level. The third portion appears to be merely an understanding between the parties that Ameracorp is responsible for the documentation. This appears appropriate, since a PUD is based on a particular configuration proposed by the developer. The fourth and final portion of the zoning provision is for the benefit of Gendler, who did not want to keep the property off the market for a long time because of the high interest in apartment real estate at that point in time. Nothing in this paragraph indicates that Gendler controlled the actions of Ameracorp or that Gendler consented to Ameracorp's acting on the trust's behalf. Ameracorp could have submitted to the city any initial design it wanted, and it could have provided any documentation in support of the design. Gendler was never shown the documentation, nor was he even aware that Tuttle existed prior to the present action.

Tuttle argues that the rezoning and PUD applications were required by Gendler, who would enjoy the benefit of fulfillment of the condition precedent and payment of the purchase price. The argument is specious. The requirement for rezoning was for the benefit of Ameracorp. If rezoning could not be obtained to the satisfaction of Ameracorp, Ameracorp was not required to complete the sale.

Under Section X(B) of the contract, the burden was placed upon Ameracorp to establish, within 90 days of the execution of the contract, that *the property was "suitable for multi-family residential development free of engineering, drainage, compaction or similar costs that may be unacceptable to Purchaser in purchaser's sole discretion"* and, under Section X(C), to obtain within 180 days from the execution of the contract, "*at Purchaser's expense, site plan approval, sewage and water tap-on permits and a building permit from appropriate governmental authorities or agencies.*" (Emphasis supplied.) Section X(E) provided: "After January 15, 1985, *unless the Purchaser has notified the Seller of his inability to satisfy*" the foregoing burdens together with other conditions precedent, Ameracorp "shall be deemed to have waived [its] rights under . . . Section X." (Emphasis supplied.)

The land contract was entered into on October 3, 1984. The engineering contract between Ameracorp and Chadsey/Young,

the contract under which Tuttle is claiming compensation, was entered into on December 17, 1984. It is true that in an addendum to the land contract of sale between Gendler and Ameracorp dated April 5, 1985, Ameracorp waived the conditions precedent in Section X of the land contract. However, by April 5, 1985, Ameracorp had already waived its *rights* under Section X because of Section X(E) of the land sale contract, which provided: "After January 15, 1985, unless the Purchaser has notified the Seller of his [purchaser's] inability to satisfy conditions precedent, Purchaser shall be deemed to have waived his rights under this Section X."

It is abundantly clear from both the written land contract of sale and the written addendum to the contract that Gendler never agreed to pay for any engineering services. Nor can the written land contract or the written addendum be read or interpreted to establish that Gendler appointed Ameracorp as the trust's agent to contract for engineering services. Because of the language in Section X(B) and (C), the only inference that can be drawn from the land contract is that the burden was upon Ameracorp to pay for any engineering fees for which it contracted and that in contracting for those services it was not acting on behalf of Gendler.

The Gendler-Ameracorp contract is similar to the contract in *Wilbur Smith & Associates, Inc. v. F & J, Inc.*, 34 Conn. Supp. 638, 382 A.2d 541 (1977), cited by Gendler, wherein the agreement between the vendor and purchaser provided that "all necessary plans and applications for the approval of group dwellings by the city plan commission, building permits and other site plan approvals were to be at the expense of the [purchaser]." *Id.* at 639, 382 A.2d at 542. The agreement was conditioned on the purchaser's receiving these approvals and permits. The plaintiff, an engineering firm, entered into a contract with purchaser to prepare subdivision plans and topographic surveys. It subsequently filed and perfected a mechanic's lien on the land owned by the vendor. The vendor had actual notice of the services rendered on behalf of the purchaser. The court held that mere knowledge on the part of the vendor that engineering work was being performed on the land did not amount to consent necessary to support a lien filed

under the Connecticut mechanic's lien law. The court also held that there was no evidence the vendor authorized the purchaser to incur any obligation at its expense, that the purchaser-engineer contract was never approved or consented to by the vendor, and that the purchaser was never the agent of the vendor.

The Gendler-Ameracorp contract factually differs from the contracts in cases relied upon by Tuttle. The contract between the vendor and purchaser in *Knudson v. Bland*, 253 Iowa 614, 113 N.W.2d 242 (1962), was more than a mere land sale contract. The vendor helped finance the development of the land for which the vendor was to receive a higher return than the original market value of the bare land. The contract was for the sale of 10 acres which had a fair value of $200 per acre; however, the total contract sales price was $25,000. Upon request of the purchaser, the vendor would deed an individual lot to the purchaser. When the purchaser had obtained outside financing, the purchaser would join in a warranty deed of conveyance back to the vendor. Title would remain with the vendor until the construction on the lot was completed. Money was paid by the purchaser to the vendor upon sale of the improved lot. Evidence was also adduced in *Knudson* that the vendor entered into a contract with a service supplier who had previously entered into a contract with the purchaser to grade and move earth on the tract of land in question. Under this vendor-service supplier contract, the vendor admitted to selling the land to the purchaser for development purposes and agreed to pay half of the service contract in the event the purchaser failed to pay. These facts combined sufficiently for the court to find that the vendor "required" the purchaser to improve the realty.

In *Sheehy v. Fulton*, 38 Neb. 691, 57 N.W. 395 (1894), this court similarly ruled on a land sale contract factually analogous to that in *Knudson*. We held that in order to subject the interest in property of a vendor to a mechanic's lien for improvements erected thereon by the purchaser, the executory contract for the sale of land with the purchaser must be of such character as to *require* the construction of the improvements and to constitute the purchaser as the vendor's agent in such construction. Under

the contract in *Sheehy*, the vendor contracted to sell a lot to the purchaser for $5 cash, with the remainder of the purchase price to be paid at a later date. The parties understood that a building was to be erected upon the unimproved lot and that the remainder of the purchase price was to be paid from the proceeds of a loan previously negotiated or which could be made upon security of the property, but which could not be consummated until excavations for the building were made and the foundations were in place. There was also evidence that the vendor had the purchaser change contractors. This was to speed up completion of the project to meet the date for the final payment of the purchase price. Finally, the evidence tended to show a supplier had refused to extend credit to the purchaser, that the vendor accompanied the purchaser to the supplier, and that the vendor signed a written agreement wherein he would protect the supplier on any material he furnished the purchaser. Calling this a "border line" case, this court found that, based on the above facts, a "distinct arrangement" existed between the vendor and purchaser such that it fell within the rule subjecting the vendor's property interest to the mechanics' liens.

This court, in *Guiou v. Ryckman*, 77 Neb. 833, 837, 110 N.W. 759, 760 (1906), held that "where the vendor and [purchaser] cooperate together in plans for the erection of improvements upon real estate covered by their agreement, the interest of the vendor, as well as that of the [purchaser], is bound for the payment of liens for labor and material which have been furnished for such improvements." Unlike the contract in the case at bar, the *Guiou* contract allowed the purchaser the right to enter the premises and begin construction of houses 30 days after signing of the contract, without making time of the essence for closing. Similar to the above cases, the vendor in *Guiou* also assisted in the financing under that contract. If the purchaser was unable to secure a loan sufficient to erect the houses, the vendor would take a second mortgage on both the houses and the lots.

In the case at bar, there is no evidence that Gendler controlled the actions of Ameracorp. Nor is there any evidence that Gendler assisted or participated in the financing of the sale,

participated in control of the land's improvements, or acted as surety for any purchaser-supplier contracts.

Before and after the contract was executed, Gendler did contact Ameracorp and its subcontractors concerning various subjects of construction. In July 1984, Gendler advised the Ameracorp representative that other developers were interested in the excavated dirt from the site. Gendler suggested that Ameracorp involve an architect early to determine how much dirt it could afford to have removed. In August of the same year, Gendler sent to Chadsey the administrative procedure for a PUD in Omaha and to Thompson, Dreessen & Dorner (Thompson), Ameracorp's engineers and land surveyors, a preliminary topographic map of the lots. In October, Gendler coordinated with Chadsey and Thompson the exact configuration of the property to be conveyed. In December, Gendler determined that an administrative lot split would be obtained to facilitate "a good clean title policy." All of these actions clearly demonstrate only that Gendler acted as any other seller by assisting in the closing of the sale. The information provided, much of which went to out-of-state entities, merely helped coordinate the process for Gendler's purchaser. There is no indication that Gendler even partially controlled the improvements or agreed to pay for any engineering fees.

The evidence in this case establishes there was no "distinct arrangement," as described in *Sheehy v. Fulton*, 38 Neb. 691, 57 N.W. 395 (1894), or "requirement," as in *Knudson v. Bland*, 253 Iowa 614, 113 N.W.2d 242 (1962). Tuttle does not argue that Gendler expressly consented to Ameracorp's acting on the trust's behalf or that Ameracorp consented to so act, the other essential elements of an agency relationship. On the latter point, there is evidence that Ameracorp did not consent. Baker, the former vice president of Ameracorp, testified that the zoning request was made for the benefit of Ameracorp and that Ameracorp would never act on behalf of the vendor in any case.

A review of Jeffrey Tuttle's testimony reflects that his opinion that an agency relationship existed between Gendler and Ameracorp was based upon the written contract of sale between those parties. As previously stated, the construction of

a written contract is a question of law for a court to decide. Mere conclusions, opinions, and beliefs are not sufficient to show that a genuine issue of fact exists.

Gendler's evidence negated the essential element of agency in Tuttle's cause of action. The record presents no genuine issue of material fact concerning the element of agency, and Gendler and the trust, as movants, are entitled to judgment as a matter of law. Tuttle's first assignment of error is without merit.

In Tuttle's second assignment of error, it claims that the court abused its discretion by setting the amount of the supersedeas bond in the amount of Tuttle's claimed lien of $42,522.04, rather than in the amount of the costs. Tuttle argues that it was prejudiced by the lower court's abuse of discretion in setting the amount of the bond because it was unable to file a bond in the amount of the lien. This court need only decide whether Tuttle was prejudiced if it was successful on the first assignment of error. Having determined that issue adversely to Tuttle, we find that the second assignment of error is without merit.

As the district court sustained Gendler and the trust's motion for summary judgment and this court now affirms the result, the dismissal of the construction lien was proper. See *Bulger v. McCourt*, 179 Neb. 316, 138 N.W.2d 18 (1965).

The district court's order of judgment is affirmed.

AFFIRMED.

EASTROADS, INC., A NEBRASKA CORPORATION, APPELLANT, V. CITY OF OMAHA AND VARNUM ARMSTRONG DEETER, INC., A MISSOURI CORPORATION, APPELLEES.

467 N.W.2d 888

Filed April 12, 1991. No. 88-1026.

1. **Summary Judgment.** Summary judgment is proper when the pleadings, affidavits, depositions, admissions, and stipulations show that there is no genuine issue as to any material fact or the ultimate inferences that may be drawn from any material fact and that, as a matter of law, the moving party is entitled to judgment.
2. **Summary Judgment: Proof.** After the movant has shown facts entitling the

movant to summary judgment as a matter of law, the opposing party has the burden of presenting evidence to show an issue of material fact which prevents a judgment as a matter of law.

3. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, the Supreme Court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
4. **Zoning: Standing.** Adjacent landowners do have standing to object to the rezoning of property; however, they do not have standing to object to an irregularity in the application itself without demonstrating any prejudice caused by the irregularity.
5. **Summary Judgment: Proof.** A party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law if the evidence presented for summary judgment remains uncontroverted.
6. **Summary Judgment: Motions for Continuance: Appeal and Error.** A continuance authorized by Neb. Rev. Stat. § 25-1335 (Reissue 1989) is within the discretion of the trial court, whose ruling will not be disturbed on appeal in the absence of an abuse of discretion.
7. **Trial: Appeal and Error.** A judicial abuse of discretion does not imply improper motive, bad faith, or intentional wrong by a judge, but requires the reasons or ruling of a trial judge to be clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result.
8. **Zoning.** The highest and best use of property is not a determinative factor in a rezoning challenge.

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

David R. Stickman and Mary E. Weber, of Stern, Swanson & Stickman, P.C., for appellant.

Charles K. Bunger, Assistant Omaha City Attorney, and Frank F. Pospishil and Sandra L. Maass, of Abrahams, Kaslow & Cassman, for appellees.

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

HASTINGS, C.J.

Plaintiff-appellant, Eastroads, Inc., filed a petition for declaratory judgment against the defendants-appellees, City of Omaha (City) and Varnum Armstrong Deeter, Inc. (Varnum), to declare a rezoning ordinance invalid, arbitrary, capricious, and illegal and to enjoin the defendants from recognizing the

ordinance and from commencing any construction on the property in question. The defendants filed a motion for summary judgment, alleging that there was no genuine issue as to any material fact and that defendants were entitled to judgment as a matter of law. The defendants' motion was granted, and Eastroads' petition was dismissed.

Eastroads appeals and assigns as error (1) the failure of the trial court to find that the ordinance enacted was arbitrary and unreasonable and contrary to law, (2) the granting of defendants' motion for summary judgment, (3) the denial of the motion of Eastroads for a continuance, and (4) the finding that Eastroads did not have standing.

Summary judgment is proper when the pleadings, affidavits, depositions, admissions, and stipulations show that there is no genuine issue as to any material fact or the ultimate inferences that may be drawn from any material fact and that, as a matter of law, the moving party is entitled to judgment. Neb. Rev. Stat. § 25-1332 (Reissue 1989); *Joseph Heiting & Sons v. Jacks Bean Co.*, 236 Neb. 765, 463 N.W.2d 817 (1990); *First Nat. Bank v. Chadron Energy Corp.*, 236 Neb. 199, 459 N.W.2d 736 (1990). After the movant has shown facts entitling the movant to summary judgment as a matter of law, the opposing party has the burden of presenting evidence to show an issue of material fact which prevents a judgment as a matter of law. *Wilson v. F & H Constr. Co.*, 229 Neb. 815, 428 N.W.2d 914 (1988). In reviewing a summary judgment, we view the evidence in a light most favorable to the party against whom the judgment is granted and give such party the benefit of all reasonable inferences deducible from the evidence. *Id.*

On December 30, 1987, Varnum filed an application with the Omaha Planning Department to rezone certain property located on the northwest corner of Interstate 80 and 13th Street in the City from urban family residential to community commercial, and for a special use permit. The application showed the property owner to be "Thirteenth Street Associates c/o Varnum Armstrong Deeter, Inc. General Partner," and was signed by Ralph W. Varnum.

The City was advised by letter from Varnum that the applicant either owned or was under contract for the purchase

of the affected property and that those agreements to purchase included the right to have the property rezoned. In addition, property owners were given notice of hearings before the Omaha Planning Board and the Omaha City Council as required by law, and they raised no objections.

On August 23, 1988, the rezoning was approved by the city council, and ordinance No. 31600 was adopted, effective September 7, 1988.

The petition of Eastroads for a declaratory judgment was filed on September 8, 1988. It alleges that the applicant was not the proper party to make application under the requirements of the Omaha Municipal Code, since it was neither the owner of the property nor the authorized agent of the owner at the time of the application; that Thirteenth Street Associates was a nonentity at the time of application and thus did not have the legal capacity to make application or enter into contracts; and that the proposed rezoning did not propose a use which is the highest and best use of the property.

Without filing an answer, defendants, on October 20, 1988, filed a motion for summary judgment, with supporting affidavits. Defendants noticed the motion for hearing for November 18, 1988. Eastroads filed a motion for continuance to permit discovery. The record discloses no ruling by the court on that motion for continuance, but obviously it was overruled or disregarded because hearing was had on November 18 on the motion for summary judgment. No objection to proceeding with this hearing was voiced by plaintiff.

By order dated December 7, 1988, the district court found that the motion for summary judgment should be sustained because there was no genuine issue of fact and the defendants were entitled to judgment as a matter of law. The court further found that the plaintiff had no standing to bring this particular action under the pleadings and evidence before the court and that the evidence showed the City had fully complied with the city ordinances with regard to rezoning of the subject property. Finally, the court entered judgment in favor of the defendants, dismissing the plaintiff's petition.

Plaintiff's first assignment of error concerns the claimed failure of Varnum to comply with the procedural requirements

of the Omaha code and the Nebraska statutes because the applicant was not the owner or the agent of the owners of all of the property at the time the application was filed. Furthermore, Eastroads argues that the applicant Thirteenth Street Associates was not an entity at the time the application was made.

Contained in the record in support of defendants' motion for summary judgment are the applications filed with the City showing Thirteenth Street Associates as the owner of the property, various letters from Varnum to the City assuring the planning department that "we" own or have under contract all of the land included in "our Zoning Application," an affidavit by Ralph Varnum as to certain property included in the application, which property is owned by Varnum, and affidavits from the remaining owners of the property included within the application to the effect that they had entered into a sales contract to sell their property to Thirteenth Street Associates, "a partnership to be formed with Varnum Armstrong Deeter, Inc., acting as the general partner therefor." Also included within the record is a portion of the Omaha city code.

In resistance to the motion were the affidavits of R. Gregory Swanson and David R. Stickman, attorneys for the plaintiff, and of Mort Sullivan, president of Eastroads. Swanson's affidavit alleges that he spoke with one of the persons who signed an affidavit regarding the contract of sale, and claims that she told him she did not remember giving anyone authority to submit the application for rezoning. Stickman asserts that after receiving notice of the hearing on the motion for summary judgment, he had insufficient time to prepare his resistance to the motion. He also claims to have a certificate from the county clerk of Douglas County stating that no copy of Thirteenth Street Associates limited or general partnership is "on file in that office." He further relates that, as to certain of the properties involved, "he has been able to determine that there is no explanation in the official record as to whether the aforesaid vendees gave their consent to the rezoning application at issue here."

Finally, the affidavit of Sullivan recites that attached to the

affidavit are copies of land contracts which show sales contracts with the various owners and "Thirteen Street Associates, a partnership to be formed with Varnum/Armstrong/Deeter, Inc., general partner, buyer."

The Omaha Municipal Code requires an application for rezoning to contain the name and address of the owner and applicant and a statement that the applicant is the authorized agent of the property owner if the applicant is not the owner. As previously stated, the application submitted by Varnum lists Thirteenth Street Associates as the property owner and applicant and is signed by Ralph Varnum.

Thirteenth Street Associates was a limited partnership to be formed with Varnum as the general partner. At the time of the application, Thirteenth Street Associates was not registered as a limited partnership with the Secretary of State, as required by Neb. Rev. Stat. § 67-240(a) (Reissue 1986), nor were articles of partnership, as an association, on file with the county clerk of Douglas County, as required by Neb. Rev. Stat. § 67-101 (Reissue 1990).

The affidavit of Ralph Varnum, besides referring to the ownership of the various parcels of land, states that "Thirteenth Street Associates, Varnum/Armstrong/Deeter Inc., and Ralph W. Varnum acted as the authorized agents for the property owners within the Project whose property was included within the request for rezoning." The affidavit further states that at all times since the contracts were entered into, the owners have approved of the request by Thirteenth Street Associates and Varnum to seek rezoning of their property.

The first two assignments of error—i.e., the ordinance was arbitrary and unreasonable, and the motion for summary judgment should not have been granted because there were questions of fact and the defendants were not entitled to judgment as a matter of law—may be considered together.

Plaintiff contends that the ordinance was arbitrary and unreasonable because of a question of ownership of the property and authority of the applicant to act for the owners, and because the use for which the property was rezoned was not its highest and best use.

In *Beall v. Montgomery Council*, 240 Md. 77, 88, 212 A.2d

751, 757 (1965), the Maryland Court of Appeals stated that "zoning ordinances are concerned with the use of property, the height of buildings and the density of population. They are not concerned with the *ownership* of the property involved and title to real property is not tried in zoning cases." (Emphasis in original.)

The court in *Beall* went on to quote from *Heath v. M. & C. C. of Baltimore*, 187 Md. 296, 49 A.2d 799 (1946), as follows: " 'Mere irregularities in an application to a board for a permit not amounting to a jurisdictional defect do not affect the validity of the permit. A substantial compliance with the requirements of an administrative regulation in making an application for a permit is sufficient.' " *Beall, supra* at 89, 212 A.2d at 757.

"Substantial compliance with the requirements as to the application is sufficient. The validity of the permit is not affected by an irregularity in the application not amounting to a jurisdictional defect or by an immaterial discrepancy in the application, nor is such discrepancy grounds for refusal of the permit." 101 C.J.S. *Zoning* § 228 (1958). See, also, *Wash. St. Prop. Owners Assn. v. Camden*, 263 Ark. 649, 566 S.W.2d 733 (1978) (stating that irregularity can be cured by subsequent actions of the city board of directors enacting ordinance while fully cognizant of the prior irregularity); *Binford v. Western Electric Co.*, 219 Ga. 404, 133 S.E.2d 361 (1963) (finding that language of statute providing that "property owners, or otherwise," could apply for rezoning, permitted application by an applicant which planned to construct office building on property but was not the owner of the property); *Stout v. Jenkins*, 268 S.W.2d 643 (Ky. 1954) (finding that no prejudice was shown by the appellants in the filing of the application by the developer rather than the owner and that any irregularity in the application was waived when appellants failed to make the owner a party to the suit); *Waites v. St. Louis County*, 484 S.W.2d 245 (Mo. 1972) (stating that once rezoning proceedings are started, proper notice is given, and hearing is held, the action the legislative body takes depends not on the identity of the owner but rather on the situation of the property, and thus the fact that the purchase contract of the developer who

petitioned for rezoning expired before the property was rezoned did not render the rezoning ordinance invalid); *Miner v. City of Yonkers*, 19 Misc. 2d 321, 189 N.Y.S.2d 762 (1959) (holding that where under statute the common council had the right, independent of any petition, to propose a zone change, any irregularity in a petition for rezoning did not affect the validity of an ordinance granting the change); *Midway Protective League v. City of Dallas*, 552 S.W.2d 170 (Tex. Civ. App. 1977) (concluding that amendments to rezoning should not be set aside lightly because of a procedural defect in their adoption, especially when the complaining parties had not shown any significant prejudice resulting from the procedural defect).

Based on the foregoing authorities, we hold that adjacent landowners do have standing to object to the rezoning of property; however, they do not have standing to object to an irregularity in the application itself without demonstrating any prejudice caused by the irregularity. Hence, plaintiff had no standing to attack any irregularity in the application for a zoning change by reason of ownership of the property. Following that same reasoning, the legal existence or nonexistence of Thirteenth Street Associates is immaterial to a decision herein.

Under the circumstances of this case, there is no dispute as to any material fact affecting the matter of ownership or agency. The showing made by defendants, in the absence of evidence to the contrary, establishes that the application was made by one having agency powers of the owners. All that the plaintiff displayed by its showing in opposition to summary judgment was that one of the owners who had given an affidavit establishing agency authority did not remember doing so. The other evidence produced by the plaintiff tended to corroborate the showing made by the defendants.

A party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law if the evidence presented for summary judgment remains uncontroverted. After the moving party has shown facts entitling it to judgment

as a matter of law, the opposing party has the burden to present evidence showing an issue of material fact which prevents a judgment as a matter of law for the moving party. *Mason State Bank v. Sekutera*, 236 Neb. 361, 461 N.W.2d 517 (1990). This rule is applicable here.

We now examine the remaining two assignments of error, i.e., the denial of a continuance and the court's finding that Eastroads did not have standing.

A continuance authorized by Neb. Rev. Stat. § 25-1335 (Reissue 1989) is within the discretion of the trial court, whose ruling will not be disturbed on appeal in the absence of an abuse of discretion. *Wachtel v. Beer*, 229 Neb. 392, 427 N.W.2d 56 (1988). A judicial abuse of discretion does not imply improper motive, bad faith, or intentional wrong by a judge, but requires the reasons or ruling of a trial judge to be clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result. *Id.* There was no abuse of discretion, especially considering the failure of the plaintiff to object to the hearing on the motion for summary judgment.

In any event, other than the claimed irregularity in the application, the only specific complaint the plaintiff made was that the rezoned use was not the highest and best use of the subject property. However, the highest and best use is not a determinative factor in a rezoning challenge. *County Comm. v. Mountain Air Ranch*, 192 Colo. 364, 563 P.2d 341 (1977); *Damick v. Planning & Zoning Commission*, 158 Conn. 78, 256 A.2d 428 (1969); *Watson v. Mayflower Property, Inc.*, 223 So. 2d 368 (Fla. App. 1969). Rather, the highest and best use is a consideration in a condemnation proceeding. The highest and best use could not, under the present statutory law, be an issue in the consideration of the actions of the City and the planning board in rezoning the area in question. Neb. Rev. Stat. § 14-403 (Reissue 1987) sets forth the elements considered in rezoning:

> Such regulations shall be made in accordance with a comprehensive plan and designed to lessen congestion in the streets; to secure safety from fire, panic and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to secure safety from flood; to

> avoid undue concentration of population; to facilitate the adequate provision of transportation, water, sewerage, schools, parks and other public requirements, and to promote convenience of access. Such regulations shall be made with reasonable consideration, among other things, as to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout such municipality.

The highest and best use is not listed as a consideration in rezoning. Appropriate use and the highest and best use are not the same. The highest and best use of the property is not a factual question in this case; therefore, summary judgment would have been proper with regard to this issue if actually addressed.

Because this matter was submitted to the trial court as a matter of law, we review the matter de novo on the record. We find that there is no dispute as to any material fact, that the ordinance was properly enacted and is not illegal and invalid, that plaintiff is not entitled to a preliminary or permanent injunction, and that plaintiff therefore is entitled to no relief. The judgment of the district court, which dismissed plaintiff's petition, is affirmed.

AFFIRMED.

GRANT, J., not participating.

K & K FARMING, INC., A NEBRASKA CORPORATION, APPELLANT AND CROSS-APPELLEE, V. FEDERAL INTERMEDIATE CREDIT BANK OF OMAHA, APPELLEE AND CROSS-APPELLANT.

468 N.W.2d 99

Filed April 12, 1991. No. 89-048.

1. **Ejectment: Proof.** In an action for ejectment there is no burden on the defendant to show title, but the plaintiff must show title in the plaintiff.
2. **Ejectment: Evidence.** A plaintiff in an ejectment action must prevail, if at all, upon the strength of his own title and not upon the weakness of his adversary's title.

3. **Ejectment: Appeal and Error.** Since an action in ejectment is one at law, a trial court's findings will not be set aside on appeal unless clearly wrong.
4. **Judgments: Appeal and Error.** In reviewing the judgment awarded in a bench trial of a law action, the Supreme Court does not reweigh evidence, but, rather, it considers the evidence in the light most favorable to the successful party, and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.
5. **Ejectment.** The essential elements of an action for ejectment are legal estate, a right of possession in the plaintiff, and unlawful detention by the defendant.
6. **Statute of Frauds: Contracts: Evidence.** The memorandum required by the statute of frauds is evidence of an oral contract and must contain the essential terms of the contract. Generally, the memorandum should contain the names of the parties, a description of the land, the price, the general terms of the agreement, and the signature of the vendor.
7. _____: _____: _____. The memorandum required by the statute of frauds is not the contract, but only written evidence of an oral contract.
8. **Courts: Judgments: Appeal and Error.** Where the record demonstrates that the decision of the trial court is correct, although such correctness is based on different grounds from those assigned by the trial court, the Supreme Court will affirm.
9. **Judgments: Appeal and Error.** A correct result will not be set aside merely because it was based upon incorrect reasoning.
10. **Appeal and Error.** An issue not presented to and passed upon by the trial court may not be raised on appeal.

Appeal from the District Court for Rock County: EDWARD E. HANNON, Judge. Affirmed.

Michael G. Helms and Mark R. Scherer, of Schmid, Mooney & Frederick, P.C., for appellant.

William G. Dittrick and Anne M. O'Brien, of Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, for appellee.

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

FAHRNBRUCH, J.

K & K Farming, Inc. (K & K), the plaintiff in the trial court, appeals a district court determination in favor of the defendant, Federal Intermediate Credit Bank of Omaha (FICB), that K & K has no interest in a particularly described 2,560 acres of real estate in Rock County, Nebraska, and no right to the rents and profits derived therefrom. We affirm.

In disposing of this ejectment action, the district court for

Rock County also found that K & K is estopped from claiming title, possession, or control of the property.

In an action for ejectment there is no burden on the defendant to show title, but the plaintiff must show title in the plaintiff. See *Nuttelman v. Julch*, 228 Neb. 750, 424 N.W.2d 333 (1988). A plaintiff in an ejectment action must prevail, if at all, upon the strength of his own title and not upon the weakness of his adversary's title. *Kozak v. State*, 189 Neb. 525, 203 N.W.2d 516 (1973), *overruled on other grounds*, *Lillich v. Lowery*, 211 Neb. 757, 320 N.W.2d 463 (1982); *Comstock v. Kerwin*, 57 Neb. 1, 77 N.W. 387 (1898).

Since an action in ejectment is one at law, a trial court's findings will not be set aside on appeal unless clearly wrong. *Griggs v. Oak*, 164 Neb. 296, 82 N.W.2d 410 (1957). See, also, *Metropolitan Utilities Dist. v. Pelton*, 236 Neb. 66, 459 N.W.2d 193 (1990). In reviewing the judgment awarded in a bench trial of a law action, the Supreme Court does not reweigh evidence, but, rather, it considers the evidence in the light most favorable to the successful party, and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence. *Howells Elevator v. Stanco Farm Supply Co.*, 235 Neb. 456, 455 N.W.2d 777 (1990); *Wurst v. Blue River Bank*, 235 Neb. 197, 454 N.W.2d 665 (1990).

FACTUAL BACKGROUND

The history of this action is best understood if reviewed in chronological order. Considered in the light most favorable to the successful party, FICB, the facts are as follows: In 1972, K & K was incorporated for the purpose of conducting farming operations. Gerald R. Kirwan, Jr., was the president and sole shareholder of K & K. Between 1973 and 1974, Kirwan and his wife, Leona, through land contracts, purchased the subject real estate, comprising 2,560 acres in Rock County, Nebraska. Upon completion of payments over a 10- to 20-year period, the Kirwans were to receive warranty deeds which were placed in escrow.

On March 5, 1980, the Kirwans assigned their interest in the land contracts to the Valentine Production Credit Association

(PCA) as security for loans to be used for annual operating expenses, which loans subsequently were drawn against a $4.7 million line of credit. In subsequent years, the line of credit and the Kirwans' indebtedness increased. Later, during the 1982 crop season, Kirwan pledged his stock in K & K to Galyen Petroleum Company (GPC) to secure the payment of a fuel bill in excess of $300,000.

On November 1, 1982, Kirwan recorded a "Notice of Contract of Sale" in the Rock County register of deeds' office. That filing gave notice of a purported contract of sale in which the Kirwans had agreed to sell the subject property, along with other real estate, to K & K.

With the downturn in the farm economy, the Kirwans were forced to file a chapter 11 bankruptcy petition in early 1983. Thereafter, the Kirwans defaulted on the PCA loan, and on August 10, 1984, PCA transferred the security assignments to the FICB.

On November 7, 1985, in order to foreclose on the K & K stock, GPC filed a "Motion for Relief from the Automatic Stay" in the Kirwans' bankruptcy proceeding. FICB filed an objection to this motion. Relying upon a stipulation executed by Richard Galyen, president and shareholder of GPC, individually and as an officer of the corporation, that GPC's interest in the bankruptcy estate was limited to the stock of K & K, FICB withdrew its objection. The stipulation contained a list representing all of K & K's assets. The list contained no real estate.

Threatened with foreclosure of the subject property by FICB, the Kirwans executed and delivered a conveyance of the subject property to FICB on February 26, 1986. The next day, FICB paid off the balances due on the original land contracts and subsequently recorded the deed the Kirwans had given it.

Subsequent to July 7, 1987, Galyen personally became the sole stockholder of K & K. On October 26, 1987, K & K filed an action in the district court for Rock County to eject FICB from the subject property. In its petition, K & K alleged it owned the subject property and alleged two causes of action: (1) that FICB should be ejected and (2) that K & K had a right to rents collected since FICB's possession. A separate interpleader

action by third-party lessees was consolidated for trial with K & K's suit. The lessees tendered their rental payments to the clerk of the district court for Rock County, pending the outcome of the action between K & K and FICB. It was stipulated that the rentals were to be paid to the successful party in K & K's ejectment case.

Following trial of the ejectment action, the district court issued its judgment on December 16, 1988, holding in substance that K & K had no interest in the subject property and dismissing K & K's ejectment petition with prejudice. The court also found in the lessees' interpleader case that the funds paid by the lessees of the subject property to the clerk of the district court should be paid to FICB.

ASSIGNMENTS OF ERROR

In its appeal, K & K claims the trial court erred (1) in holding that K & K is estopped from asserting its interest in the subject property and (2) in holding that FICB has a continuing valid interest in the subject property.

In reference to its first assignment of error, K & K argues that it made a prima facie showing of its claimed interest in the subject property.

The essential elements of an action for ejectment are legal estate, a right of possession in the plaintiff, and unlawful detention by the defendant. *Johnston v. Robertson*, 171 Neb. 324, 106 N.W.2d 192 (1960); Neb. Rev. Stat. § 25-2124 (Reissue 1989). Through the testimony of Kirwan and Patrick Moylan, a former attorney, K & K attempted to prove that on November 1, 1982, the Kirwans, by written land contract, sold the subject property, along with an additional 5,300 acres, to K & K, as evidenced by a recorded notice.

K & K argues that a recorded notice of a contract of sale is prima facie evidence of a vendee's interest in the subject real estate. Neb. Rev. Stat. § 76-238 (Reissue 1990) provides, in pertinent part:

> All deeds, mortgages and other instruments of writing which are required to be or which under the laws of this state may be recorded, shall take effect and be in force from and after the time of delivering the same to the

> register of deeds for recording, and not before, as to all creditors and subsequent purchasers in good faith without notice....

Relying on this statute, K & K claims that "[t]he necessary and logical effect of this statutory language is that a recorded instrument evidencing an interest in real property is sufficient to at least establish prima facie evidence of the interest expressed therein, as against subsequent creditors or purchasers." Brief for appellant at 10. The trial court stated that K & K had not proved a prima facie case.

The recorded notice was merely a memorandum intended to satisfy the statute of frauds. Neb. Rev. Stat. § 36-105 (Reissue 1988). The memorandum required by the statute of frauds is evidence of an oral contract and must contain the essential terms of the contract. *Heine v. Fleischer*, 184 Neb. 379, 167 N.W.2d 572 (1969). Generally, the memorandum should contain the names of the parties, a description of the land, the price, the general terms of the agreement, and the signature of the vendor. Here, the essential element of price was missing. The memorandum is not the contract, but only written evidence of an oral contract. *David v. Tucker*, 196 Neb. 575, 244 N.W.2d 197 (1976); *Ord v. Benson*, 163 Neb. 367, 79 N.W.2d 713 (1956). Thus, the contract, not the recorded notice, is controlling. In any event, K & K was not relying upon an oral contract. All of K & K's evidence reflected that the purported sale of the subject property was accomplished through a purported written contract which had been lost.

In holding for FICB and in dismissing K & K's petition with prejudice, the trial court declared:

> In short, after considering all of the evidence, I simply do not accept the [sic] Kirwan[']s and Moylan[']s testimony that tends to establish the plaintiff [K & K] purchased the real estate from the Kirwans in 1982, or at any other time. The inability to produce a written contract is not controlling. The absolute absence of any act after November 1, 1982, that would tend to support a claim of ownership by the plaintiff on one hand, and the numerous acts and statments [sic] of Kirwan tending to show, or actually showing, a claim of ownership of the land by

> Kirwans woud [sic] probably be convincing. When the positive statements of Kirwan in the bankruptcy proceeding are added, any trier of fact would be compelled by the evidence to determine that there was no sale of the real estate by Kirwans to the plaintiff.

Under the facts of this case, in the absence of the alleged contract of sale between K & K and the Kirwans, K & K has no interest whatsoever in the subject property. The trial court found there was no sale of the real estate by the Kirwans to K & K. On the other hand, at trial, deeds were produced showing that the Kirwans had conveyed the subject property to FICB for valuable consideration. There can be no question from the evidence and the trial court's findings that FICB's title to the subject property is superior to that of K & K, which the court found had no interest in or title to the subject property.

In support of its conclusion, the trial court specifically found from the evidence that (1) no contract for the sale of the subject property from the Kirwans to K & K was produced at trial; (2) the Kirwans continued to operate the land as their own until they filed voluntary bankruptcy on January 25, 1983; (3) the subject real estate was treated as one of their personal assets in the bankruptcy estate, and the debts for the balance of unpaid contract payments were shown as secured debts in the bankruptcy schedules filed by the Kirwans; (4) taxes on the real estate were paid by the Kirwans personally, and the Kirwans, not K & K, received the rents and profits from the land; (5) K & K agreed to farm the land for the Kirwan bankruptcy estate in 1985; and (6) in numerous places where a corporation would list real estate it owned as an asset, K & K did not list any of the subject real estate. The record supports all of these factual findings by the trial court.

Further, the record is uncontroverted that (1) K & K's corporate federal income tax returns for the tax years ending February 28, 1983, and February 29, 1984, do not list the subject property as an asset; (2) at a meeting of creditors before the bankruptcy court, Kirwan testified that K & K never owned the property in question; (3) in an October 15, 1985, K & K financial statement prepared by Kirwan, no mention is made of the subject property as an asset of K & K; (4) Kirwan testified

under oath that he did not believe there were any assets belonging to K & K that were not on the October 15, 1985, financial statement; (5) pursuant to a custom farming agreement, the Kirwans' bankruptcy estate received rental income from the subject property during 1985; (6) in a K & K financial statement for the 3-year period ending February 28, 1985, prepared by Peat, Marwick, Mitchell & Co. (PMM) for FICB, no land was listed as a corporate asset, nor were the land contract sellers listed as corporate liabilities; (7) in a letter dated April 11, 1985, from Kirwan, as president of K & K, to PMM, Kirwan states that he has "no reason to believe that these [PMM] financial statements require any adjustments so that they would not be misleading if relied upon by other individuals"; (8) Kirwan testified that he could not remember whether the alleged written contract between the Kirwans and K & K, which he claimed to have prepared, was an outright sale of the land or the sale of the Kirwans' land contract interest; (9) Kirwan testified that no payments were ever made by K & K to the original land contract sellers while he owned K & K; (10) the original land contract sellers never approved the alleged sale of the subject property from the Kirwans to K & K, nor were they or FICB notified of this alleged transaction; (11) in a deed and assignment of February 26, 1986, and subsequent warranty deeds of February 27, 1986, the Kirwans transferred all rights and ownership in the land contracts to FICB; (12) in the deeds of February 27, 1986, which the Kirwans executed, acknowledged before a notary public, and delivered to FICB, they covenanted that they were "lawfully seised of such real estate [the subject property] and that it is free from encumbrances subject to all matters of record," that they had "legal power and lawful authority to convey the same," and that they warranted and covenanted to "defend title to the real estate against the lawful claims of all persons"; (13) in February 1983, the Kirwans listed the subject property on their asset schedule when they filed their bankruptcy petition; (14) although required to list in their bankruptcy schedules all transfers of real estate within the year prior to the filing of their bankruptcy petition, i.e., from February 1982 to February 1983, the Kirwans did not list the subject property or the alleged

contract of sale from the Kirwans to K & K allegedly executed on November 1, 1982; and (15) to the best of Kirwan's knowledge only he, as an individual, and FICB paid property taxes on the subject property after November 1, 1982.

K & K introduced into evidence a check of K & K's in the sum of $10,000, dated November 1, 1982, and made payable to and cashed by Kirwan. The check was executed by Kirwan on behalf of K & K. The appellant claimed that the check was the consideration paid to the Kirwans pursuant to the purported November 1, 1982, written land contract of sale. Testimony for that proposition was elicited from Kirwan. No notation was made on the check that it was payment under a land contract. It is implicit in the trial court's order that the trial court discounted Kirwan's testimony that the check was paid as consideration for the purported land contract.

From the facts found by the trial court, the uncontroverted facts found in the record, and the trial court's nonacceptance of the credibility of the testimony of K & K's two primary witnesses, we cannot say that the trial court was clearly wrong in holding for FICB, in finding that K & K had no interest in the subject real estate, in dismissing K & K's ejectment petition with prejudice, and in ordering the rentals in the hands of the clerk of the court and the interest thereon to be set over to FICB.

We recognize that the trial court in deciding this case stated that K & K had not presented a prima facie case and that even had K & K presented a prima facie case, it was estopped from claiming title, possession, or control of the subject property. These conclusions were not necessary to the ultimate finding of the trial court that K & K had no interest in the subject property. Where the record demonstrates that the decision of the trial court is correct, although such correctness is based on different grounds from those assigned by the trial court, the Supreme Court will affirm. See *Weimer v. Amen*, 235 Neb. 287, 455 N.W.2d 145 (1990). A correct result will not be set aside merely because it was based upon incorrect reasoning. *In re Application A-16642*, 236 Neb. 671, 463 N.W.2d 591 (1990).

In a cross-appeal, FICB complains of evidentiary rulings by the trial court. Because of the disposition of this appeal, we need not address FICB's assignment of error.

Claiming that the lawsuit filed by K & K and its appeal to this court are frivolous, FICB requests that this court, pursuant to Neb. Rev. Stat. § 25-824 (Reissue 1989), award it attorney fees. Under this statute, attorney fees are allowable if a lawsuit or appeal is frivolous. Since the trial court made no ruling on FICB's request for attorney fees in that court, we will not consider allowing attorney fees for services in the trial court. An issue not presented to and passed upon by the trial court may not be raised on appeal. *Hensman v. Parsons*, 235 Neb. 872, 458 N.W.2d 199 (1990). The facts in this appeal do not warrant a finding that the appeal was taken frivolously.

AFFIRMED.

CAPORALE, J., not participating.

DALE BROWN AND DONNA BROWN, HUSBAND AND WIFE, APPELLEES, V. FARMERS MUTUAL INSURANCE COMPANY OF NEBRASKA, A NEBRASKA CORPORATION, APPELLANT.

468 N.W.2d 105

Filed April 12, 1991. No. 89-130.

1. **Appeal and Error.** Errors assigned but not discussed in an appellant's brief are not considered by this court.
2. _____. In an action at law, the Supreme Court views the evidence in the light most favorable to the prevailing party.
3. **Directed Verdict: Waiver.** A defendant who moves for a directed verdict at the close of the plaintiff's evidence and, upon the overruling of such motion, proceeds with trial and introduces evidence waives any error in the ruling on the motion for a directed verdict.
4. **Jury Instructions: Proof: Appeal and Error.** In order to establish as error the trial court's refusal to give a requested instruction, an appellant is under a threefold burden to show that he or she was prejudiced by the court's refusal, that the tendered instruction is a correct statement of the law, and that the instruction is applicable to the evidence in the case.
5. **Jury Instructions: Appeal and Error.** All the jury instructions given must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and evidence, there is no prejudicial error necessitating reversal.

6. _____: _____. It is not error on the part of a trial court to refuse to give a requested instruction if the substance of that request is contained in the instructions actually given.
7. **Trial: Rules of Evidence: Expert Witnesses.** In determining whether an expert's testimony is admissible pursuant to the Nebraska Evidence Rules, a court considers, among other interrelated questions, whether the expert's testimony is relevant.
8. **Rules of Evidence: Evidence: Words and Phrases.** Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. To be relevant, evidence must be rationally related to an issue by a likelihood, not a mere possibility, of proving or disproving an issue to be decided.
9. **Trial: Rules of Evidence: Expert Witnesses.** Although an expert's testimony may be relevant, it may be excluded if the probative value of the testimony is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or needless presentation of cumulative evidence.
10. **Trial: Evidence: Rules of Evidence: Appeal and Error.** A trial court's ruling on the relevancy of evidence will not be disturbed on appeal unless there has been an abuse of discretion, and the trial court's ruling with respect to Neb. Rev. Stat. § 27-403 (Reissue 1989) is likewise reviewed under an abuse of discretion standard.
11. **Trial: Expert Witnesses.** If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.
12. _____: _____. No exact standard is possible for fixing the qualifications of an expert or skilled witness. An expert or skilled witness will be deemed qualified if, and only if, he or she possesses special skill or knowledge respecting the subject matter involved so superior to that of men in general as to make his or her formation of a judgment a fact of probative value.
13. **Trial: Expert Witnesses: Appeal and Error.** A trial court's factual finding that a witness qualifies as an expert will be upheld on appeal unless clearly erroneous.
14. **Trial: Evidence: Appeal and Error.** If a general objection on the basis of insufficient foundation is overruled, the objecting party may not complain on appeal unless (1) the ground for exclusion was obvious without stating it or (2) the evidence was not admissible for any purpose.
15. **Trial: Expert Witnesses.** Generally, expert testimony is admissible only if it will be of assistance to the jury in its deliberations and relates to an area not within the competency of ordinary citizens.
16. **Trial: Expert Witnesses: Appeal and Error.** The determination of whether an expert's testimony or opinion will be helpful to a jury or assist the trier of fact will be upheld on appeal unless the trial court abused its discretion.
17. **Rules of Evidence: Expert Witnesses: Hearsay.** Rule 703 of the Nebraska Evidence Rules allows experts to rely on hearsay facts or data reasonably relied upon by experts in the field as a basis for their opinion.

18. **Insurance: Contracts.** In order to recover under an insurance policy of limited liability, an insured must bring himself or herself within its express provisions.
19. _____: _____. When the terms of an insurance policy are clear, they are to be accorded their plain and ordinary meaning.
20. **Insurance: Contracts: Intent.** When a clause in an insurance contract can fairly be interpreted in more than one way, there is ambiguity to be resolved by the court as a matter of law. The resolution of an ambiguity in a policy of insurance turns not on what the insurer intended the language to mean, but what a reasonable person in the position of the insured would have understood it to mean at the time the contract was made. In the case of ambiguity in an insurance contract, a construction favorable to the insured prevails so as to afford coverage.
21. **Insurance: Liability: Evidence: Proximate Cause.** In determining the cause of a loss for the purpose of fixing insurance liability, when evidence of concurring causes of the damage appears, the proximate cause to which the loss is to be attributed is the dominant one that sets the other causes in operation. Causes which are incidental are not proximate, though they may be nearer in time and place to the loss.

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

Leland K. Kovarik, of Holtorf, Kovarik, Nuttleman, Ellison, Mathis & Javoronok, P.C., for appellant.

Steven C. Smith, of Van Steenberg, Chaloupka, Mullin, Holyoke, Pahlke, Smith, Snyder & Hofmeister, P.C., for appellees.

HASTINGS, C.J., WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ., and COLWELL, D.J., Retired.

FAHRNBRUCH, J.

Farmers Mutual Insurance Company of Nebraska (Farmers) appeals a $16,636.70 jury verdict which determined that sheep owned by Dale and Donna Brown were stolen and that the loss was, therefore, covered under the theft provisions of an insurance policy issued to the Browns by Farmers. We affirm.

Farmers' six assignments of error combine to allege that the trial court erred in (1) overruling Farmers' motion for a directed verdict, (2) failing to give a requested instruction, (3) permitting two law enforcement officers to testify that a livestock thief or thieves were operating in Dawes County, (4) permitting testimony of a decrease in wool subsidy payments and allowing

the jury to include such amount in its verdict when the policy covered only "direct loss to insured farm personal property," and (5) not applying the applicable $100 deductible to each theft proven. The fifth assignment of error is not discussed in Farmers' brief. "Errors assigned but not discussed in an appellant's brief are not considered by this court. [Citations omitted.]" *Horst v. Johnson, ante* p. 155, 156, 465 N.W.2d 461, 462 (1991). We, therefore, will consider only the first four assignments of error listed above.

In an action at law, the Supreme Court views the evidence in the light most favorable to the prevailing party. *McCune v. Neitzel*, 235 Neb. 754, 457 N.W.2d 803 (1990). In the light most favorable to the plaintiffs, the record reflects the following:

The Browns operate a farm/ranch in Dawes County, consisting of approximately 1,400 acres upon which they graze approximately 400 to 500 head of ewes. Before their annual sale, the Browns also raise 400 to 500 lambs. The Browns further maintain 3 rams for every 100 ewes. At the time of trial, the Browns had been engaged in the sheep-raising business for 25 years.

The sheep were kept in two pastures which were north of the Browns' home and which were designated at trial as the west pasture and the north pasture. The west pasture was completely enclosed by a fence. Fencing surrounded the north pasture, except where it was bounded by a large, deep canal and Lake Whitney. The fence extended to a point where the depth of the lake was 4 feet, and the fence was lengthened or shortened to coincide with changes in the lake's water level.

The fences enclosing the sheep were 36-inch woven wire topped by three strands of barbed wire. The total height of the fences was 4½ to 5 feet. The fenceposts were constructed of steel. There was testimony that the fences were regularly repaired and rebuilt. Dale Brown (Brown) checked the fences numerous times each day. The fence gates were constructed in the same sheep-tight fashion as the fences, except that a post was attached horizontally to the bottom to prevent the sheep from escaping underneath the gates. The gates were not locked, but were held in place by attaching a wire to a post and tightening it. Brown testified that the last chore each evening

was to check to ensure that the herd was where it belonged and that the gates were closed.

Sheep tend to herd together and are not prone to escape from fencing. Brown testified that on occasion, one or two sheep had escaped, but he was always able to recover them. He further testified that in his 25 years of operating a sheep ranch, he had never lost a sheep by escape.

In 1986 and 1987, the Browns' sheep were counted in their entirety three times per year: (1) when the sheep were sheared, which was normally in February; (2) when the ewes were lambing, which could vary from midwinter or late winter to early spring; and (3) when the lambs were weaned, which was usually in November. In addition to the triannual counts, periodic rough counts were performed.

The Browns maintained a written inventory of their sheep. The actual count of the sheep was performed by Brown and Todd J. Storbeck, who is the Browns' son-in-law. There was evidence that Brown and Storbeck counted independently of one another and then compared their tallies when the counts were completed. Brown and Storbeck furnished the figures to Mrs. Brown, who was the bookkeeper. She recorded the counts in an inventory record. Any decrease to the herd due to death or sale, for example, was reflected in the inventory records. During the entire existence of their sheep operation, the Browns had practiced the inventory method as described.

In the previous 25 years, the Browns never experienced any discrepancies between their head count and the count reflected in their inventory records. In 1985, 132 sheep were missing, and the Browns suspected theft. Due to the suspected theft of their sheep in 1985, the Browns contacted their insurance agent, Barton Kreider, and purchased insurance through him from Farmers. Farmers is an insurance company with its headquarters located in Lincoln, Nebraska, and issues farm insurance policies throughout Nebraska.

The policy issued by Farmers to the Browns covered "direct loss to insured farm personal property caused by . . . **Theft or Attempted Theft.**" It excluded theft (1) committed by an insured person, (2) if the only evidence is an inventory shortage, (3) caused by wrongful conversion or embezzlement, (4) caused

by escape, or (5) if the only evidence is mysterious disappearance. The period of the policy was 36 months, with an effective date of August 19, 1986.

Four hundred and eighty-eight ewes were counted in November 1986. In January 1987, 403 ewes were counted when they were sheared. Of the 85 missing ewes, Brown discovered 8 dead, leaving 77 ewes for which he could not account. Brown testified that at the time of their disappearance, the missing ewes were worth $85 per head, for a total of $6,545. The Browns reported the loss to their insurance agent and the Nebraska State Patrol.

On November 6, 1987, when he "weaned the lambs out," Brown counted 491 ewes and 444 lambs. The increase in the number of sheep which occurred between January and November 1987 was due to the Browns' purchase of replacement animals. At that time, the Browns could account for all of the sheep. On November 19, 1987, Brown counted 365 lambs when he delivered them to a livestock market. He found the remnants of 7 lambs which had been killed by coyotes, leaving a loss of 72 lambs. After discovery of the loss of lambs, the ewes were counted on the afternoon of November 19, 1987. The count yielded a total of 44 missing ewes. He valued the missing ewes in the amount of $3,815 and the lambs which he lost in the sum of $5,154.08. The Browns again reported the losses to their insurance agent and the Nebraska State Patrol, and also contacted the county sheriff's office.

After the disappearance of the sheep in January and November 1987, in an effort to locate the sheep, Brown searched his entire ranch and the surrounding lands and inquired of his neighbors. Aerial searches were conducted. Neither the Browns nor law enforcement personnel were ever able to locate the missing sheep.

The Browns filed claims for the missing sheep with their insurance agent under the theft provisions of the policy issued to them by Farmers. Farmers denied the claims on the basis that the Browns failed to show that the sheep were stolen.

Brown testified that he or his wife did not take the sheep, that he did not temporarily place them elsewhere, and that none of his employees hid or embezzled the sheep. Mrs. Brown,

Storbeck, and Patrick M. Meng, who was employed in the sheep operation by the Browns, stated that they did not take the sheep.

The ewes' disappearance in January coincided with an increased price for ewes and wool and with the time for marketing the ewes. At the time of the second disappearance in November 1987, the lambs were ready for market, and the price for lambs and ewes was attractive.

Brown testified that after he discovered the losses in November 1987, he inspected the fences in the two pastures and did not find any places where the fence was down or broken. During the period of time in question, Brown never discovered any breaks in the fences, loose fences, areas through which sheep could escape, or gates left open. Brown stated that his sheep did not jump over fences.

After the losses were discovered, the inventory records were reviewed. No mistakes were uncovered, and the records reflected the actual physical counts.

There was testimony that the only predators of sheep in the area of the Browns' ranch were coyotes, dogs, foxes, and eagles and that the Browns suffered predation problems. There was testimony that a predator does not completely devour a sheep and leaves behind the traces of any sheep which the predator kills. Brown testified that he could account for all losses caused by predators.

As stated, there were also an unfenced lake and canal bordering the north pasture. Brown testified that he did not need a fence around water because sheep "just don't go in the water" and that he had never caught any sheep wading in the water or discovered that any sheep had crossed the canal. There was also testimony that sheep did not walk upon Lake Whitney when it was frozen.

Without objection, Brown testified as to a method by which the sheep could have been stolen. He stated that thieves could enter his land through unlocked gates from the county roads, round the sheep up with sheep dogs into portable corrals, and pick them up and place them in a livestock trailer.

The Dawes County sheriff, Karl J. Dailey, testified that he believed a livestock thief or thieves were operating in Dawes

County. Gary H. Renner, a sergeant in the investigative services of the Nebraska State Patrol, testified that it was his opinion that from 1985 through 1987, a livestock thief or thieves were operating in the Dawes County area.

On February 26, 1988, the Browns filed the instant action, claiming, in substance, that the losses of their sheep and other damages were covered under the theft provisions of the policy issued to them by Farmers. Farmers admitted that the policy was issued by it to the Browns, that the policy was in full force and effect during the time when the Browns claimed the sheep were stolen, and that the Browns made timely claims for all the losses which occurred. Farmers further agreed that Kreider was an agent of Farmers and was, at all times, acting within the scope of his authority in performing services for it. The central issue at trial was whether the Browns proved that the sheep were stolen. The jury entered a verdict in the amount of $16,636.70 in favor of the Browns. This appeal followed.

I. DIRECTED VERDICT

At the close of the plaintiffs' case in chief, Farmers moved for a directed verdict. The court overruled that motion. Farmers thereupon adduced additional evidence by way of testimony and a videotape exhibit. Farmers did not move for a directed verdict at the close of all the evidence. On appeal, Farmers, in support of its first assignment of error, contends that because the Browns failed to show that the disappearance of the sheep was the result of theft, which is the only insured peril applicable to this case, the trial court erred in failing to sustain its motion for a directed verdict and to dismiss the case.

"A defendant who moves for a directed verdict at the close of the plaintiff's evidence and, upon the overruling of such motion, proceeds with trial and introduces evidence waives any error in the ruling on the motion for a directed verdict. [Citations omitted.]" *Lincoln Co. Sheriff's Emp. Assn. v. Co. of Lincoln*, 216 Neb. 274, 277, 343 N.W.2d 735, 738-39 (1984). Accord, *Church of the Holy Spirit v. Bevco, Inc.*, 215 Neb. 299, 338 N.W.2d 601 (1983); *Schaffer v. Strauss Brothers*, 164 Neb. 773, 83 N.W.2d 543 (1957); *Mack v. Parkieser*, 53 Neb. 528, 74 N.W. 38 (1898). Therefore, there is no question to be reviewed

by this court regarding Farmers' motion for a directed verdict.

II. INSTRUCTIONS

Farmers requested the trial court to submit its instruction No. 5, which states, "Where several inferences are [deducible] from the facts presented, which inferences are opposed to each other but equally consistent with the facts proved, the [plaintiffs] do not sustain their burden of proof by a reliance alone on the inferences that would entitle them to recover." In its instruction No. 6, the trial court defined direct and circumstantial evidence and instructed the jury that the law made no distinction between those two types of evidence and that a fact could be proved by either direct or circumstantial evidence or both. Instruction No. 6 was taken verbatim from NJI2d 1.31. The court overruled Farmers' objection to the giving of instruction No. 6 and to the court's failure to give Farmers' requested instruction No. 5. Farmers' second assignment of error alleges that by doing so, the trial court allowed the jury to render judgment in the Browns' favor if the jury found theft to be equally possible with other explanations for the missing sheep.

> In order to establish as error the trial court's refusal to give a requested instruction, an appellant is under a threefold burden to show that he or she was prejudiced by the court's refusal, that the tendered instruction is a correct statement of the law, and that the instruction is applicable to the evidence in the case. [Citations omitted.]

Chadron Energy Corp. v. First Nat. Bank, 236 Neb. 173, 184, 459 N.W.2d 718, 728 (1990). All the jury instructions given must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and evidence, there is no prejudicial error necessitating reversal. *Denesia v. St. Elizabeth Comm. Health Ctr.*, 235 Neb. 151, 454 N.W.2d 294 (1990). It is not error on the part of a trial court to refuse to give a requested instruction if the substance of that request is contained in the instructions actually given. *Id.*

The trial court instructed the jury that it must not indulge in any speculation, guess, or conjecture. The jury was instructed

that before the Browns could recover against Farmers under the theft provisions of the policy, the Browns were required to

> prove by the greater weight of the evidence each and all of the following:
>
> 1. That they suffered a loss of sheep.
> 2. The number of sheep lost.
> 3. That the loss was a theft loss as defined by the policy.
> 4. The actual cash value of the sheep at the time of the loss and any other damages resulting from direct loss by theft.

The district court further instructed the jury that if the Browns did not meet their burden of proof, then its verdict must be for Farmers. The instructions informed the jury that recovery could not be had for theft by the Browns, inventory shortage, wrongful conversion or embezzlement, escape, or mysterious disappearance. Most importantly, the trial court instructed the jury that the party who has the burden of proving a claim must do so by the greater weight of the evidence; that the greater weight of the evidence means evidence sufficient to make a claim more likely true than not true; and that if the evidence upon a claim is evenly balanced or if it weighs in favor of the other party, then the burden of proof has not been met.

The instructions given to the jury clearly informed the jury that it could not render a verdict in favor of the Browns unless it found that the Browns proved their case by the greater weight of the evidence. These instructions foreclosed the jury from choosing among several inferences which were opposed to each other but equally consistent with the facts proved. As the substance of requested instruction No. 5 was contained in the instructions actually given, the trial court did not err in refusing to give that instruction. Nor did the trial court err in giving instruction No. 6. The instructions given by the court, taken as a whole, correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and evidence.

III. EVIDENTIARY ISSUES

In its third assignment of error, Farmers complains that the trial court permitted two law enforcement officers to testify

whether in their opinion a livestock thief or thieves were operating in Dawes County at times relevant to this case. Over an objection on the basis of hearsay, inadequate foundation, and relevance, Sheriff Dailey opined that a livestock thief or thieves were operating in Dawes County. Sheriff Dailey's opinion was based on conversations with other law enforcement professionals, brand inspectors, his deputy, and area farmers and ranchers; reports and bulletins of livestock thefts received by his office; and his training in basic investigation. Sergeant Renner testified that it was his opinion that in the years 1985 through 1987, a livestock thief or thieves were operating in the Dawes County area. Farmers' objection to Sergeant Renner's testimony on the grounds of relevancy, hearsay, foundation, and invasion of the province of the jury was overruled. Sergeant Renner's opinion was based on intelligence from confidential sources, reports from other agencies, and investigative reports from State Patrol troopers and investigators.

While Farmers attacks the foregoing testimony on the grounds of impermissible expert testimony, its contention necessarily raises the question of the relevance of that testimony. See *State v. Reynolds*, 235 Neb. 662, 457 N.W.2d 405 (1990) (in determining whether an expert's testimony is admissible pursuant to the Nebraska Evidence Rules, a court considers, among other interrelated questions, whether the expert's testimony is relevant). See, also, Neb. Rev. Stat. § 27-402 (Reissue 1989) (only relevant evidence is admissible). "Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Neb. Rev. Stat. § 27-401 (Reissue 1989). "To be relevant, evidence must be rationally related to an issue by a likelihood, not a mere possibility, of proving or disproving an issue to be decided. [Citations omitted.]" *State v. Lonnecker, ante* p. 207, 210, 465 N.W.2d 737, 740-41 (1991).

The evidence that a livestock thief or thieves were operating in Dawes County makes it more likely that the Browns' sheep were stolen. Although an expert's testimony may be relevant, it

may be excluded if the probative value of the testimony is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or needless presentation of cumulative evidence. *Reynolds, supra*; Neb. Rev. Stat. § 27-403 (Reissue 1989). There is nothing to suggest a decision on an improper basis in this case. See *Lonnecker, supra* (in the context of § 27-403, "unfair prejudice" means an undue tendency to suggest a decision on an improper basis). A trial court's ruling on the relevancy of evidence will not be disturbed on appeal unless there has been an abuse of discretion, and the trial court's ruling with respect to § 27-403 is likewise reviewed under an abuse of discretion standard. *State v. Baltimore*, 236 Neb. 736, 463 N.W.2d 808 (1990). The trial court did not abuse its discretion in finding the officers' testimony relevant and not prejudicial.

"If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Neb. Rev. Stat. § 27-702 (Reissue 1989). Farmers first contends that neither officer was qualified as an expert in theft investigation and, therefore, neither should have been allowed to testify that a livestock thief or thieves were operating in Dawes County.

No exact standard is possible for fixing the qualifications of an expert or skilled witness. *Herman v. Lee*, 210 Neb. 563, 316 N.W.2d 56 (1982). An expert or skilled witness will be deemed qualified if, and only if, he or she possesses special skill or knowledge respecting the subject matter involved so superior to that of men in general as to make his or her formation of a judgment a fact of probative value. *Northern Nat. Gas Co. v. Beech Aircraft Corp.*, 202 Neb. 300, 275 N.W.2d 77 (1979); *Mathine v. Kansas-Nebraska Nat. Gas Co., Inc.*, 189 Neb. 247, 202 N.W.2d 191 (1972). A trial court's factual finding that a witness qualifies as an expert will be upheld on appeal unless clearly erroneous. *Reynolds, supra*.

As an initial matter, it is questionable whether Farmers properly raised the issue of Dailey's and Renner's expert qualifications at trial by way of a general foundation objection.

If a general objection on the basis of insufficient foundation is overruled, the objecting party may not complain on appeal unless (1) the ground for exclusion was obvious without stating it or (2) the evidence was not admissible for any purpose. *Sherard v. Bethphage Mission, Inc.*, 236 Neb. 900, 464 N.W.2d 343 (1991).

Even assuming arguendo that Farmers could avoid an adverse application of the rule expressed in *Sherard*, its argument that both law enforcement officers were not qualified as experts is without merit. Sheriff Dailey testified that he had been a police officer in Chadron and that his present duties encompassed investigating criminal activities. He further stated that he had been involved in investigating livestock thefts and that his office investigated the theft of the Browns' sheep. Sergeant Renner was a 24-year veteran of the Nebraska State Patrol. His job duties comprised conducting and supervising criminal investigations in the Panhandle area of the state. Sergeant Renner testified that State Patrol officers receive training in theft investigations, including livestock thefts. He further testified that he personally had investigated livestock thefts. The disappearance of the Browns' sheep was investigated by the State Patrol. Upon a review of the foregoing, it is clear that the trial court was not clearly erroneous in finding that the officers possessed special knowledge respecting area livestock thefts so superior to that of men in general as to make their opinions facts of probative value. We further note that the trial court instructed the jury that it was the sole judge of the credibility of the witnesses and that it determined the weight to be accorded expert testimony.

Farmers next contends that even if Dailey and Renner qualified as experts, their testimony did not "assist the trier of fact [in determining] a fact in issue." Generally, expert testimony is admissible only if it will be of assistance to the jury in its deliberations and relates to an area not within the competency of ordinary citizens. *Dotzler v. Tuttle*, 234 Neb. 176, 449 N.W.2d 774 (1990). The determination of whether an expert's testimony or opinion will be helpful to a jury or assist the trier of fact will be upheld on appeal unless the trial court abused its discretion. *State v. Reynolds*, 235 Neb. 662, 457

N.W.2d 405 (1990).

The fact that a livestock thief or thieves were operating in Dawes County was within the specialized knowledge of law enforcement personnel, and not within the competency of ordinary citizens, and assisted the jury in determining whether the Browns' sheep were stolen. The district court did not abuse its discretion.

Farmers' further claim that the officers' testimony constituted impermissible hearsay is unfounded. "[R]ule 703 of the Nebraska Evidence Rules allows experts to rely on hearsay facts or data reasonably relied upon by experts in the field as a basis for their opinion." *State v. Hayden, ante* p. 286, 293, 466 N.W.2d 66, 70 (1991) (citing *Gibson v. City of Lincoln*, 221 Neb. 304, 376 N.W.2d 785 (1985)). Sheriff Dailey testified that the information upon which he based his opinion was information upon which he regularly relied in his duties as sheriff. Sergeant Renner asserted that the information which was the basis of his opinion was of the type which is normally relied upon by people in the law enforcement profession. The trial court did not abuse its discretion in permitting the expert testimony which was based upon hearsay. See *State v. Hayden*, 233 Neb. 211, 444 N.W.2d 317 (1989) (reviewing a hearsay challenge to expert testimony under an abuse of discretion standard). Farmers' third assignment of error is meritless.

IV. WOOL INCENTIVE PAYMENTS

In its fourth assignment of error, Farmers, in substance, complains that the trial court erred in permitting the Browns to recover wool incentive payments which the Browns would have received had their sheep not been stolen. Brown testified that due to the reduction in the number of the Browns' sheep by theft, his wool incentive payments were decreased. As Brown explained, the federal government pays sheep owners an incentive based on the weight of an animal's wool. The source of the payments was from imports of sheep from New Zealand and Australia. The parties stipulated that if the loss was covered under the Browns' insurance policy, the amount of the loss was $1,022.62. The sum of $1,022.62 was arrived at by multiplying the number of sheep lost by the dollar amount of the incentive

payments which would have been received had the sheep not been lost. The jury awarded the Browns the claimed amount for the lost wool incentive payments.

Farmers argues that the Browns' policy covered only the losses of the sheep themselves. Therefore, it maintains that the damages for the lost wool incentive payments fall outside the coverage of the policy.

Our analysis begins with the terms of the policy, which provided coverage for "direct loss to insured farm personal property" caused by theft. Apart from the question of whether the wool incentive payments were a "direct loss" caused by theft, Farmers asserts that the wool incentive payments are not "insured farm personal property."

Nowhere in the policy is "insured farm personal property" defined. Nonetheless, we are guided by a number of well-established rules. In order to recover under an insurance policy of limited liability, an insured must bring himself or herself within its express provisions. *Ditloff v. State Farm Fire & Cas. Co.*, 225 Neb. 375, 406 N.W.2d 101 (1987). When the terms of an insurance policy are clear, they are to be accorded their plain and ordinary meaning. *Allstate Ins. Co. v. Farmers Mut. Ins. Co.*, 233 Neb. 248, 444 N.W.2d 676 (1989). When a clause in an insurance contract can fairly be interpreted in more than one way, there is ambiguity to be resolved by the court as a matter of law. *Polenz v. Farm Bureau Ins. Co.*, 227 Neb. 703, 419 N.W.2d 677 (1988). The resolution of an ambiguity in a policy of insurance turns not on what the insurer intended the language to mean, but what a reasonable person in the position of the insured would have understood it to mean at the time the contract was made. *Id.* In the case of ambiguity in an insurance contract, a construction favorable to the insured prevails so as to afford coverage. *Id.* Accord *Malerbi v. Central Reserve Life*, 225 Neb. 543, 407 N.W.2d 157 (1987).

Under one plausible interpretation, by narrowly focusing on the words "insured farm personal property," a reasonable person in the position of the insured could interpret that language as restricting coverage to losses of the sheep themselves, irrespective of the question of whether the losses were direct or not. Alternatively, the policy could fairly be

interpreted as providing that so long as "insured farm personal property" is stolen, any loss directly attributable to that theft is also covered. Because the policy language is ambiguous, the terms are construed in favor of the Browns so that "farm personal property" includes wool incentive payments.

The remaining issue to be decided is whether the wool incentive payments were a "direct loss" caused by theft. With respect to theft insurance, it has been said, "The policy of insurance may limit recovery to 'direct' loss, which is generally construed as meaning the proximate as opposed to a remote loss." 10A G. Couch, Cyclopedia of Insurance Law § 42:76 at 218-19 (rev. 2d ed. 1982). Nebraska is in accord with this rule. In *Clouse v. St. Paul Fire and Marine Ins. Co.*, 152 Neb. 230, 233, 40 N.W.2d 820, 823 (1950), this court held, " 'Direct,' as so used, means 'immediate' or 'proximate,' as distinguished from 'remote' or 'incidental.' [Citations omitted.]" We further explained:

> In determining the cause of a loss for the purpose of fixing insurance liability, when evidence of concurring causes of the damage appears, the proximate cause to which the loss is to be attributed is the dominant, the efficient one that sets the other causes in operation; and causes which are incidental are not proximate, though they may be nearer in time and place to the loss. [Citations omitted.]

Id. at 234, 40 N.W.2d at 823. See, also, *Lydick v. Insurance Co. of North America*, 187 Neb. 97, 187 N.W.2d 602 (1971) (death of cattle not a direct loss caused by windstorm because the wind combined with a number of other factors to produce the loss).

In this case, there is no cause for the loss of wool incentive payments other than the theft of the sheep. The theft of the sheep directly caused the reduction in wool incentive payments, as those payments correspondingly decreased by the number of sheep stolen. Farmers' fourth assignment of error is without merit.

The judgment of the district court for Dawes County must be affirmed.

The Browns are awarded $2,500 to apply toward their attorney fees incurred in this appeal. See, Neb. Rev. Stat.

§ 44-359 (Reissue 1988); *Havelock Bank v. Western Surety Co.*, 217 Neb. 560, 352 N.W.2d 855 (1984).

AFFIRMED.

HARMON CABLE COMMUNICATIONS OF NEBRASKA LIMITED PARTNERSHIP, A LIMITED PARTNERSHIP, APPELLEE AND CROSS-APPELLANT, V. SCOPE CABLE TELEVISION, INC., A CORPORATION, APPELLANT AND CROSS-APPELLEE.
HARMON CABLE COMMUNICATIONS OF NEBRASKA LIMITED PARTNERSHIP, A LIMITED PARTNERSHIP, APPELLEE AND CROSS-APPELLANT, V. SCOPE CABLE TELEVISION OF NEBRASKA CO., A GENERAL PARTNERSHIP, APPELLANT AND CROSS-APPELLEE.

468 N.W.2d 350

Filed April 19, 1991. Nos. 88-821, 88-822.

1. **Contracts: Words and Phrases.** A condition is an event, not certain to occur, which must occur, unless its nonoccurrence is excused, before performance under a contract becomes due.
2. _____: _____. A promise is a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made.
3. **Contracts: Liability.** As a general rule, a condition must be exactly fulfilled before liability can arise on a contract.
4. **Contracts: Intent.** Whether contractual language is deemed conditional or promissory generally depends upon the intention of the parties.
5. _____: _____. Where the intent of the parties is not clear, the disputed language is generally deemed to be promissory rather than conditional.
6. **Contracts: Intent: Words and Phrases.** Terms such as "if," "provided that," "when," "after," "as soon as," "subject to," "on condition that," or some similar phrase are evidence that performance of a contractual provision is a condition.
7. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, the Nebraska Supreme Court views the evidence most favorably to the party against whom the motion is granted and gives that party the benefit of all the inferences deducible from the evidence.
8. **Parol Evidence: Contracts.** The parol evidence rule renders ineffective proof of a prior or contemporaneous oral agreement which alters, varies, or contradicts the terms of a written agreement.
9. **Summary Judgment.** Summary judgment is appropriate when the pleadings,

depositions, admissions, stipulations, and affidavits in the record show that no genuine issue exists as to any material fact or as to the ultimate inferences that may be drawn from any material fact and that, as a matter of law, the moving party is entitled to judgment.

10. **Trial: Witnesses: Appeal and Error.** The trial court is given discretion in determining whether a sufficient basis for a lay witness' opinion has been established, and such determination will not ordinarily be disturbed on appeal absent an abuse of that discretion.
11. **Breach of Contract: Damages.** In a breach of contract case, only reasonably foreseeable damages are recoverable.
12. **Damages.** There exists a general duty to mitigate damages, and a party failing to mitigate damages is generally precluded from recovering those damages which could have been avoided had that party fulfilled its duty to mitigate.
13. _____. The doctrine of mitigation of damages does not apply when compensating a wronged purchaser for the loss of the bargain.
14. **Damages: Presumptions.** The law related to the duty of an injured party to mitigate the damages presumes that further damage has occurred following the tort or breach of contract.
15. **Records: Appeal and Error.** An appellant is responsible for including within the bill of exceptions matters material to issues presented for review.
16. **Motions for Mistrial: Time.** A motion for mistrial based on an opposing party's improper argument is to be made before the jury retires to deliberate.
17. **Trial.** The latitude allowed one during the trial of a cause rests in the discretion of the trial court.
18. **Trial: Appeal and Error.** In the absence of prejudice, misconduct in arguing a cause is not a ground for reversal.
19. **Trial: Juries: Verdicts.** A party may not induce a larger verdict by argument calculated to distract the jury's attention from the issues or by prejudicial statements which have no support in the evidence.
20. **Rules of Evidence: Jurors: Affidavits: Verdicts.** Neb. Rev. Stat. § 27-606(2) (Reissue 1989) does not bar the use of a juror affidavit to establish that a jury made a transpositional error in completing verdict forms in the consolidated trial of cases against multiple defendants.
21. **Words and Phrases.** A setoff is a means of satisfying a debt.
22. **Claims: Interest.** Where a liquidated claim held by one party and an unliquidated claim held by a competing party are set off against one another, and the claims arose from the same transaction, interest on the liquidated claim may be allowed only on any balance due after the setoff.

Appeal from the District Court for Washington County: MARK J. FUHRMAN, Judge. Judgments vacated, and causes remanded with direction.

Neil B. Danberg and James L. Schneider, of Kennedy, Holland, DeLacy & Svoboda, for appellants.

M.J. Bruckner and Paul J. Peter, of Bruckner, O'Gara,

Keating, Sievers & Hendry, P.C., for appellee.

HASTINGS, C.J., WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ., and COLWELL, D.J., Retired.

CAPORALE, J.

I. INTRODUCTION

Under separate contracts, plaintiff-appellee, Harmon Cable Communications of Nebraska Limited Partnership, a limited partnership, purchased through its predecessor in interest, Harmon & Company, Inc., a cable television system from each of the defendants-appellants, Scope Cable Television, Inc., a corporation, and Scope Cable Television of Nebraska Co., a general partnership. Claiming that each of the sellers failed to deliver the promised number of subscribers and that each had improperly charged for certain accounts receivable, the purchaser brought the action designated in this court as case No. 88-821 against the corporate seller and the action denominated herein as case No. 88-822 against the partnership seller. Each seller in turn counterclaimed to recover on a promissory note the purchaser had executed in favor of the sellers.

In each suit the trial court granted the purchaser a partial summary judgment, ruling that the seller had indeed failed to deliver the promised number of subscribers. Pursuant to the agreement of the parties, the cases were thereafter consolidated for trial. A jury trial followed on the question of the damages resulting from the sellers' failure to deliver the promised number of subscribers. The jury returned verdicts finding that the purchaser had been damaged in each transaction.

By further agreement of the parties, the trial court, as the finder of fact and law, adjudicated the issues presented by the purchaser's accounts receivable claims and the sellers' counterclaims. The trial court awarded the purchaser an adjustment on the accounts receivable in each case and granted each seller a setoff under the note it had obtained from the purchaser.

After appeal to this court the cases were consolidated for briefing and argument. The sellers claim the trial court erred in (1) sustaining the purchaser's motions for partial summary

judgment on the issue of liability, (2) admitting certain of the purchaser's damages evidence and refusing the sellers' damages instructions, (3) refusing to instruct the jury that the purchaser had a duty to mitigate its damages, (4) permitting the purchaser to withdraw a claim of attorney-client privilege with respect to a certain exhibit, in admitting said exhibit into evidence, and in not permitting its author to fully explain it, (5) overruling the sellers' motion for mistrial made at the conclusion of closing arguments, and (6) failing to grant the sellers' posttrial motions and in initiating proceedings subsequent to acceptance of the jury's verdicts and discharge of the jury.

By cross-appeal, the purchaser claims the trial court erred in granting the sellers interest on the promissory notes made by the purchaser.

Although the record sustains none of the sellers' assignments of error, the trial court incorrectly assessed the interest due on the promissory notes. Accordingly, we vacate the judgments of the trial court and remand with the direction that judgments be entered in accordance with this opinion.

II. FACTS

On June 21, 1985, the purchaser's predecessor in interest and the sellers entered into the contracts described in part I. By their terms, the contracts were not to be closed until sometime between October 31 and December 31, 1985. Although there were two separate sellers, cable systems, and contracts, the purchaser insists that it approached the transactions as one purchase, for one price, agreeing to the separate contracts and price allocations made therein as an accommodation to the sellers.

As part of its contract, the corporate seller warranted that it would, as of the date of closing, deliver at least 1,200 "basic subscribers," that is, consumers of the basic cable services the seller offered, and 1,160 "pay subscribers," that is, consumers of services in addition to basic services. The partnership seller warranted that it would deliver at least 2,125 basic subscribers and 2,060 pay subscribers.

In August or September 1985, the sellers informed the purchaser's predecessor of potential subscriber shortfalls. On

October 18, 1985, the purchaser's predecessor assigned its rights under the agreements to the purchaser.

On November 5, 1985, the parties entered into a written addendum to their agreements. This document acknowledged that the sellers would be unable to deliver the warranted number of subscribers, and recited that the parties disagreed as to the purchaser's remedies for that failure. The compact noted that the sellers were of the view that the purchaser's sole remedy was to terminate the agreements and receive a refund of all moneys paid, whereas the purchaser maintained that such failure was a breach of the agreements, entitling it to exercise any remedy agreed upon in the contracts, including the instigation of a lawsuit. Having thus covenanted to disagree, the parties nonetheless contracted to close and complete the transactions on November 5, 6, or 7, 1985.

At the November 5, 1985, closing, the purchaser delivered $2,470,000 to the sellers, plus a note in the sum of $5,000 to the corporate seller and a note in the sum of $20,000 to the partnership seller, totaling the agreed-upon purchase price of $2,495,000.

On December 3, 1985, the purchaser sent the sellers a letter notifying them that they had not delivered the warranted number of subscribers, that they had sold accounts receivable which represented past-due balances on disconnected accounts in violation of the purchase agreements, and that unless they cured these failures within 60 days, the purchaser would offset against its damages those amounts otherwise due the sellers under the promissory notes the purchaser had issued. These lawsuits followed.

The number of subscribers actually delivered was undisputed at trial. The corporate seller delivered 1,144 basic and 813 pay subscribers, amounting to a shortfall of 56 basic and 347 pay subscribers. The partnership seller delivered 2,096 basic and 2,085 pay subscribers, amounting to a shortfall of 29 basic subscribers and a surplus of 25 pay subscribers. Each of the contracts provides that one basic subscriber is the equivalent of two pay subscribers. The parties therefore agreed that the corporate seller failed to deliver 229.5 "equivalent basic units," the 56 basic subscriber shortfall plus one-half of the 347 pay

subscriber shortfall. (We hereafter refer to the equivalent basic units simply as "units.") Likewise, the parties agreed that the partnership seller failed to deliver 16.5 units, the 29 basic subscriber shortfall less one-half of the 25 excess pay subscribers delivered. Therefore, there was an agreed total subscriber shortfall of 246 units, the 229.5 corporate shortfall plus the 16.5 partnership shortfall.

In testifying about the purchaser's damages, Alan Harmon, chairman of the board of the purchaser's predecessor, employed a "cash-flow multiplier" method in calculating the purchaser's damages. He explained that at the time of the transactions, it was the cable industry standard to sell cable systems for seven to eight times annual cash-flow. Harmon testified that in framing the offer of $2,495,000 for the purchase of the two systems, his company considered estimates of the sellers' cash-flows multiplied by 7.76. To measure the purchaser's damages, Harmon first determined the lost annual cash-flow resulting from the subscriber shortfall. For purposes of this calculation, Harmon stated that basic subscribers generate, after expenses, $123.58 annual cash-flow, whereas pay subscribers generate only $38.73 net annual cash-flow. Harmon multiplied these values by the appropriate subscriber shortfall and then multiplied that product by the cash-flow multiplier, which resulted in total damages of $177,385, $157,020 being apportioned to the corporate seller and $20,365 to the partnership seller.

The purchaser also called Marc Weisberg, a cable television system broker engaged in the selling and financing of cable systems. He testified that while the cash-flow multiplier method Harmon utilized was an objective, direct way of calculating the worth of a cable system and a legitimate method to use in determining damages in cases of subscriber shortfalls, he considered another method to be equally valid and employed that other method. Weisberg noted that between the two contracts, the sellers warranted the delivery of 4,935 units, the 3,325 basic subscribers warranted plus one-half of 3,220 pay subscribers warranted. He then divided the 4,935 units into the purchase price and attained a purchase price of $506 per unit. In his view, the purchaser's damages were the product of

multiplying that unit purchase price by the 246-unit shortfall, a total of $124,476.

The sellers countered with the testimony of Robert Jones, a professional consultant and appraiser in the telecommunications industry. Jones offered two methods for calculating damages. Under the first method, he focused on the paragraph in each of the contracts which purports to allocate the purchase price to various items. Each paragraph declares:

> Seller and [Purchaser] agree that this Agreement for the sale of the Business, including the trade fixtures, furniture, equipment and inventory and other assets, tangible or intangible (including the Covenant Not to Compete) *is indivisible* even though separate considerations are to be stated for such property. Seller and [Purchaser] further agree that the purchase price shall be allocated in the following manner . . . .

(Emphasis supplied.)

The corporate allocation is as follows:

Covenant Not to Compete	$ 1,000
Franchise	280,000
CATV System	255,000
Land	20,000
Buildings	70,000
Vehicles, heavy equipment	5,000
Tools and test equipment	6,000
	$ 637,000

The partnership allocation is as follows:

Covenant Not to Compete	$ 2,000
Franchise	198,000
CATV System	1,607,000
Easement Rights	2,000
Buildings	22,000
Vehicles, heavy equipment	10,000
Tools and test equipment	17,000
	$1,858,000

Jones testified that the value of the subscriber list was only a portion of the item termed "Franchise." He stated that taking into account the services made available by the systems, the value of the entire subscriber lists of the two sellers was

$191,500. Jones then divided that figure by the 4,935 warranted units and obtained a value of $39 per unit. Multiplying this value by the 246-unit shortfall, Jones concluded that the purchaser's total damages were $9,594.

Jones also posited a replacement cost method for determining the purchaser's damages. He stated that under prevailing industry standards, including consideration of marketing fees and installation expenses, the purchaser could replace each missing unit for $38.44. Under this approach, Jones stated that the purchaser's damages were $9,456, $38.44 multiplied by 246 units.

The sellers also offered the testimony of Michael Kruger, the former president of the purchaser and its predecessor. Kruger, who left the purchaser in 1986, refuted Harmon's testimony concerning the process by which the predecessor had valued the sellers' systems both during the negotiations and in calculating the damages resulting from the subscriber shortfalls. Kruger testified that the value of the subscriber list comprised a portion of the value attributable to the franchise portion of the allocation paragraphs and that the purchaser's damages were "minimal," in the "$20,000 range."

The purchaser recalled Harmon on rebuttal and through him offered, solely for the purpose of rebutting Kruger's trial testimony, a letter Kruger had written while president of the purchaser to one of the purchaser's non-Nebraska attorneys. Kruger therein outlined the four damage assessment methods which were eventually testified about at trial. He also wrote he foresaw the sellers arguing that the purchaser had not been damaged at all, due to an increase in the market value of the systems between the date of signing the contracts and the date of closing.

The sellers objected to the introduction of the letter, claiming that as it had not been produced during discovery, the purchaser could not introduce the letter as evidence at trial. This objection was overruled, and the evidence was received for the limited purpose offered.

On surrebuttal, the sellers recalled Kruger to explain the letter, but the trial court ruled that as the letter was offered for impeachment purposes only, Kruger could not address it for the

purpose of rehabilitating himself. Nonetheless, in response to questions posed by the sellers' trial attorney in a manner construed to impeach Harmon's testimony, Kruger did explain portions of the letter, as detailed in part III(4), *infra*.

The subscriber shortfall issues were submitted to the jury on special verdict forms, which in each case provided a space in which to insert the amount of damages should the jury find for the purchaser. On June 10, 1988, the jury found for the purchaser against the corporate seller in the amount of $9,000 and for the purchaser against the partnership seller in the amount of $110,800. The parties having waived their appearance, the trial court accepted the jury's verdicts and excused the jurors.

On June 20, 1988, each of the sellers filed a combined motion for judgment notwithstanding the verdict or, in the alternative, for a new trial. The motions noted that the larger amount of damages was assessed against the partnership seller, which delivered all but approximately one-half of 1 percent of the warranted units, whereas the corporate seller failed to deliver 13 percent of the warranted units. On June 23, 1988, the purchaser filed a motion to correct the verdict forms. Attached to this motion was the affidavit of the jury foreman, which declared that he had made a transpositional error in filling out the special verdict forms.

A hearing was held on the various posttrial motions on July 27, 1988. Citing the juror affidavit, which was received in evidence, the trial court ordered that the jury reassemble to reexamine the verdicts. The jury was reassembled on August 31, 1988, and instructed to consider the possibility of a transpositional error without reconsidering the substantive issues in the cases. Thereupon, the jury returned special verdicts in each case, signed by all the jurors, which recited: "We, the Jury duly impanelled and sworn in the above entitled cause do find that: A transpositional error was made on the verdict forms and we request that they be corrected by the Court to conform to the affidavit of [the jury foreman]."

On September 8, 1988, the trial court entered its judgments. It awarded the purchaser $106,763 against the corporate seller, $110,800 as determined by the jury for the subscriber shortfall

plus $963 in accounts receivable adjustments, less $5,000 due the corporate seller under the promissory note the purchaser had executed.

The trial court also awarded the partnership seller $9,146 against the purchaser. It gave the purchaser credit for $9,000 as determined by the jury on the subscriber shortfall, awarded the purchaser $1,854 in accounts receivable adjustments, and found that the partnership seller was entitled to $20,000 on the promissory note the purchaser executed.

The sellers again filed in each case a motion for judgment notwithstanding the verdict or for a new trial, which motions were overruled on the same day the trial court modified its judgments "to reflect that interest rates on the two Promissory Notes in issue will run from the date of making said Notes."

III. ANALYSIS OF SELLERS' APPEAL

With that history of the facts in mind, we first turn our attention to the sellers' assignments of error.

1. SUMMARY JUDGMENT

The first assignment questions the propriety of granting the purchaser summary judgment on the question of the sellers' liability for the subscriber shortfall. The sellers claim that the purchaser forfeited any right to damages for that failure because it did not comply with the notice provisions of the contracts and, in any event, did not act in good faith.

(a) Notice

Each contract contains an indemnification paragraph, which provides:

> [Purchaser] shall not assume any debts or other liabilities of Seller. *Seller* hereby covenants and *shall* defend and *indemnify [Purchaser]* and hold harmless [Purchaser] at all times after the Closing Date from and against and *in respect to any and all losses, liabilities, costs (including, without limitation, court costs), damages, expenses (including, without limitation, reasonable attorneys fees) or deficiencies arising out of or due to*:
>
> (a) *Any inaccuracy in or breach of any representation, breach of warranty or nonfulfillment of any agreement,*

> *covenant or obligation on the part of Seller made in this Agreement*;
>
> (b) Any and all liabilities or obligations of Seller of any nature, whether accured [sic], absolute, contingent or otherwise, existing on the Closing Date; and
>
> (c) Any actions, suits, proceedings, costs, expenses and legal fees incident to any of the foregoing items listed under paragraphs (a) and (b) of this paragraph.
>
> *[Purchaser] shall assert any claim* or claims for indemnification under the provisions of this paragraph above *by giving written notice* of such claim or claims to Seller within 30 days of discovery, but not later than 18 months from the date of closing. *Each such notice shall set forth* in reasonable detail the factual basis giving rise to the claim or claims and *the amount of the damages and expenses incurred by [Purchaser] as a result of such claim or claims*. Seller agrees that it shall promptly reimburse and pay [Purchaser] for such damages and expenses. If any claim for indemnification is *based upon an action or claim filed or made against [Purchaser] by a third party*, then Seller shall have the right to negotiate a settlement or compromise of any such action or claim or to defend any such action or claim at the sole cost and expense of, and with counsel selected by Seller.

(Emphasis supplied.)

Whether the sellers' contention that the purchaser cannot recover damages resulting from the subscriber shortfall because it failed to comply with the notification provisions of the indemnification paragraphs has merit depends upon whether those provisions are conditional or promissory. Courts have struggled for centuries with differentiating between conditions and promises. See, e.g., *Constable v. Cloberie*, Palmer 397 (1626), reprinted in 79 Eng. Rep. 1259. While we appear to not have made a detailed analysis of this distinction, we have recognized its existence. See *General Credit Corp. v. Imperial Cas. & Indemnity Co.*, 167 Neb. 833, 95 N.W.2d 145 (1959).

A condition has been defined as "an operative fact, one on which the existence of some particular legal relation depends."

3A A. Corbin, Corbin on Contracts § 627 at 11 (1960). Another author similarly defines a condition as "(1) Any operative fact that will create some new legal relation, or extinguish an existing relation; or, (2) Words or other manifestations that indicate that a fact shall have such operation." 5 S. Williston, A Treatise on the Law of Contracts § 663 at 123-24 (3d ed. 1961). The Restatement definition of a condition is also in accord: "A condition is an event, not certain to occur, which must occur, unless its non-occurrence is excused, before performance under a contract becomes due." Restatement (Second) of Contracts § 224 at 160 (1981). See, also, *Cosgrove v. Mademoiselle Fashions*, 206 Neb. 275, 292 N.W.2d 780 (1980) (quoting § 224, formerly § 250).

A promise, on the other hand, occurs when one "expresses an intention that some future performance will be rendered and gives assurance of its rendition to the promisee." 3A A. Corbin, *supra*, § 633 at 25. Again, the Restatement is in accord: "A promise is a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made." Restatement (Second) of Contracts § 2(1) at 8 (1981). See, also, *Helle v. Landmark, Inc.*, 15 Ohio App. 3d 1, 472 N.E.2d 765 (1984) (quoting § 2(1)). In the event of nonfulfillment, the distinction between a promise and a condition becomes important. As a general rule, a condition must be exactly fulfilled before liability can arise on the contract. 5 S. Williston, *supra*, § 675; 3A A. Corbin, *supra*, § 633. See, also, *Regent Intern. Hotels v. Las Colinas Hotels*, 704 S.W.2d 101 (Tex. App. 1985); *Knox v. Knox*, 337 Mich. 109, 59 N.W.2d 108 (1953); *Aetna Ins. Co. of Hartford, Conn. v. Jeremiah*, 187 F.2d 95 (10th Cir. 1951); *Friedman v. Decatur Corporation*, 135 F.2d 812 (D.C. Cir. 1943). This general rule finds support in the Restatement as well:

> (1) Performance of a duty subject to a condition *cannot become due unless the condition occurs* or its non-occurrence is excused.
>
> (2) Unless it has been excused, the non-occurrence of a condition discharges the duty when the condition can no longer occur.

> (3) Non-occurrence of a condition is not a breach by a party unless he is under a duty that the condition occur.

(Emphasis supplied.) Restatement (Second) of Contracts § 225 at 165 (1981). See, also, *Corrigan Dispatch Co. v. Casa Guzman, S.A.*, 696 F.2d 359 (5th Cir. 1983) (citing § 225).

Nonfulfillment of a promise, however, gives rise to a different remedy. "The non-fulfillment of a promise is called a breach of contract, and *creates in the other party a secondary right to damages*; it is the failure to perform that which was required by a legal duty." (Emphasis supplied.) 3A A. Corbin, *supra*, § 633 at 26. See, also, J. Calamari & J. Perillo, The Law of Contracts § 11-9 (3d ed. 1987); *Cramer v Metropolitan Savings*, 401 Mich. 252, 258 N.W.2d 20 (1977), *cert. denied* 436 U.S. 958, 98 S. Ct. 3072, 57 L. Ed. 2d 1123 (1978).

Thus, if the notice requirements of the indemnification paragraphs are deemed to be a condition to the sellers' liability, the purchaser's noncompliance would discharge the sellers' liability. If the notice requirements are deemed to be a promise, then the remedy lies in an action for damages.

Whether contractual language is deemed conditional or promissory generally depends upon the intention of the parties. See, e.g., *Mrozik Const. v. Lovering Associates*, 461 N.W.2d 49 (Minn. App. 1990); *Criswell v. European Crossroads S. Ctr.*, 792 S.W.2d 945 (Tex. 1990); *Gildea v. Kapenis*, 402 N.W.2d 457 (Iowa App. 1987); *Cobbs v. Fred Burgos Const. Co.*, 477 So. 2d 335 (Ala. 1985); *Ide v. Joe Miller & Co.*, 703 P.2d 590 (Colo. App. 1984); *Ballenger Corp. v. City of Columbia, S.C.*, 286 S.C. 1, 331 S.E.2d 365 (1985); *Cramer v Metropolitan Savings, supra*. Where the intent of the parties is not clear, the disputed language is generally deemed to be promissory rather than conditional. See, e.g., *Mrozik Const., supra*; *Sahadi v. Continental Ill. Nat. Bank & Trust Co.*, 706 F.2d 193 (7th Cir. 1983); *Mularz v. Greater Park City Co.*, 623 F.2d 139 (10th Cir. 1980); *Howard v. Federal Crop Ins. Corp.*, 540 F.2d 695 (4th Cir. 1976). Terms such as "if," "provided that," "when," "after," "as soon as," "subject to," "on condition that," or some similar phrase are evidence that performance of a contractual provision is a condition. *Criswell, supra*; *Ballenger Corp., supra*.

Notwithstanding application of the rule that in reviewing a summary judgment we view the evidence most favorably to the party against whom the motion is granted and give that party the benefit of all the inferences deducible from the evidence, *Joseph Heiting & Sons v. Jacks Bean Co.*, 236 Neb. 765, 463 N.W.2d 817 (1990), under the state of this record, the absence of any language indicative of a condition precludes a conclusion that the parties clearly intended the notice requirements to constitute a condition to the creation of the contract. They therefore are promises, the breach of which gives rise to an action for damages.

(b) Good Faith

Citing to Neb. U.C.C. § 1-203 (Reissue 1980), the sellers also contend that the purchaser's failure to conduct a marketing campaign prior to closing the sale amounted to a breach of the requirement of good faith and reasonableness in commercial transactions and that summary judgment thus could not properly lie. In making that claim, the sellers state that this court "has recognized that a similar requirement of good faith and reasonableness is imposed upon parties to agreements that may not necessarily be covered by the [Uniform Commercial Code]." Brief for appellants at 37. In support of that proposition, the sellers cite *Newman v. Hinky Dinky*, 229 Neb. 382, 427 N.W.2d 50 (1988) (requirement of good faith and reasonableness applies to situation where lessor withheld consent to proposed assignment of lease), and *Bernstein v. Seglin*, 184 Neb. 673, 171 N.W.2d 247 (1969) (lessor could not unreasonably refuse to accept a new tenant in mitigation of damages under a lease). Accepting a substitute lessee is quite a different matter from the sale and purchase of a business by knowledgeable and experienced persons. However, assuming for the purposes of this analysis, but not deciding, that a requirement of good faith and reasonableness applies to these transactions, there is still no question of material fact on the issue of the sellers' liability for the subscriber shortfall.

Each of the contracts contains a programming paragraph, which provides:

> [Purchaser] and Seller agree to negotiate in good faith a

separate agreement ("Marketing Agreement") under which [Purchaser] may implement changes in any programming as well as rate changes for the premium services, between August 15 and closing, and conduct a marketing campaign. All such activities and related conditions will be set forth in a written "Marketing Agreement", approved by both parties. *If a "Marketing Agreement" is not executed, [Purchaser] shall have no right or obligation to undertake such activities.* No provision of this Agreement, or the performance of the parties hereunder, shall be altered in any way by the "Marketing Agreement", or the performance of the parties thereunder the principal provisions of the "Marketing Agreement" shall include, with limitation:

a) [Purchaser] to coordinate all activities.

b) Seller shall approve [Purchaser's] marketing and capital budgets.

c) [Purchaser] to pay all associated marketing costs. If there is no closing under the purchase agreement, Seller will promptly reimburse [Purchaser] for the actual cost of the marketing.

d) [Purchaser] will advance the costs of any hardware installed in Seller's system; if there is no closing under the Purchase Agreement, Seller will promptly reimburse [Purchaser] for the actual cost of such equipment.

e) All changes in rates and programs to be set forth in the "Marketing Agreement".

(Emphasis supplied.) The foregoing language clearly contemplates that a marketing agreement might not come into existence and provides that in such an event the purchaser would not only have no obligation to undertake a marketing campaign, but it would have no right to engage in such an activity.

The sellers nonetheless assert that via the programming provisions, the purchaser "reserved the right to undertake a marketing campaign." Brief for appellants at 38. At the summary judgment hearing, the sellers introduced the affidavit of Timothy Garrigan, the corporate seller's vice president. Garrigan declared therein that the purchaser had, prior to

September 1985, been informed there would be a shortfall in delivered subscribers and had, pursuant to the aforementioned programming provisions, agreed to undertake a marketing campaign, but elected not to do so. It is the sellers' position that this "reserved right," coupled with Garrigan's affidavit, presents a question of fact "with respect to whether the parties' course of dealing supplemented or qualified the terms of the agreement by their anticipated marketing program." *Id.* at 39.

This asserted oral amendment to the purchase agreements must be considered in light of the subsequent written addendum first discussed in part II. The last paragraph of that addendum recites that "[t]here are no modifications, amendments or changes to the Agreements." Obviously, this written provision stands in stark contrast to the sellers' position that an amendment to the purchase agreements concerning the purchaser's intention to undertake a marketing campaign had been agreed to.

Garrigan's affidavit is tantamount to oral testimony contradicting the terms of the written addendum which unequivocally declare that the original purchase agreements had not been amended or modified. As such, the affidavit is subject to the strictures of the parol evidence rule, which renders ineffective proof of a prior or contemporaneous oral agreement which alters, varies, or contradicts the terms of a written agreement. *Five Points Bank v. White*, 231 Neb. 568, 437 N.W.2d 460 (1989).

Summary judgment is appropriate when the pleadings, depositions, admissions, stipulations, and affidavits in the record show that no genuine issue exists as to any material fact or as to the ultimate inferences that may be drawn from any material fact and that, as a matter of law, the moving party is entitled to judgment. *Lichty v. Federal Land Bank of Omaha, ante* p. 682, 467 N.W.2d 657 (1991). As to the issue of the sellers' liability for the subscriber shortfall, the trial court properly concluded that there exists no genuine issue as to any material fact nor the ultimate inferences which may be drawn therefrom and that the purchaser is entitled to judgment as a matter of law. See Neb. Rev. Stat. § 25-1332 (Reissue 1989) (interlocutory summary judgment permitted on issue of

liability notwithstanding existence of genuine issue as to amount of damages).

2. DAMAGES

In the next assignment of error the sellers challenge the trial court's handling of the purchaser's shortfall damages evidence and its instructions relating to that topic.

(a) Evidence

The sellers' first concern in connection with the handling of the damages issue rests on the fact that Harmon was not designated as an expert witness prior to trial. Under a pretrial ruling, one not designated as such prior to trial could not be presented to the jury as an expert. Thus, the question becomes whether he was qualified as a lay witness to testify as he did.

Neb. Rev. Stat. § 27-701 (Reissue 1989) provides:

> If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

We have ruled that a trial court is given discretion in determining whether a sufficient basis for a lay witness' opinion has been established and that such determination will not ordinarily be disturbed on appeal absent an abuse of that discretion. *Schmidt v. J. C. Robinson Seed Co.*, 220 Neb. 344, 370 N.W.2d 103 (1985).

Harmon began managing and brokering cable systems in 1960. During the next 12 years, he was involved in the purchase of over 100 cable television systems throughout the country. Since 1972, Harmon has operated as an independent broker and consultant in the cable industry, focusing on the acquisition of franchises. At the time of the trial, he was operating cable systems in Nebraska and five other states.

Harmon's testimony was replete with references to industry standards, his own personal experiences in the cable television industry, and his own part in the formulation of these contracts. As such, it cannot be said that his testimony was inadmissible because it was not rationally related to his

perceptions. Similarly, it cannot be said that his opinion as to the damages suffered was not helpful to an understanding of the purchaser's damages claims. Finally, it cannot be said that his opinion was not helpful to a determination of the amount of damages actually suffered by the purchaser. Thus, Harmon's opinion testimony fell within the strictures of § 27-701. The fact that Harmon was a person having an interest in the outcome of the cases goes only to the weight of his testimony, not to its admissibility.

(b) Instructions

Relying on *Birkel v. Hassebrook Farm Serv.*, 219 Neb. 286, 363 N.W.2d 148 (1985), the sellers further claim that the trial court erred in failing to instruct the jury that any damages award granted the purchaser was limited to the amounts foreseeable by each of the sellers. More specifically, they urge that the dollar amounts claimed by the purchaser are so great as to be unforeseeable and thus unrecoverable: "[The sellers] had no reason to know that [the purchaser] believed a 5% subscriber shortfall was worth $177,000 nor that . . . Weisberg believed the entire transaction was only a 'subscriber' transaction [resulting in a damages estimate of $124,476]." Brief for appellants at 25. However, an examination of the doctrine of foreseeability of damages in general, and of *Birkel* specifically, demonstrates that the sellers' premise is fallacious.

The rule limiting recovery in breach of contract cases to reasonably foreseeable damages arose in the landmark case of *Hadley v. Baxendale*, 9 Ex. 341 (1854), reprinted in 156 Eng. Rep. 145. In *Hadley*, damages for lost profits, suffered while a mill was inoperable due to a broken iron shaft, could not be recovered from a common carrier that unreasonably delayed shipment of a new shaft to the mill where the common carrier had no reason to know that such damages would flow from its breach. The deciding factor in *Hadley* was not that a certain damages amount was foreseeable. Instead, the case turned on the fact that the common carrier, given its limited knowledge of the circumstances, could not foresee that its breach would result in lost profits.

In *Birkel, supra*, this court held that where a grain storage

and drying bin failed due to improper installation, evidence of costs incurred in obtaining alternative drying and storage facilities was foreseeable and should therefore have been admitted at the trial court. In so ruling, the *Birkel* court relied in part on Restatement (Second) of Contracts § 351 at 135 (1981), which reads as follows:

> (1) Damages are not recoverable for loss that the party in breach did not have reason to foresee as a probable result of the breach when the contract was made.
>
> (2) Loss may be foreseeable as a probable result of a breach because it follows from the breach
>
> (a) in the ordinary course of events, or
>
> (b) as a result of special circumstances, beyond the ordinary course of events, that the party in breach had reason to know.
>
> (3) A court may limit damages for foreseeable loss by excluding recovery for loss of profits, by allowing recovery only for loss incurred in reliance, or otherwise if it concludes that in the circumstances justice so requires in order to avoid disproportionate compensation.

Thus, what the sellers foresaw as to the amount of damages their breach would cause is irrelevant. What is relevant is whether the sellers had reason to foresee that the purchaser would suffer damages due to the sellers' failure to deliver the warranted number of subscribers.

The specific contemplation in the negotiated addendum to the agreements, that the purchaser would seek damages for the breach, demonstrates that such damages were not unforeseeable to the sellers. Nor can it be said that the purchaser's damages did not flow from the breach in the ordinary course of events. Thus, the doctrine of unforeseeability of damages is not applicable in these cases.

3. Mitigation

In the third assignment of error, the sellers contend the trial court erred in refusing to instruct the jury that the purchaser had a duty to mitigate its damages.

The sellers correctly note that in Nebraska there exists a general duty to mitigate damages and that a party failing to

mitigate damages is generally precluded from recovering those damages which could have been avoided had that party fulfilled its duty to mitigate. *S.N. Mart, Ltd. v. Maurices Inc.*, 234 Neb. 343, 451 N.W.2d 259 (1990) (landlord has duty to relet premises to mitigate damages where tenant abandons premises); *Gottsch Feeding Corp. v. Red Cloud Cattle Co.*, 229 Neb. 746, 429 N.W.2d 328 (1988) (cattle owner's dealings with agister prior to breach deemed sufficient to avoid application of mitigation doctrine). However, that principle alone is not sufficient to decide the issue in this case.

Under the programming paragraphs of the agreements discussed in part III(1)(b) above, the purchaser had no right to undertake a marketing campaign to add customers prior to the close of the purchase agreements. Thus, the purchaser could have done nothing to mitigate its damages prior to closing.

Moreover, this is not a case wherein a nonbreaching party sat idly by while damages escalated. The purchaser had fully performed its obligations under the purchase agreements. The sellers' failure to deliver the warranted number of subscribers resulted in the purchaser's receiving entities that were not worth as much as those for which it had bargained. Thus, the purchaser's damages, having arisen at the time of the breach, were static.

As stated by the New Mexico Supreme Court, "mitigation of damages does not apply when compensating a wronged purchaser for the loss of the bargain." *Hickey v. Griggs*, 106 N.M. 27, 30, 738 P.2d 899, 902 (1987) (mitigation inapplicable where vendor of real estate breaches executory contract). "The law related to the duty of an injured party to mitigate the damages presumes that further damage has occurred following the tort or breach of contract." *Schroeder v. DiPascal Cabinet Co., Inc.*, 467 So. 2d 1380, 1382 (La. App. 1985) (mitigation not applicable where no further damage occurred following cabinet refinisher's breach in rendition of services to plaintiff).

Although not involving a contract for the purchase and sale of real estate only or for the rendition of personal services, as the aforementioned authorities do, the facts of these cases render them subject to the same principle. The purchaser merely seeks compensation for what it was denied by the sellers'

breach of the bargain the parties had made.

4. ATTORNEY-CLIENT PRIVILEGE

Next, the sellers assert the trial court erred in permitting the purchaser to withdraw a claim of attorney-client privilege regarding the Kruger letter described in part II and that it therefore improperly received that document in evidence. In addition, the sellers urge that the trial court erred in not permitting Kruger to explain the writing.

(a) Receipt of Evidence

The claim that the letter was improperly received in evidence is premised on the assertion that the purchaser withheld its production despite "extensive discovery requests." Brief for appellants at 33. The sellers further state that the purchaser "acknowledged that [the letter] was withheld from discovery as subject to an attorney-client privilege." *Id.* It is the sellers' contention that a document withheld from pretrial discovery under a claim of attorney-client privilege cannot be used at trial by the party asserting that privilege.

However, the claims of the sellers regarding their pretrial discovery requests and the purchaser's responses are not supported by the record. While the purchaser's counsel stated he felt the letter was subject to the attorney-client privilege, there is no showing of a refusal to comply with a discovery request for any reason. Indeed, in an exchange between counsel, the purchaser claimed that it had informed the sellers prior to trial of the existence of the letter. The record is simply devoid of evidence of the sellers' discovery requests. The only indication that the sellers conducted any discovery in this regard lies in its assertion at trial that "we have discovery questions out that are extremely sensitive."

In the absence of a record documenting exactly what discovery the sellers undertook with respect to the letter and exactly how the purchaser responded, the inquiry into that aspect of the matter ends. See, *State v. Biernacki, ante* p. 215, 465 N.W.2d 732 (1991) (appellant responsible for including within bill of exceptions matters material to issues presented for review); *GFH Financial Serv. Corp. v. Kirk*, 231 Neb. 557, 437 N.W.2d 453 (1989).

(b) Explanation

The remaining portion of this assignment of error, that the trial court erred in refusing to allow Kruger, as the author, to explain the letter's contents, requires a more detailed analysis. As reflected in part II above, the letter was accepted into evidence for the sole purpose of impeaching Kruger's earlier criticism of the methods Harmon used in calculating the purchaser's damages and Kruger's assessment of the purchaser's damages as minimal.

Neb. Rev. Stat. § 27-613 (Reissue 1989) reads, in pertinent part: "(2) Extrinsic evidence of a prior inconsistent statement by a witness *is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon*, or the interests of justice otherwise require." (Emphasis supplied.)

Upon recalling Kruger during surrebuttal, the trial court initially disallowed questioning by the sellers, which would have given Kruger an opportunity to explain the apparent inconsistencies between his trial testimony and the statements contained in his letter.

> [Sellers' counsel]. Mr. Kruger, I'm going to show you what has been marked as [an exhibit]. Mr. Harmon just talked about it.
>
> [Kruger]. Yes, sir.
>
> [Sellers' counsel]. Would you describe in your own words what [the letter] represents?
>
> [Purchaser's counsel]: Objected to, Your Honor. Improper rebuttal. He can aver or deny what is said in there, but nothing more than that.
>
> [Sellers' counsel]: Your Honor, the whole scope of this thing was discussed.
>
> [Purchaser's counsel]: You asked about it, I didn't.
>
> [Sellers' counsel]: He can certainly explain what it was.
>
> THE COURT: The letter was offered by [purchaser] without explanation. You — [sellers] opened the door and got into the contents. I'll sustain the objection.

To this point the rulings of the trial court violated § 27-613(2). See, e.g., *State v. Antillon*, 229 Neb. 348, 426 N.W.2d 533 (1988).

However, through persistent questioning, the sellers succeeded in putting before the jury Kruger's testimony that he had told the witness Harmon that the most sustainable of the damages calculations set forth in the letter was the replacement value method, and that because of that belief and the minimal damages associated with that method, Kruger advised against filing suit. Kruger was further permitted to testify that the cash-flow multiplier and per subscriber methods of calculating the damages were simply arguments, put in their best light, advanced by the purchaser.

The jury having been made aware of those explanations, the trial court's initial error was corrected.

5. Mistrial Motion

The sellers also assign as error the trial court's denial of its motion for mistrial based on the asserted misconduct of the purchaser's counsel during closing argument. While the sellers made no objection during opposing counsel's closing argument and rebuttal, they did move for a mistrial after the jury was instructed and the case submitted to it. The specific grounds urged in the motion and argued in the sellers' briefs are that the purchaser, through its counsel, improperly asserted that the sellers fraudulently misrepresented the number of subscribers to be delivered and improperly commented as to witness Kruger's credibility.

In *Sandomierski v. Fixemer*, 163 Neb. 716, 719, 81 N.W.2d 142, 145 (1957), this court stated:

> Whether or not an objection to the remarks of counsel made in his argument to the jury may properly be made at the close of the argument, or whether it must be done at the very time they are made, does not appear to have been decided previously by this court. We think that, for several reasons, such objection may properly be made at the close of the argument. *Our previous decisions indicate that the submission of the case to the jury without objection to such misconduct, and counsel's evident willingness to take his chances on a favorable verdict, constitute a waiver of the misconduct.* His objection at the close of the argument and before submission to the jury is in no sense a waiver

> on any such basis. It could well be that any one improper statement would not constitute prejudicial error, while the cumulative effect of several would give rise to a claim of prejudice. Continued objections by counsel to prejudicial statements of opposing counsel in his argument to the jury could place the former in a less favorable position with the jury, and thus impose an unfortunate consequence upon his client which was actually caused by the wrongful conduct of opposing counsel. This he is not required to do. Attorneys engaged in the trial of cases to a jury know or ought to know the purposes of arguments to juries. When they depart from the legitimate purpose of properly presenting the evidence and the conclusions to be drawn therefrom, they must assume the responsibility for such improper conduct. They are in no position to demand that opposing counsel shall jeopardize his position with the jury by constant objections to their improper conduct.

The import of the foregoing language is that the aggrieved party may not take its chances on a favorable verdict and, after an unsuccessful outcome, complain of the opposing party's misconduct during closing argument. The motion was thus timely made in this case. However, we now conclude that the better practice is to make the motion for mistrial before the case is submitted to the jury, thereby enabling the trial court to more easily address an improper argument curable by something less drastic than the declaration of a mistrial. We therefore require that in the future, a motion for mistrial based on an opposing party's improper argument be made before the jury retires to deliberate.

Before moving on to a review of the grounds of misconduct specified in the sellers' mistrial motion, we recall that the latitude allowed one during the trial of a cause rests in the discretion of the trial court, *Billingsley v. Dutton*, 81 Neb. 667, 116 N.W. 301 (1908), and that in the absence of prejudice resulting therefrom, misconduct in argument is not a ground for reversal, *Chicago Lumber Co. v. Gibson*, 179 Neb. 461, 138 N.W.2d 832 (1965), and *Rankin v. Northern Assurance Co.*, 98 Neb. 172, 152 N.W. 324 (1915). However, a party may not induce a larger verdict by argument calculated to distract the

jury's attention from the issues or by prejudicial statements which have no support in the evidence. *Sandomierski v. Fixemer, supra.*

In connection with the first ground of misconduct asserted in the sellers' motion, the sellers point out that the purchaser, notwithstanding that the issue of liability had been determined against the sellers, nonetheless argued, without having pled fraud and in the absence of any evidential support, that the sellers had misrepresented the number of subscribers to be delivered. This assertion rests on an analogy the purchaser drew between the subject transactions and a sale of a large parcel of land.

The purchaser argued that just as a buyer of such land would not be able to tell the number of acres involved by simply looking and to some extent would have to rely on the representations made by the landowner, so, too, did the purchaser in these cases have to rely upon the representation of the number of subscribers made by the sellers. The purchaser concluded this portion of its argument by saying that if the owner of the land "didn't produce those acres, then, he's got to give [the buyer] back the money upon which that deal was based."

As the damages calculations proffered by the witnesses in these cases were all predicated on the subscriber shortfall, there was no question but that the sellers were being asked to compensate the purchaser for their failure to deliver the warranted number of subscribers. Thus, while it is true that the argument was not related to any issue before the jury and was therefore improper, the argument did nothing more than tell the jury what the evidence told the jury. Accordingly, the argument was not prejudicial.

The last specified and argued claim of misconduct rests on statements the purchaser made during argument concerning the credibility of the witness Kruger. During cross-examination, after Kruger and the purchaser's counsel sparred as to whether Kruger had refused to talk with counsel other than during a deposition, Kruger denied having left the purchaser's predecessor "in a bitter mood," and commented that purchaser's counsel would not "impune [sic] [Kruger's] honor"

or they would not "get along"; that counsel did not seem to think Kruger spoke the truth; and that what Kruger had said was "God's truth."

During argument, the purchaser's counsel stated that Kruger had lied more than once and that the jury might wonder why a former president would testify as Kruger did. Counsel further commented in that connection that he knew Kruger "had it in for Mr. Harmon, but I couldn't, for the life of me, understand why he had it in for me. He only met me once."

It is true, as the sellers argue, that under Canon 7, DR 7-106(C)(4), of the Nebraska Code of Professional Responsibility, an attorney appearing in his or her professional capacity before a tribunal shall not assert his or her personal opinion as to the credibility of a witness. However, here, the purchaser's counsel did not state his opinion as to Kruger's credibility, he simply stated it as fact that the witness had lied. In view of the sparring between counsel and Kruger during cross-examination, it cannot be said that counsel's argument in that regard was without foundation. It was for the jury to decide how to evaluate counsel's statements. See *State v. Bradley*, 236 Neb. 371, 461 N.W.2d 524 (1990) (distinguishes between statement of counsel's belief as to one's guilt and statement that evidence would demonstrate guilt). Moreover, in their argument the sellers extolled Kruger's veracity and pointed to evidence they claim corroborates his testimony.

Under the circumstances, we cannot conclude the trial court abused its discretion in overruling the sellers' motion for mistrial.

6. Jury Reassembly and Posttrial Motions

In the sixth and final assignment of error, the sellers assert that the trial court erred in initiating proceedings after accepting the jury's verdicts and discharging the jury, and in failing to grant their posttrial motions.

(a) Reassembly

The sellers contend that since the purchaser's motion to correct the verdict forms was not filed until 13 days after they were returned, the motion was untimely under Neb. Rev. Stat. §§ 25-1142 and 25-1143 (Reissue 1989).

Section 25-1142 defines a new trial as "a reexamination in the same court of an issue of fact after a verdict by a jury, report of a referee, or a decision by the court." In these cases the purchaser sought not a reexamination of an issue of fact but, rather, an investigation into a possible clerical error of the jury and the correction of any such error prior to any judgments having been rendered. Therefore, the motion was not one for a new trial and was not subject to the 10-day limit on the filing of new trial motions imposed by § 25-1143.

Neb. Rev. Stat. § 25-1123 (Reissue 1989) provides that "[i]f . . . the verdict be defective in form only, the same may, with the assent of the jury before they are discharged, be corrected by the court." The essential requirement of that statute is that a verdict which appears to be defective in form not be corrected without consent of the jury. The requirement that assent occur before the jury is discharged is to assure that the jury is assembled together and agrees that there was in fact a defect in the form of its verdict. This requirement is met by reassembly of the jury. While an 82-day delay might in some instances make reassembly impossible, such did not prove to be the situation in these cases. Thus, as correction of the jury forms was requested by the reassembled jury, the corrections were made with the jury's assent before its operative discharge. At first blush, it might appear this ruling is at variance with the rationale behind the rule adopted in part III(5) above concerning motions for mistrial based on an opponent's improper argument. The difference between the two situations, however, is that while a party controls whether and when to move for a mistrial, no party controls the commission of a clerical error by a jury.

Nonetheless, the sellers, citing *Rahmig v. Mosley Machinery Co.*, 226 Neb. 423, 412 N.W.2d 56 (1987), argue that Neb. Rev. Stat. § 27-606 (Reissue 1989) prohibits the trial court's actions. Section 27-606 reads, in pertinent part:

> (2) Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or

> concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him *indicating an effect of this kind* be received *for these purposes.*

(Emphasis supplied.) The sellers contend that, as interpreted by *Rahmig*, the acceptance of the jury foreman's affidavit was barred under the last sentence of § 27-606(2) and that therefore the reassembly of the jury was improper.

However, *Rahmig* held only that § 27-606(2) prohibits the use of a juror's affidavit to impeach a verdict on the basis of jury motives, methods, misunderstandings, thought processes, or discussions during deliberations which might enter into the verdict. It does not address the issue now before us, namely, whether a juror's affidavit may be used to establish the occurrence of a clerical error by transposition in the rendition of the verdicts against multiple defendants in a consolidated trial.

The final sentence of § 27-606(2) does not bar juror affidavits in all situations. It merely makes the restrictions on juror testimony announced in the first sentence of subsection (2) applicable to juror affidavits or other evidence of juror statements. In other words, it renders inadmissible an affidavit containing information to which a juror could not testify.

The affidavit in this case did not attempt to impeach the amount of the damages awarded. Instead, it declared that a clerical mistake was made in filling out the separate verdict forms:

> 3. At the end of the deliberations, we determined that the total amount of damages sustained by [the purchaser] as a result of the two [sellers'] actions was $119,800.00. This was the unanimous agreement of all the jurors. We then apportioned $110,800.00 in damages against [the corporate seller] and $9,000.00 against [the partnership seller].
>
> 4. In completing the verdict forms, I [the foreman]

> inadvertently placed the $110,800.00 figure on the verdict form for [the partnership seller] . . . and the $9,000.00 figure on the verdict form for [the corporate seller] . . . . In so doing, I placed the allocated damage figure on the wrong verdict forms.

Section 27-606, enacted by the Legislature in 1975 Neb. Laws, L.B. 279, is similar to Fed. R. Evid. 606. The first sentence of § 27-606(2) is identical to the first sentence of rule 606(b) as it was adopted by Congress in 1975. (In 1987, rule 606 was amended to make it gender neutral; however, no substantive change to the rule has been made since its adoption.) See 3 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 606 (1990). The second sentence of § 27-606(2) is identical to the second sentence of the initial House of Representatives version of rule 606(b), a version never adopted by the entire Congress. See 3 J. Weinstein & M. Berger, *supra*, ¶¶ 606 and 606[08]. As adopted by Congress, the second sentence of rule 606(b) reads: "Nor may his affidavit or evidence of any statement by him *concerning a matter about which he would be precluded from testifying* be received for these purposes." (Emphasis supplied.) 28 U.S.C. app. (1982). The differences in the adopted and unadopted versions of the federal rule are cosmetic, not substantive.

Decisions from other jurisdictions with similar rules are also enlightening. In *Prendergast v. Smith Laboratories, Inc.*, 440 N.W.2d 880 (Iowa 1989), the Iowa Supreme Court held that Iowa's version of rule 606(b) did not bar the receipt of juror testimony to demonstrate a mistake in the completion of special verdict forms. The Colorado Court of Appeals ruled that Colorado's version of rule 606(b) does not preclude inquiry into possible clerical mistakes in filling out the dollar amounts for two separate causes of action on the wrong verdict forms. *Kading v. Kading*, 683 P.2d 373 (Colo. App. 1984).

In *Attridge v. Cencorp Div. of Dover Tech. Intern.*, 836 F.2d 113 (2d Cir. 1987), the court approved of the district court's reformation of a verdict based on posttrial interviews of the jurors, holding that rule 606(b) did not apply in situations where juror evidence is received to show that "the verdict delivered was not that actually agreed upon." 836 F.2d at 116.

The U.S. Court of Appeals for the Fifth Circuit has ruled similarly. See *U.S. v. Dotson*, 817 F.2d 1127 (5th Cir. 1987), *modified on other grounds* 821 F.2d 1034. Such a view of rule 606(b) and the various state versions of that rule are also shared by commentators. See, e.g., 3 J. Weinstein & M. Berger, *supra*, ¶ 606[04]; 1 G. Joseph & S. Saltzburg, Evidence in America: The Federal Rules in the States § 40.3 (1987).

However, at least two states with versions of rule 606 have concluded otherwise. "To admit affidavits of jurors to correct a mistake in recording the verdict would permit all losing parties to attack verdicts, thereby vitiating the finality and definitiveness of a judgment." *Cyr v. Michaud*, 454 A.2d 1376, 1383 (Me. 1983). "Regardless of the rule in other jurisdictions, in Maryland it is well settled that a juror cannot be heard to impeach his verdict, whether the jury conduct objected to be misbehavior or mistake." *Oxtoby v. McGowan*, 294 Md. 83, 101, 447 A.2d 860, 870 (1982).

These holdings are tempered by the fact that they did not arise out of factual circumstances analogous to those presently before us. In *Cyr, supra*, there was an attempt to show that the jury had in fact meant to award a substantially lower amount than was awarded. This allegedly occurred when the jury entered a $20,000 figure into a verdict form which asked by what amount total damages in the case (allegedly found to be $100,000 by the jurors) were to be reduced. The affidavits purported to show that the jury intended the award itself to be $20,000, not $80,000 (arrived at by reducing $100,000 by $20,000). In *Oxtoby, supra*, the appellants were attempting to introduce evidence of juror coercion and juror use of a textbook not admitted at trial.

Prior to the enactment of § 27-606, Nebraska adhered to the general rule that

> affidavits or other sworn statements of jurors will not be received to impeach or explain a verdict, to show on what grounds it was rendered, to show a mistake in it, to show the jurors misunderstood the charge of the court, or to show they mistook the law or the result of the finding because such matters inhere in the verdict.

Selders v. Armentrout, 192 Neb. 291, 294, 220 N.W.2d 222, 224

(1974).

The general rule that juror affidavits will not be allowed to impeach a verdict dates back centuries. Prior to 1785, there was no common-law rule explicitly prohibiting the receipt of juror testimony. See *McDonald v. Pless*, 238 U.S. 264, 35 S. Ct. 783, 59 L. Ed. 1300 (1915). In 1785, however, Lord Mansfield refused to accept juror affidavits which indicated that the jury had decided a case by the casting of lots. See *Vaise v. Delaval*, 1 T.R. 11 (1785), reprinted in 99 Eng. Rep. 944. As stated by the U.S. Supreme Court in *McDonald, supra* at 264 U.S. at 268, "That ruling soon came to be almost universally followed in England and in this country." *McDonald*, which dealt with an alleged quotient verdict, has become notable for the following passage, relied on in part by the sellers in this case:

> If the facts were as stated in the affidavit, the jury adopted an arbitrary and unjust method in arriving at their verdict, and the defendant ought to have had relief, if the facts could have been proved by witnesses who were competent to testify in a proceeding to set aside the verdict. But let it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict. If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation—to the destruction of all frankness and freedom of discussion and conference.

McDonald at 238 U.S. at 267-68, quoted in, e.g., *Rahmig v. Mosley Machinery Co.*, 226 Neb. 423, 412 N.W.2d 56 (1987), and *Attridge v. Cencorp. Div. of Dover Tech. Intern.*, 836 F.2d 113 (2d Cir. 1987). However, *Vaise, supra*, and *McDonald, supra*, were attempts to impeach the mental process by which those verdicts were rendered, not examples of clerical errors

made in the filling out of a verdict form.

Many courts, without discussion of rule 606(b), have specifically recognized that postverdict evidence from jurors of clerical errors made in the rendition of a verdict may be admitted. See, e.g., *Erickson by Erickson v. Hammermeister*, 458 N.W.2d 172 (Minn. App. 1990); *McStocker v. Kolment*, 160 A.D.2d 980, 554 N.Y.S.2d 702 (1990); *Colling v Avon Disposal, Inc.*, 179 Mich. App. 796, 446 N.W.2d 361 (1989); *Bianchi v. Nordby*, 409 N.W.2d 835 (Minn. 1987); *Rodriguez v. Baker*, 91 A.D.2d 143, 457 N.Y.S.2d 801 (1983); *Rose v. Thau*, 45 A.D.2d 182, 357 N.Y.S.2d 201 (1974); *Kink v. Combs*, 28 Wis. 2d 65, 135 N.W.2d 789 (1965); *Southern Pacific Railroad Co. v. Mitchell*, 80 Ariz. 50, 292 P.2d 827 (1956); *Hopkinson's Admx. et als. v. S. D. Stocker*, 116 Vt. 98, 70 A.2d 587 (1950); *Young v. United States*, 163 F.2d 187 (10th Cir. 1947), *cert. denied* 332 U.S. 770, 68 S. Ct. 83, 92 L. Ed. 355 and 334 U.S. 859, 68 S. Ct. 1533, 92 L. Ed. 1779 (1948). The statement of the Vermont Supreme Court in *Hopkinson's Admx. et als., supra* at 101-02, 70 A.2d at 589, is as sound now as it was when announced over 40 years ago:

> The general principle that the statements of the jurors will not be received to establish their own misconduct is, as a rule, considered as not preventing the reception of their evidence as to what really was the verdict agreed upon, in order to prove that, through mistake or otherwise, it has not been correctly expressed.

We therefore conclude the trial court properly considered and acted upon the foreman's affidavit.

(b) Posttrial Motions

In view of the foregoing, we determine that the trial court properly overruled the sellers' motions for judgments notwithstanding the verdicts or, in the alternative, for a new trial.

IV. ANALYSIS OF CROSS-APPEAL

Finally, we come to the purchaser's cross-appeal. It is the purchaser's position that its letter of December 3, 1985, notifying the sellers that it was exercising its right to set off damages suffered against amounts owing on the notes, as

described in part II above, acted as a discharge of the notes, and, thus, no interest could run on those amounts from that time on.

In support of its assertion, the purchaser cites us to Neb. U.C.C. § 3-601(2) (Reissue 1980), which reads: "Any party is also discharged from his liability on an instrument to another party by any other act or agreement with such party which would discharge his simple contract for the payment of money." The purchaser argues that by announcing its intention to set off against the amounts due under the notes its damages resulting from the sellers' breaches under the purchase and sale agreements, the notes were discharged pursuant to § 3-601(2).

However, the purchaser ignores § 3-601(1), which provides: "The extent of the discharge of any party from liability on an instrument is governed by the sections on (a) payment or *satisfaction* (Section 3-603) . . . ." (Emphasis supplied.) While "satisfaction" is not defined in article 3 of the code, under the common law a setoff is a means of satisfaction of a debt. See, e.g., *Rohn v. Kelley*, 156 Neb. 463, 56 N.W.2d 711 (1953), *cert. denied* 346 U.S. 854, 74 S. Ct. 68, 98 L. Ed. 368, *disapproved on unrelated grounds*, *Lambie v. Stahl*, 178 Neb. 506, 134 N.W.2d 86 (1965); *State ex rel. Bates v. Morgan*, 154 Neb. 234, 47 N.W.2d 512 (1951). See, also, *Barkei v. Delnor Hosp.*, 207 Ill. App. 3d 255, 565 N.E.2d 708 (1990); *Security Pacific Nat. Bank v. Wozab*, 51 Cal. 3d 991, 800 P.2d 557, 275 Cal. Rptr. 201 (1990); *Bank of Kansas v. Hutchinson Health Services, Inc.*, 13 Kan. App. 2d 421, 773 P.2d 660 (1989), *aff'd* 246 Kan. 83, 785 P.2d 1349 (1990). Therefore, the situation before us falls within the purview of § 3-601(1)(a) and its referent, Neb. U.C.C. § 3-603 (Reissue 1980).

Section 3-603(1) provides, in pertinent part: "The liability of any party is discharged *to the extent of his* payment or *satisfaction* to the holder . . . ." (Emphasis supplied.) Comment 3 to this section states, in relevant part: "Payment to the holder discharges the party who makes it from his own liability on the instrument, and a part payment discharges him pro tanto. *The same is true of any other satisfaction.*" (Emphasis supplied.) The terms of § 3-603(1) are specifically applicable to these cases.

Because these cases fall within the scope of § 3-603, § 3-601(2) does not come into play. The latter section is, in effect, a "catchall" provision which recognizes the possibility that a debt might be discharged by some means other than those encompassed in § 3-601(1)(a) through (i). See 5 W. Hawkland & L. Lawrence, Uniform Commercial Code Series § 3-601:03 (1984).

Therefore, in the action against the corporate seller, the purchaser is entitled to a discharge from liability on its note to that seller, originally worth $5,000, against the damages the purchaser was awarded against that seller. Likewise, in the action against the partnership seller, the purchaser is entitled to a discharge from liability on its note to that seller, originally worth $20,000, against the damages the purchaser was awarded against that seller. However, the question remains as to what interest accrues under the notes.

In *York Plmb. v. Groussman Inv.*, 166 Colo. 382, 443 P.2d 986 (1968), the Colorado Supreme Court was presented with a similar set of circumstances. Therein, the contractor had performed various plumbing, heating, and ventilating jobs for the owner, totaling $83,260.59. The owners paid $74,108.55 upon completion of the work, and the contractor filed a mechanic's lien on the balance of $9,152.04. The owners claimed that the contractor had breached its warranty with respect to some of the work done and asserted a right to a setoff of $3,242.80, thus claiming that the unpaid balance had been reduced to $5,909.24. The owners then proffered a check of $5,909.24 to the contractor. The contractor rejected the check and filed suit to collect on its lien.

The trial court found that the owners' offer of the check was ineffectual as a tender of payment, further finding that the owners were entitled to a setoff of $1,741.05. The trial court also found that the contractor's entire claim under the mechanic's lien was unliquidated until the judgment was rendered and that the contractor was therefore not entitled to interest prior to judgment.

The Colorado Supreme Court reversed that portion of the trial court's judgment denying the contractor any interest. In so deciding, the court made the following statements at 166 Colo.

at 385, 443 P.2d at 987:

> [The owners] argue that the unliquidated character of the claim for damages for breach of warranty makes the [contractor's] claim undetermined and unliquidated until final judgment. We do not agree. In *F. & C. C. R. Co. v. Tennant*, 32 Colo. 71, 75 P. 410, this court stated that, "Debtors cannot avoid the payment of interest by disputing the account, and when at the trial the account or any portion of it is established, the creditor is entitled to interest upon the amount found to be due." And in *Henrylyn Co. v. Meneray Co.*, 55 Colo. 438, 135 P. 980, the court again stated that, "Certainly a debtor cannot defeat the running of interest against him for the part of a debt which he admits that he owes, and which would otherwise draw interest, by simply making a claim of an unliquidated set-off against the whole debt."

Having decided that the accrual of interest could not be thus avoided, the Colorado court went on to limit its holding:

> While the authorities are not uniform, we think the better rule permits the offset of an unliquidated claim against a liquidated claim before the computation of interest, at least in situations in which the two claims arise out of the same general transaction. "Where a claim under an agreement is certain and liquidated, but is reduced because of the allowance of an unliquidated off-set or counterclaim, *interest may be allowed only on the balance due*." [Citations omitted.]

(Emphasis supplied.) *Id.* at 386, 443 P.2d at 988. Accord, *Hollon v. McComb*, 636 P.2d 513 (Wyo. 1981); *Fairway Builders, Inc. v. Malouf, etc.*, 124 Ariz. 242, 603 P.2d 513 (1979); *Fluor Corp. v. United States ex rel. Mosher Steel Co.*, 405 F.2d 823 (9th Cir. 1969), *cert. denied* 394 U.S. 1014, 89 S. Ct. 1632, 23 L. Ed. 2d 40; *Farrington v. Freeman*, 251 Iowa 18, 99 N.W.2d 388 (1959).

We find the reasoning of the Colorado Supreme Court persuasive. Accordingly, we hold that where a liquidated claim held by one party and an unliquidated claim held by a competing party are set off against one another, and the claims arose from the same transaction, interest on the liquidated

claim may be allowed only on any balance due after the setoff.

The purchaser's belief that it must account for interest on the entire amount of each note for the period of time between the execution of the notes and its notification to the sellers of the breach of warranties under the contracts is unwarranted. The purchaser suffered its damages as of the date of closing, which coincided with the date on which the notes were executed. Therefore, as of that day, November 5, 1985, the purchaser had unliquidated claims against the sellers. The date of notification is irrelevant. The sellers are entitled only to interest accruing on the notes after the purchaser's damages are set off in each case.

Therefore, in the action against the corporate seller, deducting the purchaser's obligation on its $5,000 note from the $111,763 damages awarded it leaves a $106,763 balance due the purchaser on the corporate seller's liquidated claim, and the seller is entitled to no interest. Accordingly, the trial court should have entered judgment in favor of the purchaser against the corporate seller in the amount of $106,763.

In the action against the partnership seller, the purchaser was awarded a total of $10,854. In this case, the purchaser had given a $20,000 note. Deducting the purchaser's damages award from the amount of the note leaves a balance of $9,146 not discharged and thus due the partnership seller. Accordingly, the trial court should have entered judgment in favor of the partnership seller in the amount of $9,146 plus interest in accordance with the terms of the note, to run from the date the purchaser executed the note.

V. DECISION

Accordingly, we vacate the judgments of the trial court and remand the causes with the direction that judgments be entered in accordance with this opinion.

JUDGMENTS VACATED, AND CAUSES REMANDED WITH DIRECTION.

PHYLLIS MILLARD, PERSONAL REPRESENTATIVE OF THE ESTATE OF EDMUND M. MILLARD, DECEASED, APPELLEE AND CROSS-APPELLANT, V. HYPLAINS DRESSED BEEF, INC., A KANSAS CORPORATION, ET AL., APPELLANTS AND CROSS-APPELLEES. RICHARD H. WATERS III, PERSONAL REPRESENTATIVE OF THE ESTATE OF RICHARD H. WATERS, JR., DECEASED, APPELLEE AND CROSS-APPELLANT, V. HYPLAINS DRESSED BEEF, INC., A KANSAS CORPORATION, ET AL., APPELLANTS AND CROSS-APPELLEES.

468 N.W.2d 124

Filed April 19, 1991. Nos. 89-095, 89-096.

1. **Summary Judgment: Appeal and Error.** In an appeal of a summary judgment, the Supreme Court views the evidence in a light most favorable to the party against whom the judgment is granted and gives that party the benefit of all reasonable inferences deducible from the evidence.
2. **Summary Judgment.** Summary judgment is to be granted only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
3. **Workers' Compensation.** The Nebraska Workers' Compensation Act, Neb. Rev. Stat. §§ 48-101 et seq. (Reissue 1988), is the employee's exclusive remedy against an employer for an injury arising out of and in the course of employment.
4. _____. Whether an accident arises out of and in the course of the employment must be determined by the facts of each case; there is no fixed formula.
5. _____. Transportation furnished to an employee by an employer either incident to the employment contract or because of the custom of the job brings the employee within the scope of his employment for workers' compensation purposes during the time of the transportation.
6. _____. Where an employer provides transportation in a vehicle that is under the employer's control, an injury during that journey arises out of and in the course of employment, and the exclusive remedy for the employee is the Workers' Compensation Act.
7. **Attorney Fees.** A court may award attorney fees and court costs against any attorney or party who has brought or defended a civil action that alleges a claim or defense which is frivolous or made in bad faith.
8. **Trial: Appeal and Error.** On appeal, the standard of review for a trial court's determination of sanctions is abuse of discretion.
9. **Actions: Words and Phrases.** A lawsuit may be deemed frivolous where there is evidence that it was filed with an improper motive or based on a legal position so wholly without merit as to be ridiculous.
10. _____: _____. A legal position without merit is one that is without rational argument based on law and evidence to support a litigant's position in the lawsuit.

Appeal from the District Court for Madison County: RICHARD P. GARDEN, Judge. Affirmed.

William G. Line, of Kerrigan, Line & Martin, for appellants.

David A. Domina, of Domina, Gerrard, Copple & Stratton, P.C., for appellees.

HASTINGS, C.J., WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ., and COLWELL, D.J., Retired.

WHITE, J.

In this appeal we are presented with the question of sanctions against an attorney and in the cross-appeal with the grants of summary judgments. The defense counsel in wrongful death actions has appealed the denial of attorney fees and costs, asserting that the wrongful death claims were frivolous and that plaintiffs' counsel should be ordered to pay appellants' attorney fees and court costs as provided in Neb. Rev. Stat. § 25-824(2) (Reissue 1989).

The defendants-appellants assign as error the trial court's denial of their motions for attorney fees and the trial court's rulings on evidentiary questions. The plaintiffs-appellees have cross-appealed the grants of summary judgments for the defendants. We affirm.

FACTS

The underlying wrongful death actions were brought by the personal representatives of two employees who were killed in a 1986 plane crash. They sued the estate of the pilot, Sam V. Davis, and two of the companies he owned and controlled—Hyplains Dressed Beef, Inc., a meatpacking plant in Dodge City, Kansas, and its parent company, the S & R Land & Cattle Co., Inc. Davis also owned Cornland Dressed Beef, Inc., a meatpacking plant in Lexington, Nebraska, where the decedent Edmund M. Millard was plant superintendent and the decedent Richard H. Waters, Jr., was general manager.

On April 14, 1986, Davis and two passengers flew from Dodge City to Lexington, where they picked up Millard and Waters, and continued to Norfolk, Nebraska. In Norfolk, the

group toured a livestock slaughter and meatpacking facility. The parties disagree as to the purpose of the trip. The plaintiffs contend that Davis had a personal interest in the operation of the Norfolk plant and may have been considering its purchase, while the defendants argue that Davis planned to expand the Lexington operation and wanted his Cornland and Hyplains employees to see the kill floor that had been installed in Norfolk.

After the tour of the Norfolk facility, the group planned to go to Omaha to inspect another plant and to attend an American Meat Institute meeting. The plane crashed in a snowstorm soon after takeoff from Norfolk.

After the defendants' second motions for summary judgments were granted and the plaintiffs' petitions were dismissed, the defendants filed motions for attorney fees under § 25-824, claiming that the actions were frivolous because wrongful death claims are barred by the exclusive remedy of the Nebraska Workers' Compensation Act. The motions were denied, and the motions for new trial on sanctions were overruled. This appeal follows.

CROSS-APPEAL

The plaintiffs-appellees have cross-appealed the grants of summary judgments for the defendants. In granting judgments for defendants, the trial court found that Davis was piloting the aircraft which crashed, resulting in the deaths of Millard and Waters. The court found evidence which disclosed that the decedents were employed by Cornland at the time of their deaths, that Davis was the president of Cornland, and that the decedents were killed while on a trip related to the business of Cornland (to inspect a meatpacking plant for the purpose of expanding the Cornland plant). The court held that Davis was an employee of the defendant corporations, as well as of Cornland. Because of the acceptance of workers' compensation benefits for the decedents from Cornland, the plaintiffs were precluded from recovering in tort against Cornland or Davis.

In our review of a summary judgment, this court views the evidence in a light most favorable to the party against whom the

judgment is granted and gives that party the benefit of all reasonable inferences deducible from the evidence. Moreover, summary judgment is to be granted only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Landon v. Pettijohn*, 231 Neb. 837, 438 N.W.2d 757 (1989).

Under state law the Nebraska Workers' Compensation Act, Neb. Rev. Stat. §§ 48-101 et seq. (Reissue 1988), is the employee's exclusive remedy against an employer for an injury arising out of and in the course of employment. "If the accident does not arise out of and in the course of the employment, there is no coverage, and the parties then are not subject to the act." *Marlow v. Maple Manor Apartments*, 193 Neb. 654, 659, 228 N.W.2d 303, 306 (1975). See, also, *Haumont v. City of Lincoln*, 229 Neb. 52, 424 N.W.2d 892 (1988). "Whether an accident arises out of and in the course of the employment must be determined by the facts of each case. There is no fixed formula by which the question may be resolved." *Thomsen v. Sears Roebuck & Co.*, 192 Neb. 236, 242, 219 N.W.2d 746, 750 (1974).

The plaintiffs assert that the decedents were employed by Cornland, an independent corporation controlled by Davis, but that the decedents had no relationship to Hyplains or S & R, the named defendants. They allege that the plane was registered to Hyplains, and it may have been owned by, registered to, or used by S & R. The plaintiffs' petitions state that the decedents were traveling in the plane at the special request of the defendants to assist and evaluate the Norfolk plant and its equipment and that they boarded the plane at the request of Davis and the corporate defendants.

While this court has not previously been faced with similar cases, we have dealt with the question of transportation provided by an employer in two instances. In *Kopfman v. Freedom Drilling Co.*, 220 Neb. 323, 327, 370 N.W.2d 89, 92 (1985), we held:

> [T]ransportation furnished to an employee by an

> employer either incident to the employment contract or because of the custom of the job the employee had with the employer operates to bring the employee within the scope of his employment for workmen's compensation purposes during the time of the transportation.

In *Schademann v. Casey*, 194 Neb. 149, 156-57, 231 N.W.2d 116, 122 (1975), we held:

> [W]here incident to the employment contract, whether express, implied, or by custom, it is understood by the employer and employee that the employer will transport the employee to or from the place where the work is to be done, and the employer does so provide that transportation in a vehicle under the employer's control, an injury during that journey arises out of and in the course of employment.

Applying these rules to the present case, we find that the transportation was provided by the defendants, that it was under the control of the defendants, and that the injury and deaths of the decedents arose out of and in the course of their employment with Davis and his corporations. As such, the exclusive remedy of the plaintiffs is the Workers' Compensation Act.

The issue raised during the summary judgment phase concerned the employment relationships of the decedents and the defendants. The plaintiffs pleaded that (1) Davis controlled Hyplains and was the controlling shareholder of its parent company, S & R; (2) Davis used the corporate defendants as his alter ego and for personal benefit and purposes; and (3) the corporate defendants were operated as a single venture without regard to their purported separate corporate identities, functioning de facto as a single venture. While the plaintiffs did not urge the adoption of a "dual capacity" theory as an exception to the exclusive remedy provision, their position seems to be that they could pursue Davis in his capacity as owner of Hyplains and S & R, which was separate from his role as president of the employer, Cornland.

We have previously addressed the issue of dual capacity or "dual persona" as it relates to workers' compensation only briefly. In *Johnston v. State*, 219 Neb. 457, 364 N.W.2d 1

(1985), the plaintiff argued that where an injured employee does not recover full compensation under the workers' compensation laws, the court should apply the dual capacity doctrine in which "an employer may become liable to an employee in tort if, with respect to that tort, the employer occupies a position which places upon it obligations independent of and distinct from its role as an employer." *Id.* at 461, 364 N.W.2d at 4. The case dealt with the State Tort Claims Act, and we did not reach the question of whether the dual capacity theory should be adopted.

According to Professor Arthur Larson's treatise on workers' compensation, the dual capacity theory has been abandoned in most jurisdictions. See *Home Ins Co v Jones & Lamson*, 144 Mich. App. 91, 373 N.W.2d 249 (1985), *vacated* 424 Mich. 890, 381 N.W.2d 729. However, the Wisconsin Supreme Court has adopted a narrower version proposed by Professor Larson, the dual persona doctrine: "An employer may become a third person, vulnerable to tort suit by an employee, if—and only if—he possesses a second persona so completely independent from and unrelated to his status as employer that by established standards the law recognizes it as a separate legal person." 2A A. Larson, The Law of Workmen's Compensation § 72.81 at 14-229 (1990). Accord *Henning v. General Motors Assembly*, 143 Wis. 2d 1, 419 N.W.2d 551 (1988).

Even if we adopted a dual persona theory, the facts of these cases do not support its application here. We do not find that Davis had a second persona so unrelated to his status as employer that he would be a separate legal person. Cornland, Hyplains, and S & R were all intertwined and controlled by Davis, who ordered the decedents to accompany him to Norfolk and Omaha. Whether the purpose was to benefit the decedents' employer, Cornland, or to benefit one of the other entities does not alter Davis' liability. The decedents were employees whose professional expertise led them to be asked to provide their opinions, and those opinions were offered in the course and scope of their employment.

Two other airplane crash cases also support our holding. In *Ocasek v. Krass*, 153 Ill. App. 3d 215, 505 N.E.2d 1258 (1987), *cert. denied* 116 Ill. 2d 562, 515 N.E.2d 113, the estate of an

employee killed in an airplane crash brought a wrongful death action against the estate of the deceased employer, who was also the pilot. The pilot was the owner of the plane and used it for company business. Illinois courts had recognized the dual capacity exception to the exclusive remedy of the Illinois Workers' Compensation Act. The court stated that a plaintiff must first establish that the employer's second capacity " 'generates obligations unrelated to those flowing from the first, that of employer.' " *Id.* at 217, 505 N.E.2d at 1260. "[T]he plaintiff must show that the employer was acting as a 'distinct separate legal *persona*.' " *Id.* at 217-18, 505 N.E.2d at 1260.

The Illinois court held that

> the mere fact that the employer, as an individual, pilots an airplane, drives a car, or performs other such functions which impose upon him the duty to exercise due care, does not serve to endow him with a second legal *persona* completely independent from and unrelated to his status as an employer.

Id. at 218, 505 N.E.2d at 1260.

The pilot, "in undertaking to provide transportation for his employee on a company business trip . . . had an obligation as employer to exercise due care," *id.*, but that did not meet the separate legal persona requirement. The trial court's grant of summary judgment for the plaintiff was reversed and the cause remanded with directions that the trial court enter judgment for the defendant.

In New York, the widow of an employee who was killed in an airplane crash when returning from a business trip sought to recover from the employer. See *Molinari v. Kar-San Dev.*, 117 A.D.2d 194, 502 N.Y.S.2d 552 (1986), *aff'd* 69 N.Y.2d 910, 509 N.E.2d 56, 516 N.Y.S.2d 457 (1987). The plane was owned by the employer defendant, but was piloted by an independent contractor. The court noted that the dual capacity doctrine had previously been declared "fundamentally unsound" by New York courts because it would " 'seriously undermin[e] the salutary social purposes underlying the existing workers' compensation scheme.' " 117 A.D.2d at 196, 502 N.Y.S.2d at 553.

The plaintiff asserted that the defendant's liability arose out of an independent transaction by which it became owner of the

plane and was not based on the defendant's status as the decedent's employer. The court held that the "defendant's acquisition and ownership of the airplane bore a direct relationship to the employment, for the airplane was used to fly employees, including decedent, on business trips for the benefit of defendant" and that the pilot was acting as defendant's agent. *Id.* at 197, 502 N.Y.S.2d at 554. Since the plaintiff had conceded that her action would be barred if the pilot had been an employee, the court dismissed the complaint, noting that "we cannot sanction circumvention of the exclusivity provisions . . . on the basis of 'illusory distinctions.' " *Id.*

It would be an illusory distinction were we to allow the plaintiffs here to pursue Davis and the corporate defendants on the basis which they urge. Examining the evidence in a light most favorable to the plaintiffs and giving them the benefit of all reasonable inferences deducible from the evidence, we find that the defendants are entitled to judgment as a matter of law and that the district court's grants of summary judgments were correct.

SANCTIONS

Under Nebraska law a court may award attorney fees and court costs "against any attorney or party who has brought or defended a civil action that alleges a claim or defense which a court determines is frivolous or made in bad faith." § 25-824(2).

The defendants contend that the plaintiffs' lawsuits were frivolous because counsel could have learned with minimal investigation that wrongful death claims are barred by the exclusive remedy provisions of the Nebraska Workers' Compensation Act.

The district court found that the lawsuits were not filed in bad faith and were not frivolous, and overruled the defendants' applications for fees.

We have not previously been faced with determining the standard of review for a district court's overruling of a request for sanctions. The U.S. Supreme Court has stated that an appellate court should apply an abuse-of-discretion standard in reviewing all aspects of a federal district court's determination

of sanctions. "A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Cooter & Gell v. Hartmarx Corp.*, ____ U.S. ____, 110 S. Ct. 2447, 2461, 110 L. Ed. 2d 359 (1990). Applying that standard to the present case, we find no error and affirm the judgment of the district court.

For a lawsuit to be deemed to be frivolous, there must be evidence that it was filed with an improper motive or based on "a legal position so wholly without merit as to be ridiculous." *Behrens v. American Stores Packing Co.*, 236 Neb. 279, 288, 460 N.W.2d 671, 677 (1990). A legal position without merit is one that is "without rational argument based on law and evidence to support a litigant's position in the lawsuit." *Lutheran Medical Center v. City of Omaha*, 229 Neb. 802, 814, 429 N.W.2d 347, 354 (1988). "[S]anctions should not be imposed except in the clearest cases." *First Nat. Bank v. Chadron Energy Corp.*, 236 Neb. 199, 201, 459 N.W.2d 736, 739 (1990).

When the present cases were filed, questions remained as to the employment relationships among the parties. Answers to these questions were necessary to determine any possible liability. The trial court overruled the defendants' first motions for summary judgment precisely because it believed that some genuine issue of material fact remained as to the employment relationships. It was only after the second motions for summary judgment, which followed additional discovery, including several depositions, that judgments in favor of the defendants were entered. No evidence has been presented to indicate that the lawsuits were wholly without merit, were filed with an improper motive, or were ridiculous. They were not filed frivolously or in bad faith, and sanctions are not appropriate.

Not before us at this time is the question of the timing of a motion for attorney fees. We note only for future reference that in the federal system a motion for allowance of attorney fees is a collateral and independent claim and, as such, need not be filed within the 10-day period for motions to alter or amend the judgment. The U.S. Court of Appeals for the Eighth Circuit

has suggested a 21-day time limit. The court also noted that the time for appeal of a judgment on the merits runs from the entry of judgment and that subsequent consideration of an attorney fee claim does not toll the time for appealing the judgment on the merits. *Obin v. Dist. No. 9 of Intern. Ass'n, Etc.*, 651 F.2d 574 (8th Cir. 1981).

EVIDENTIARY QUESTIONS

On the cross-appeal the plaintiffs-appellees also assign as error the trial court's admission of depositions and affidavits which include statements asserted to have been made by Davis as to the purpose of the trip. The evidence was objected to on the basis of hearsay. The defendants-appellants' other two assignments of error object to rulings of the trial court concerning the exclusion of evidence. We do not find that the trial court's rulings on the evidence were clearly erroneous.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DARREN W. SEAMAN, APPELLANT.

468 N.W.2d 121

Filed April 19, 1991. No. 90-104.

1. **Drunk Driving: Sentences: Probation and Parole.** An order of probation for a person convicted of third-offense driving while under the influence of alcoholic liquor may include a provision not to operate a motor vehicle for any reason whatsoever during the entire term of probation.
2. **Statutes: Intent.** In construing a statute, the Nebraska Supreme Court must look at the statutory objective to be accomplished, the problem to be remedied, or the purpose to be served, and then place on the statute a reasonable construction which best achieves the purpose of the statute, rather than a construction defeating the statutory purpose.

Appeal from the District Court for Lancaster County, BERNARD J. MCGINN, Judge, on appeal thereto from the County Court for Lancaster County, JACK B. LINDNER, Judge. Judgment of District Court affirmed.

Clay B. Statmore for appellant.

Robert M. Spire, Attorney General, and Wynn Clemmer for appellee.

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

BOSLAUGH, J.

The defendant, Darren W. Seaman, was found guilty of driving while intoxicated, third offense, and careless driving and was sentenced to 5 years' probation. As a part of the order of probation the trial court ordered the defendant not to operate a motor vehicle for any reason whatsoever during the entire term of probation.

The defendant appealed to the district court, contending the county court had exceeded its jurisdiction by suspending his driving privileges for 5 years. The district court affirmed the trial court's sentence, stating:

> [T]he alternative to the judge was to suspend Mr. Seaman for 15 years and Mr. Seaman could have been sentenced to jail for up to six months and fined up to five hundred dollars.
>
> So, considering the statutory penalties that were available to the judge, I cannot find — I do not find that it's an abuse of discretion for him to try probation with this five-year denial of driving license privileges.

The defendant has appealed to this court and assigns as error the district court's finding that the county court did not abuse its discretion by including in the order of probation the requirement that the defendant not operate a motor vehicle for the entire 5-year period of probation.

Relying on Neb. Rev. Stat. § 39-669.07(c) (Reissue 1988), the defendant contends that because he was sentenced to probation, his driver's license could have been suspended for only 1 year. Section 39-669.07(c), which is now codified at § 39-669.07(2)(c) (Cum. Supp. 1990), provides that if a person, upon conviction of driving under the influence of alcoholic liquor,

> has had two or more convictions under this section in the

> ten years prior to the date of the current conviction . . . such person shall be guilty of a Class W misdemeanor, and the court shall, as part of the judgment of conviction, order such person not to drive any motor vehicle in the State of Nebraska for any purpose for a period of fifteen years from the date ordered by the court and shall order that the operator's license of such person be revoked for a like period. . . .
>
> If the court places such person on probation or suspends the sentence for any reason, the court shall, as one of the conditions of probation or sentence suspension, order such person not to drive any motor vehicle in the State of Nebraska for any purpose for a period of one year, and such order of probation shall include as one of its conditions confinement in the city or county jail for seven days.

A Class W misdemeanor for third-offense driving while intoxicated is punishable by 3 to 6 months' imprisonment and a $500 fine. See Neb. Rev. Stat. § 28-106(1) (Reissue 1989).

The defendant asserts that his license should have been suspended for only 1 year because the trial court placed him on probation. He argues that if the Legislature had intended the court could revoke his license for more than 1 year while placing him on probation, the statute would have read that as one of the conditions of probation, the court shall order such person not to drive " 'for a period of <u>at least</u> one year.' " Brief for appellant at 4.

In 1982, the Legislature amended § 39-669.07 by adding the language requiring that as a condition of probation for third-offense driving while intoxicated, the court must order a defendant not to drive in Nebraska for any purpose for a period of 1 year.

The primary purpose of the 1982 amendment was to get drunk drivers off the road. See Judiciary Committee Hearing, L.B. 568, 87th Leg., 2d Sess. (Jan. 19, 1982).

In floor debate on the 1982 amendment it was stated:

> The judge is not required to permanently suspend. All the law requires, all the bill requires as currently written is a mandatory one year suspension for third offenders. So the

> judge has the option of suspending it for one year up to permanent but he is not required to suspend it permanently.

Floor Debate, 87th Leg., 2d Sess. 10164 (Apr. 5, 1982).

In referring to the requirement of revocation of a driver's license for 1 year and confinement in the city or county jail for 7 days as conditions of probation or sentence suspension upon conviction of third-offense driving while intoxicated, one of the cosponsors of L.B. 568 stated: "We do not limit the courts in what they can do on probation. We are saying to the courts you must do at least these two things. If you wish to take probation further you may do so." *Id.* at 10105.

Although § 39-669.07 does not contain the language suggested by the defendant, it is clear from the legislative history that the Legislature intended that as a condition of probation for a conviction of third-offense driving while intoxicated, the trial court could revoke the defendant's driver's license for more than 1 year.

> [I]n construing a statute, this court must look at the statutory objective to be accomplished, the problem to be remedied, or the purpose to be served, and then place on the statute a reasonable construction which best achieves the purpose of the statute, rather than a construction defeating the statutory purpose.

State v. Burnett, 227 Neb. 351, 353, 417 N.W.2d 355, 357 (1988).

Relying on Neb. Rev. Stat. § 29-2262(2)(p) (Reissue 1989) and *State v. Nuss*, 190 Neb. 755, 212 N.W.2d 565 (1973), the defendant further argues that even if § 39-669.07 does not preclude a suspension of longer than 1 year, the trial court had no authority to order his license suspended for more than 1 year because that condition is not reasonably related to the defendant's rehabilitation.

Section 29-2262 provides in pertinent part:

> (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.

We believe the 5-year revocation of the defendant's driving privileges was reasonably related to his rehabilitation, and it was not an abuse of the trial court's discretion to impose such a condition.

The defendant has been convicted three times of driving while under the influence. In view of his record of traffic and other offenses and his history of drunk driving, the condition that he not drive during the entire period of his probation was reasonable.

The judgment is affirmed.

AFFIRMED.

FAHRNBRUCH, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. ANTHONY L. JONES, APPELLANT.

468 N.W.2d 120

Filed April 19, 1991. No. 90-338.

Judgments: Evidence: Appeal and Error. This court may affirm a judgment of guilty if, after consideration of the record, we find that the admission of evidence in question was harmless beyond a reasonable doubt.

Appeal from the District Court for Douglas County: KEITH HOWARD, Judge. Affirmed.

Thomas M. Kenney, Douglas County Public Defender, and Brian S. Munnelly for appellant.

Robert M. Spire, Attorney General, and Elaine A. Catlin for appellee.

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

HASTINGS, C.J.

Defendant, Anthony L. Jones, appeals a jury verdict and a

judgment of guilty of theft by unlawful taking of property worth over $1,000, in violation of Neb. Rev. Stat. § 28-511 (Reissue 1989). His sole assignment of error is that the trial court allowed a witness to testify about a matter without sufficient evidence to support a finding that the witness had personal knowledge of the matter. We affirm.

In the early afternoon of November 13, 1989, a couple, the defendant and a woman, entered Feierman's jewelry store on 60th and Maple Streets in the Benson area of Omaha. The couple looked at rings, neck chains, and diamond pendants. Eventually, the woman purchased a diamond necklace, and later, the defendant picked out a man's wedding band that did not appear to fit the defendant. However, the defendant did not want to leave the ring overnight to be sized. His female companion paid for the ring with a credit card.

During the time it took the jewelry store owner's wife to call in the credit card number for authorization, the defendant left the store. There was testimony that the defendant left the store quickly, with his hands in his jacket pockets, and that he used his shoulder to open the front door of the store.

Yolanda Haynie, an acquaintance of the defendant's, testified that the defendant told her he had "robbed" a store in the Benson area. As stated, Feierman's jewelry store was located in the Benson area. She also said that the defendant told her he had come into possession of at least 13 golden wedding rings or engagement rings as a result of the theft.

The testimony concerning which the defendant complains is that of Web Feierman, Jr., the owner of the jewelry store, who stated that "[o]ne ring was returned when the dime store brought in our display tray from the gutter in front." An objection as to lack of foundation was overruled.

The complained-of testimony was of an insignificant nature. The defendant had been identified as the only person other than his female companion who had been in the store and in a position to steal the ring display tray during the time that it disappeared. Defendant had been quoted as telling a friend that he had "robbed" a store in the Benson area and had come into possession of a number of rings.

This court may affirm the judgment of guilty if, after

consideration of the record, we find that the admission of the evidence in question was harmless beyond a reasonable doubt. *State v. Christian, ante* p. 294, 465 N.W.2d 756 (1991); *State v. Bradley*, 236 Neb. 371, 461 N.W.2d 524 (1990).

Beyond a reasonable doubt the evidence adduced here, without considering the hearsay testimony of Feierman as to what the employee of the dime store had told him, established the guilt of the defendant.

The judgment of the district court is affirmed.

AFFIRMED.

IN RE INTEREST OF T.F.P., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. L.P., APPELLANT.

468 N.W.2d 116

Filed April 19, 1991. No. 90-643.

1. **Appeal and Error.** Errors argued but not assigned will not be considered on review by this court.
2. **Parental Rights: Evidence: Appeal and Error.** In an appeal from a judgment terminating parental rights, the Supreme Court reviews the case de novo to determine whether the evidence is clear and convincing that parental rights should be terminated.
3. **Parental Rights: Appeal and Error.** In an appeal from a judgment terminating parental rights, the Supreme Court is required to reach a conclusion independent of the findings of the trial court; however, where the evidence is in conflict, this court considers and may give weight to the trial court's observation of the witnesses and acceptance of one version of the facts rather than another.
4. **Parental Rights.** A juvenile's best interests are the primary considerations in deciding whether parental rights should be terminated.

Appeal from the County Court for Nemaha County: THOMAS J. GIST, Judge. Affirmed.

Charles D. Hahn for appellant.

Allen Fankhauser, of Kotouc, Fankhauser & Maschman, guardian ad litem.

HASTINGS, C.J., WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ., and COLWELL, D.J., Retired.

COLWELL, D.J., Retired.

This is an appeal from an order of the Nemaha County Court, sitting as a juvenile court, which, pursuant to Neb. Rev. Stat. § 43-292(6) (Reissue 1988), terminated the mother's parental rights to her son, T.F.P., who had been adjudged a juvenile within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1988). The father's parental rights were terminated pursuant to Neb. Rev. Stat. § 43-292(1) (Reissue 1988); he does not appeal. We affirm.

This case arose from the long-term incarceration of the father at the Nebraska Penal Complex and the 9-month incarceration of the mother in the Richardson County, Nebraska, jail for writing bad checks. On March 4, 1986, the mother signed a voluntary placement of T.F.P. with the Nebraska Department of Social Services (DSS).

When DSS took T.F.P. into custody, the child, who was born on February 3, 1983, was 3 years old. He had head lice, was not toilet trained, and was developmentally delayed by about 1 year. The mother, T.F.P., and two of her older children were then living with a man who was not her husband and the man's son. It appeared the only support available from the man and his son was $70 a month received by the son for National Guard duty.

DSS was working with the mother because she had demonstrated a pattern of being unable to manage her funds and a lack of parenting skills.

A juvenile court petition was filed on March 25, 1986, alleging that T.F.P. was a juvenile as defined by § 43-247(3)(a) because he was homeless and abandoned by his parent; he lacked proper parental care by reason of the fault or habits of his parent; and his parent neglected or refused to provide proper subsistence, education, or other necessary care for his health, morals, or well-being. On May 6, 1986, T.F.P. was adjudicated a juvenile as alleged, based in part on admissions of the mother. Disposition was with DSS, and a plan for reunification was ordered.

Pursuant to statute requiring 6-month reviews, the case was reviewed on November 4, 1986, and the plan for reunification was offered and received without objection. The plan required the mother to do the following: (1) continue with counseling

and parenting instruction as needed; (2) obtain adequate permanent housing, with no other unmarried and/or unrelated persons living there, and maintain clean and sanitary conditions; (3) live within her income, which includes not writing bad checks; (4) see that the child receives appropriate medical and educational services; and (5) work with Christian Heritage. The plan was to begin when the mother was released from jail.

The next review was held May 5, 1987, and the mother had made substantial progress since her release from incarceration. T.F.P. was placed with his mother in her home, with custody remaining with DSS.

At the November 10, 1987, review hearing, the evidence showed the mother's progress had deteriorated since July 1987. Twenty-six bad checks had been written between October 13 and October 20, 1987, using checks from a bank in Johnson, Nebraska.

At the review hearing on April 12, 1988, it was shown that the mother was over $1,000 behind in her rent, she had been forging her landlord's signature on rent receipts, she had written more bad checks, and she had been living with a man who was not her husband. The mother was not taking T.F.P. to necessary appointments, and she was having difficulty in supporting and disciplining him. T.F.P. was placed with his foster family by DSS on that date.

The review hearing of November 8, 1988, showed that visitations with his mother had a disruptive effect on T.F.P., the mother's participation in counseling was superficial, and she continued to be dishonest with DSS workers regarding her finances. DSS indicated that if the mother was unable to meet the plan, the agency would request termination of her parental rights.

The next review hearing was May 2, 1989. Because of a misunderstanding on the part of her attorney, the mother was not present. No evidence was adduced; however, a notation was made that the mother was involved in a 31-check check-kiting scheme at a Humboldt, Nebraska, bank. The previous plan remained in effect.

At the review hearing on October 31, 1989, the evidence

showed that the mother was still writing bad checks. A complaint had been filed in Otoe County, Nebraska, against the mother for writing an insufficient-fund check, to which complaint she pled guilty and was sentenced to 30 days in jail on July 12, 1989. On April 12, 1989, a complaint had been filed in Nemaha County for issuing a bad check, a Class IV felony, to which complaint the mother pled guilty and was awaiting sentencing. At the time of the hearing, the mother was living with and helping support another man, who was married to someone else. The mother testified at this hearing that she understood the terms of the plan and that she had not done very well in her rehabilitation.

On February 22, 1990, a petition for termination of parental rights was filed, alleging that reasonable efforts under the direction of the court had failed to correct the conditions which led to the determination that T.F.P. was within the meaning of § 43-247(3)(a). A hearing was held on April 3 and June 12, 1990. The evidence was basically the same as that presented at past review hearings. There was evidence that plans were submitted by DSS at each review hearing in the form of reports and that the mother generally failed to comply with them.

Leslie Mamer, a therapist for the mother and T.F.P., testified that the mother's regular writing of bad checks was not an addictive behavior but, rather, a controllable choice for her. Mamer described a check pyramid scheme that the mother had used, involving numerous checks and several banks. According to Mamer, the prognosis for reform on the mother was guarded, and therapy would be long term. In her opinion, it was not in T.F.P.'s best interests to be returned to his mother.

The mother admitted that she understood the plans for reunification. She admitted that she had written possibly hundreds of bad checks since the inception of this case. She also testified that she was on 2 years' probation for the felony conviction in Nemaha County. She promised she would not write any more bad checks, but was not sure she would be able to keep that promise.

There was testimony that T.F.P.'s foster family is willing to adopt him.

The trial court found that the causes for T.F.P.'s juvenile

status under § 43-247(3)(a) were the mother's jail incarceration for writing bad checks and that she had failed to comply with the rehabilitative plan's provisions concerning living within her budget and not writing bad checks. It was also found that she failed other aspects of the plan as well. The trial court terminated the mother's parental rights because of the mother's failure to comply with the rehabilitative plan conditions and the clear evidence that T.F.P.'s best interests required such termination.

The mother assigns as error the trial court's findings and termination of her parental rights. She argues the failure of the State to comply with some statutory procedures; however, she does not assign the same as error. Errors argued but not assigned will not be considered on review by this court. *Federal Land Bank of Omaha v. Victor*, 232 Neb. 351, 440 N.W.2d 667 (1989).

This case is reviewed de novo to determine whether the evidence is clear and convincing that parental rights should be terminated. *In re Interest of J.S., A.C., and C.S.*, 227 Neb. 251, 417 N.W.2d 147 (1987). The Supreme Court is required to reach a conclusion independent of the findings of the trial court; however, where the evidence is in conflict, this court considers and may give weight to the trial court's observation of the witnesses and acceptance of one version of the facts rather than another. *Id.*

The problems necessitating the court's involvement in this case were that the mother was incarcerated for writing bad checks and that she was deficient in parenting, financial management, and homemaking skills. Budgeting and parenting skills, together with refraining from criminal activity, were always part of the reunification plans submitted at each review hearing.

The mother understood that she was not to write bad checks; however, she continued to do so. She was in jail again, for 30 days, and on probation for 2 years. Furthermore, she continued to have relationships with men who created an additional drain on her resources, and her parenting skills fell short of what was expected of her and what her son's needs required.

T.F.P. has been in foster care for more than half his life. He is entitled to and needs permanency and stability, which his mother does not provide. He needs a secure and permanent home. T.F.P. has a foster family that is ready to provide for his needs and such a home.

A juvenile's best interests are the primary considerations in deciding whether parental rights should be terminated. *In re Interest of J.S., A.C., and C.S., supra*. When a parent cannot rehabilitate herself within a reasonable period of time, the best interests of the child require that a final disposition be made without delay. *Id*.

The evidence is clear and convincing that the mother failed to correct the conditions which led to the court's involvement in this matter and that it is in T.F.P.'s best interests that the mother's parental rights be terminated.

The judgment is affirmed.

AFFIRMED.

QUANTUM ELECTRIC, INC., APPELLEE, V. CONCEPT DEVELOPMENT, INC., A MISSOURI CORPORATION, AND FIREMAN'S FUND INSURANCE CO., A CALIFORNIA CORPORATION, APPELLANTS.

468 N.W.2d 372

Filed April 25, 1991. No. 88-538.

Appeal from the District Court for Lancaster County, BERNARD J. MCGINN, Judge, upon the recommendation of the Appellate Division of the District Court, BUCKLEY, DAVIS, and ILLINGWORTH, District Judges. Affirmed as modified.

James R. Place, Kelle J. Westland, and Alan M. Thelen, of Breeling, Welling & Place, for appellants.

Tim Engler, of Nelson & Harding, for appellee.

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

PER CURIAM.

Having considered the briefs and the recommendation of the Appellate Division of the District Court and upon a de novo review of the record, we find that a reasonable controversy existed as to the plaintiff's right to recover or the amount of such recovery, and therefore the claim was unliquidated. The district court erred in awarding prejudgment interest, and its judgment is ordered modified to exclude the award of prejudgment interest. The judgment of the district court, as modified, is affirmed.

AFFIRMED AS MODIFIED.

GEORGE R. GERINGER, APPELLANT, V. CITY OF OMAHA ET AL., APPELLEES.

468 N.W.2d 372

Filed April 25, 1991. No. 89-056.

1. **Administrative Law: Appeal and Error.** The standard of review in an error proceeding involving an administrative agency is that both the district court and the Supreme Court review the record to determine whether the agency acted within its jurisdiction and whether there is relevant evidence to support the decision.
2. **Administrative Law: Evidence: Appeal and Error.** The evidence is sufficient to support an administrative agency's decision if the agency could reasonably find the facts as it did based on the testimony and exhibits contained in the record.
3. **Administrative Law: Due Process: Notice: Evidence.** In proceedings before an administrative agency or tribunal which has jurisdiction, procedural due process requires the following: notice, identification of the accuser, factual basis for the accusation, reasonable time and opportunity to present evidence concerning the accusation, and a hearing before an impartial board. Once the record discloses that those elements of due process existed with respect to the findings and action of the administrative agency or tribunal, further judicial action is neither permissible nor required.

Appeal from the District Court for Douglas County: DARVID D. QUIST, Judge. Affirmed.

Thomas J. Young, of Young & LaPuzza, for appellant.

Kent N. Whinnery, Deputy Omaha City Attorney, for appellees.

HASTINGS, C.J., WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ., and COLWELL, D.J., Retired.

COLWELL, D.J., Retired.

George R. Geringer appeals his dismissal on May 3, 1988, by the Omaha Planning Department from his position as a Community Developer II in the urban planning division of that city. His dismissal was upheld, after notice and hearing, by the Omaha Personnel Board, and, upon appeal, it was sustained by the district court. We affirm.

His dismissal was premised on two grounds: (1) He had violated his outside employment limitations, and (2) he had given "misleading" statements to his superiors.

Appellant assigns as error (1) insufficient competent evidence, (2) that the board's findings were arbitrary and capricious, and (3) denial of due process for the personnel board's refusal to allow his rebuttal evidence.

Appellant was originally hired by the city in 1974 as a Community Developer II. In 1981 he was designated the executive director of the Land Reutilization Authority (LRA). Its main function is to sell foreclosed tax-delinquent property and return it to the tax rolls. His duties included inventory, management, and eventual sale of the LRA properties. On March 23, 1983, appellant was removed as director, and he resumed his position as a full-time Community Developer II up to the time of his dismissal.

Shortly after his removal as director, appellant sought permission from the city to engage in outside employment. On July 14, 1983, he submitted a memorandum and, on July 18, an application requesting approval of outside employment, in compliance with Omaha Mun. Code, ch. 23, art. III, § 23-99 (1980), which in part provides:

> 2. Employees covered by Chapter 23 shall not engage in any business or occupation nor be employed in any capacity other than his or her position in the City service unless permission for such outside activity has been obtained in writing from the department head and approved by the Personnel Director.

The outside employment was as a "consultant" for a

corporation known as General Capital Corporation (hereinafter GCC). GCC was incorporated by friends of the appellant's, including his wife, Patricia Geringer, for the purpose of investing in LRA properties and other types of "inter-city" (which, from the context of the record, we assume must mean "inner-city") redevelopment ventures. Because GCC was involved in city-related projects, the planning department was concerned about a possible overlap or conflict between appellant's employment with GCC and his position in the planning department. Therefore, the planning department required that a specific limitation be added to appellant's approval to engage in outside employment with GCC. That disclaimer/limitation provided: "While being employed by the City of Omaha, Planning Department, I will not engage whatsoever in any activity as a representative or employee of General Capital Corporation that is part of or related to any program or project of the Planning Department." The appellant signed the statement on August 1, 1983.

Appellant's discharge grew out of his activities involving real estate located at 3019 Corby Street in Omaha (Corby Street property). During the summer of 1983, he advised GCC to purchase the Corby Street property from the LRA. The Corby Street property had been foreclosed for delinquent taxes, and it was listed among the LRA inventory properties. In 1983, the LRA's sale process generally was as follows: A prospective purchaser would contact the LRA director. Once a price had been negotiated and a commitment had been received from the purchaser, the LRA director would take that offer to the LRA board for approval of the sale. If the sale was approved, then the property would be paid for by the purchaser. The LRA director would then request a deed through the county attorney's office. The county attorney would move that the district court confirm the sale of the property, and eventually a sheriff's deed to the property would be produced and delivered to the LRA for the purchaser. This whole process generally took at least 60 to 90 days.

Most LRA inventory properties are either vacant lots or uninhabitable houses. The Corby Street property was neither. It was a house inhabited by people purchasing it under a land

contract; consequently, it was an attractive investment.

In late March 1983, GCC's representative, Claude Shokes, contacted Stanley Saklar, appellant's successor as director of LRA, to negotiate a purchase of the Corby Street property. Saklar had no knowledge of appellant's association with GCC or that appellant's approval for outside employment with GCC was expressly limited by a caveat forbidding appellant from involving himself as a representative of GCC in planning department activities. Saklar and Shokes negotiated the sale of the Corby Street property, including this unusual event: During the process of their negotiations, a deed dated May 31, 1983, to the Corby Street property was inexplicably sent to the LRA. Under LRA procedure, only the LRA director had the authority to request the deeds to LRA inventory properties. The LRA director would not request a deed until such time as he had received a commitment from a buyer to purchase the property, approval from the LRA board to make the sale, and money from the purchaser. Here, Saklar had neither requested the deed nor negotiated a sale of the Corby Street property at the time the deed was dated. The sale was consummated, and eventually the property was recorded in the name of the appellant and his wife.

In 1984, after GCC had purchased the Corby Street property, the city received a complaint from a citizen that appellant had participated in a process that dispossessed a family of its home at the Corby Street address. In the investigation that followed, Martin Shukert, the city planning director, sent a letter to appellant and asked for a response in writing with respect to "any connection that you [appellant] or Ms. Geringer [appellant's wife] may have had with the sale or management of 3019 Corby." The appellant responded, "I . . . am not affiliated with General Capital Corporation. I can not confirm the ratification of sale of 3019 Corby Street because the records of [the corporation] are not privy to me." Based upon that information Shukert concluded that there were no grounds for any further action. Later, Shukert discovered the appellant was present at the GCC board meetings at which the purchase of the Corby Street property was discussed and the transaction approved; the appellant, as part of his compensation as

consultant for GCC, had an ownership interest in GCC; and the appellant was at one time the fee title owner of the Corby Street property. This further information, viewed in light of the appellant's earlier denial of any knowledge of or involvement with or in the Corby Street property, prompted Shukert to recommend the appellant's discharge from the city's employ.

On April 14, 1988, the Omaha Planning Department ordered appellant's suspension and dismissal based on two areas of inappropriate conduct: first, that appellant was involved in the purchase of property at 3019 Corby Street, which was contrary to his outside employment disclaimer/limitation, and second, that during the course of an investigation, the appellant gave "misleading" statements concerning his knowledge of the facts surrounding the purchase of the Corby Street property.

Appellant prosecuted an appeal to the Omaha Personnel Board, and following a hearing on June 30, 1988, that appeal was denied by a vote of 4 to 0. An error proceeding was then prosecuted to the Douglas County District Court, which affirmed the decision of the personnel board.

SUFFICIENCY OF THE EVIDENCE

Appellant contends that the district court erred in finding that there was competent evidence to support the personnel board's decision and in finding that the decision was not arbitrary and capricious.

The standard of review in an error proceeding involving an administrative agency is that both the district court and the Supreme Court review the record to determine whether the agency acted within its jurisdiction and whether there is relevant evidence to support the decision. *Wadman v. City of Omaha*, 231 Neb. 819, 438 N.W.2d 749 (1989); *Stone v. City of Omaha*, 229 Neb. 10, 424 N.W.2d 617 (1988). Further, the reviewing court is restricted to the record before the administrative agency and does not reweigh evidence or make independent findings of fact, and the evidence is sufficient to support an administrative agency's decision if the agency could reasonably find the facts as it did based on the testimony and exhibits contained in the record. *Wadman v. City of Omaha, supra*; *Stone v. City of Omaha, supra*.

The personnel board found that the appellant's dismissal was supported by evidence in the following particulars:

> [A]ppellant was found to have violated the limitations upon which he was granted permission to engage in outside employment. More specifically, appellant was found to have involved himself in the corporate business matters of GCC wherein such corporate business matters involve the City of Omaha and/or property under the administration or control of the City, and furthermore that appellant purposely misstated the extent of his involvement and knowledge to his supervisor regarding events culminating in the purchase of LRA property by GCC.

First, we consider whether the appellant violated the provisions of the disclaimer/limitation statement. On July 14, 1983, the appellant sent an interoffice memo to his immediate supervisor, Frank Mann, requesting approval for outside employment, saying he "[had] been offered an opportunity to work as a part-time consultant to the General Capital Corporation of Omaha" and that he "[had] reviewed the corporation's expectations . . . and [found] no conflict involving labor standards or current city duties." Further, he said that should he find a conflict of duties between corporation expectations and his current job obligations to the city, he would discuss the situation with the department immediately.

Because GCC was actively involved in "inter-city" redevelopment projects, appellant was asked to sign a disclaimer/limitation statement which expressly proscribed him from "engag[ing] whatsoever in any activity as a representative or employee of [GCC] that is part of or related to any program or project of the Planning Department." On August 16, 1983, the application was approved after appellant had signed the disclaimer/limitation statement and, in addition, he assured Mann and Shukert that if any conflict or overlap of duties arose between his jobs, he would immediately bring it to their attention.

The record shows that appellant did engage in consulting activities with GCC which directly related to a program under

the administrative control of the planning department. During the summer and fall of 1983, he attended periodic board meetings of GCC and he actively advocated the purchase of the Corby Street property to the GCC board members. In April 1984, GCC purchased the Corby Street property from LRA. The date on the deed, May 31, 1983, is not explained.

Concerning any official misstatements, Shukert sent an interoffice memo to the appellant on August 24, 1984, asking him to explain any connection that he may have had with the sale of the Corby Street property. That same day, the appellant returned a letter to Shukert which stated, "I can not confirm the ratification of sale of 3019 Corby Street because the records of [GCC] are not privy to me."

Later investigation established that appellant did have access to the GCC records because he had an ownership interest in GCC. Michael F. Wheeler, a GCC board member, testified that "there's no doubt that [the appellant] knew that [GCC] purchased the property," that appellant had participated in GCC board meetings where the purchase of the Corby Street property was discussed, and that appellant had advocated its purchase by the corporation.

Clearly there was sufficient competent evidence to support the action taken by the Omaha Personnel Board, and appellant's first assignment of error is without merit.

Appellant's second assigned error is not addressed, since it is not discussed in his brief. See *In re Interest of N.L.B.*, 234 Neb. 280, 450 N.W.2d 676 (1990).

DUE PROCESS

Last, appellant contends that during the personnel board hearing, he was denied due process of law because he had no opportunity to rebut statements made against him.

In *States v. Anderson*, 219 Neb. 545, 364 N.W.2d 38 (1985), this court stated:

> "[Procedural due process is] simply that fundamental fairness which a person has the right to expect—even demand—and receive through our system of law. For this reason, in proceedings before an administrative agency or tribunal which has jurisdiction . . . procedural due process

> requires the following: notice . . . identification of the accuser; factual basis for the accusation; reasonable time and opportunity to present evidence concerning the accusation; and a hearing before an impartial board. . . . Under our standard of review, once the record discloses that those elements of due process existed with respect to the findings and action of an administrative agency or tribunal, further judicial action is neither permissible nor required."

Id. at 547-48, 364 N.W.2d at 40, quoting *In re Appeal of Levos*, 214 Neb. 507, 335 N.W.2d 262 (1983).

In his brief, appellant indicates that he would have called himself, his wife, and Shukert to rebut allegations raised in the testimony of Gary Carlson, a city witness. Such proposed evidence was not offered at the hearing, nor was an offer of proof made that would preserve the issue for our examination. Counsel stated, "You don't allow redirect or rebuttal anyway," and closing arguments followed.

Appellant does not discuss the application of the rules in *States, supra*; rather, he improperly relies on *U. S. v. Storer Broadcasting Co.*, 351 U.S. 192, 76 S. Ct. 763, 100 L. Ed. 1081 (1956), an adjudication which specifically provided a right to present rebuttal evidence under 47 U.S.C. § 309 (1952) of the federal communications act.

Here, the procedural due process protections as set out in *States, supra*, were fully met in all respects at the hearing before the personnel board. Appellant was denied neither a substantial right nor due process.

AFFIRMED.

CAPORALE, J., not participating in the decision.

STATE OF NEBRASKA, APPELLEE, V. HERMAN D. BUCKMAN, APPELLANT.

468 N.W.2d 589

Filed April 25, 1991. No. 89-312.

1. **Homicide: Juries: Verdicts.** In a first degree murder case, the jury need only be unanimous as to its verdict that defendant committed first degree murder, and not as to the theory which brought them to that verdict.
2. **Trial: Pleadings: Evidence: Appeal and Error.** When a motion in limine to exclude evidence is overruled, the movant must object during trial when the objectionable evidence is offered and may not predicate error on the admission of evidence to which no objection was made when it was offered.
3. **Trial: Evidence: Other Acts: Appeal and Error.** Absent an abuse of discretion, a trial court's ruling on the admission or exclusion of evidence of other wrongs or acts will not be disturbed on appeal.

Appeal from the District Court for Lancaster County: DONALD E. ENDACOTT, Judge. Affirmed.

Alan G. Stoler and Miles W. Johnston, Jr., for appellant.

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

HASTINGS, C.J., WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ., and COLWELL, D.J., Retired.

GRANT, J.

On January 13, 1989, an amended information was filed in the Lancaster County District Court charging defendant, Herman D. Buckman, in count I, with the first degree murder of Denise Stawkowski, in violation of Neb. Rev. Stat. § 28-303(1) (Reissue 1989), and in count II, with use of a weapon to commit that felony, in violation of Neb. Rev. Stat. § 28-1205(1) (Reissue 1989). In count II it was also alleged that defendant was a habitual criminal, as defined in Neb. Rev. Stat. § 29-2221 (Reissue 1989).

After trial, the jury returned guilty verdicts on both counts, and the court entered judgment on the verdicts. After a later hearing, the court determined that defendant was a habitual criminal. After a sentencing hearing, defendant was sentenced to life imprisonment on count I, with credit for 377 days in jail previously served, and to 20 to 60 years' imprisonment on count

II, as enhanced under the habitual criminal statute. The terms were to be served consecutively. Defendant timely appealed.

Defendant asserts that the district court erred in (1) finding that the evidence was sufficient to sustain the verdicts, (2) failing to instruct the jury that a guilty verdict for first degree murder must be either unanimous as to premeditated murder or unanimous as to felony murder, (3) allowing the testimony of Karen Niemann and overruling a motion in limine to exclude this testimony, (4) allowing admission of evidence relating to defendant's illegal controlled substances involvement and possession of stolen property, and (5) allowing the State to proceed without electing between premeditated murder and felony murder as a basis for the charge of first degree murder. We affirm.

The record shows the following: The victim, Denise Stawkowski, was a 25-year-old wife and mother of four children at the time of her death on February 19, 1988. She was a drug dealer and a drug user. The victim's husband, Jeffrey Stawkowski, testified that his wife began to sell drugs in September 1987 and that she handled all of the money, drugs, and documentation of weekly drug transactions. The victim kept a record of her drug transactions in a blue trifold ledger, along with the drugs, money, and razor blades for dividing the drugs. Approximately once a week, she drove to a location near Mound City, Missouri, and purchased her inventory of an ounce of methamphetamine and an ounce of cocaine for the week. She then returned to Lincoln, Nebraska, where she divided the drugs into smaller quantities for sale.

The victim sold drugs to several people in Lincoln, including Richard and Cheryl Fisher and defendant and Goldie Fisher. Jeffrey Stawkowski testified that his wife began selling small quantities of methamphetamine to defendant and his girl friend, Goldie Fisher, in December 1987. In January 1988, defendant and Goldie Fisher began to purchase cocaine from the victim. Defendant and Goldie Fisher paid for the drugs with cash or offered merchandise for them, including camcorders, clothes, jackets, and shoes. The victim preferred cash because of the difficulty of converting the merchandise, but she did sometimes accept merchandise for drugs.

Defendant's first assignment of error is that the evidence was insufficient to sustain his convictions. In a criminal case, a guilty verdict will not be disturbed if the evidence, viewed most favorably to the State, is sufficient to support the verdict. *State v. Johnson*, 236 Neb. 831, 464 N.W.2d 167 (1991); *State v. Ayres*, 236 Neb. 824, 464 N.W.2d 316 (1991). It is not the province of the Supreme Court to resolve conflicts in the evidence, pass on credibility of witnesses, determine the plausibility of explanations, or weigh the evidence when determining the sufficiency of the evidence. These tasks are for the trier of fact. *Johnson, supra*. Circumstantial evidence may be the basis for a criminal conviction as long as that evidence, taken as a whole, establishes guilt beyond a reasonable doubt. *State v. Fellman*, 236 Neb. 850, 464 N.W.2d 181 (1991); *State v. Zitterkopf*, 236 Neb. 743, 463 N.W.2d 616 (1990).

The facts in this case, when viewed in the light most favorable to the State, are sufficient for a jury to convict defendant of murder in the first degree and use of a firearm to commit a felony. Section 28-303(1) provides: "A person commits murder in the first degree if he kills another person (1) purposely and with deliberate and premeditated malice, or (2) in the perpetration of or attempt to perpetrate any sexual assault in the first degree, arson, robbery, kidnapping . . . ." Based on the facts, the jury could have concluded that defendant killed the victim either purposely and with deliberate and premeditated malice or in the perpetration of a robbery. Both defendant's premeditation sufficient to establish premeditated first degree murder and an intent to commit the crime of robbery, resulting in murder, could be inferred from defendant's conduct, his statements in reference to his conduct, and the circumstances surrounding the incident. The existence of the requisite state of mind is a question of fact and may be established through circumstantial evidence. *Ayres, supra*. The record shows that the defendant and his girl friend, Goldie Fisher, bought drugs on a regular basis from the victim, Denise Stawkowski, and that shortly before the murder, defendant was dissatisfied with either the quantity or quality of the drugs he was buying from the victim. Defendant, on at least one occasion, threatened to steal any drugs the victim might have

had. Approximately a week before the murder, defendant was trading merchandise for drugs, and a few days before the murder he was looking for more drugs and a gun. The morning before the day of the murder, which occurred in the early morning hours of February 19, 1988, defendant and Goldie Fisher traded a VCR for the balance due on an "eight-ball" of drugs received earlier in the week from the victim. Later that day, they were trying to sell leather jackets and baby clothes to try to get money to pay Goldie Fisher's babysitter.

A few hours before the murder, they also tried to sell or trade a ".38 Special" gun to Jeffrey Stawkowski for drugs. The same caliber gun was used to kill the victim. It was established that the victim had her purse, which contained roughly $2,000 and three eight-balls of cocaine, when she was with Goldie Fisher at approximately 1 a.m. on February 19, 1988. None of these items were found with the victim's body when it was found at approximately 3:20 the same morning. On February 19, after the murder, defendant and Goldie Fisher spent large amounts of cash in Lincoln, but when they were arrested, the baby clothes and leather coats were still in defendant's car, and after his spending spree, defendant still had $656 in cash in his possession.

Karen Niemann testified that she picked up Goldie Fisher, who was alone on the road near the location of the murder, at approximately 1:30 a.m., within the timeframe for the victim's death as set by a pathologist. Other evidence placed Goldie Fisher with defendant immediately before and after the murder, and a jury could infer that she was with defendant at the time of the murder.

Bloodstains on defendant's clothing and on the steering wheel cover and floormats in his car, as well as a Kool cigarette butt found in the victim's car and a package of Kool cigarettes and brown slippers found near the murder scene, all allow a jury to place defendant at the scene. A cellmate, imprisoned with defendant in jail, testified that defendant bragged that he had killed the victim in the presence of Goldie Fisher and that he had used the money that he stole from her to pay debts.

A myriad of detailed evidence supported defendant's convictions. Defendant's first assignment of error is without

merit.

Defendant next contends that the district court erred in not instructing the jurors that it was necessary that they be unanimous in their verdict regarding the theory of first degree murder, either premeditated murder or felony murder, on which they based their verdict. He contends that by not requiring unanimity as to one theory or the other, the court allowed the jurors to find the defendant guilty and yet not be unanimous as to how they reached their conclusion. Defendant suggests that if half the jurors believed he committed premeditated murder and the other half believed he committed felony murder, the verdict of guilty could not be unanimous.

This argument, in the first degree murder context, presents a question of first impression in this court. We believe, based on our rule as set forth in *State v. Parker*, 221 Neb. 570, 379 N.W.2d 259 (1986), and the rule in a majority of jurisdictions, that the jury need only be unanimous as to its verdict that defendant committed first degree murder, and not as to the theory which brought it to that verdict.

The jurors were instructed by the court in this connection, as follows:

> Count I: MURDER IN THE FIRST DEGREE
>
> Under Count I of the information in this case, depending on the evidence, you may find the defendant:
>
> a. Guilty of Murder in the First Degree; or
>
> b. Guilty of Murder in the Second Degree; or
>
> c. Guilty of Manslaughter; or
>
> d. Not guilty.
>
> The material elements which the state must prove by evidence beyond a reasonable doubt in order to convict the defendant of Murder in the First Degree as charged in Count I are:
>
> 1. That the defendant, Herman D. Buckman, killed Denise L. Stawkowski.
>
> 2. That the defendant did so purposely and with deliberate and premeditated malice, or that the defendant did so while in the perpetration of a robbery or attempt to perpetrate a robbery of Denise L. Stawkowski.
>
> . . . .

> The state has the burden of proving beyond a reasonable doubt each and every one of the foregoing material elements necessary for conviction.
>
> If you find from the evidence beyond a reasonable doubt that each of the foregoing material elements is true, it is your duty to find the defendant guilty of Murder in the First Degree under Count I. On the other hand, if you find the state has failed to prove beyond a reasonable doubt any one or more of the foregoing material elements, it is your duty to find the defendant not guilty of Murder in the First Degree under Count I.

This instruction correctly states the law, is not misleading, and adequately states the issues of the case.

Defendant contends that the jury should have been instructed that the jury had to be unanimous in its guilty verdict as to one theory of the charged crime and not simply unanimous as to the fact that defendant had committed first degree murder. This contention is without merit. *State v. Parker, supra*, involved a violation of Neb. Rev. Stat. § 39-669.07 (Reissue 1984), driving while under the influence. We noted that the statute defines but a single offense which may be committed in a variety of ways, and concluded:

> Where . . . a single offense may be committed in a number of different ways and there is evidence to support each of the ways, the jury need only be unanimous in its conclusion that the defendant violated the law by committing the act and need not be unanimous in its conclusion as to which of several consistent theories it believes resulted in the violation.

221 Neb. at 572, 379 N.W.2d at 261.

Other jurisdictions have held this to be the rule in first degree murder cases. See, *People v. Sullivan*, 173 N.Y. 122, 65 N.E. 989 (1903) (jury need not unanimously agree upon a single statutory theory of crime charged if evidence sufficient to support either theory); *State v. Wilson*, 220 Kan. 341, 552 P.2d 931 (1976) (where verdict can be justified on either of two interpretations of the evidence, premeditation or felony murder, verdict cannot be impeached by showing part of jury proceeded on one interpretation and part on another); *State v.*

Williams, 285 N.W.2d 248 (Iowa 1979), *cert. denied* 446 U.S. 921, 100 S. Ct. 1859, 64 L. Ed. 2d 277 (1980) (no reversible error in instruction allowing jury to find defendant guilty of first degree murder without unanimity as to premeditation or felony murder); *State v. Encinas*, 132 Ariz. 493, 647 P.2d 624 (1982) (defendant entitled to unanimous verdict on crime charged, not precise manner in which act committed). See, also, *People v. Milan*, 9 Cal. 3d 185, 507 P.2d 956, 107 Cal. Rptr. 68 (1973); *People v Fullwood*, 51 Mich. App. 476, 315 N.W.2d 594 (1974); *Newsted v. State*, 720 P.2d 734 (Okla. Crim. App. 1986); *Gavin v. State*, 425 N.W.2d 673 (Iowa App. 1988).

Under our statute, one may commit first degree murder either by committing premeditated murder or by killing another while in the commission of a felony. Under the felony murder doctrine, the State is relieved of the burden of proving premeditation and malice when the victim's death is caused by a defendant in the course of defendant's commission of another felony. See *State v. Bradley*, 210 Neb. 882, 317 N.W.2d 99 (1982). We noted in *Parker* that it did not matter whether some of the jurors believed one theory and some believed another, as long as they all determined that the defendant was operating a motor vehicle while under the influence of alcohol. Thus, the defendant in *Parker* was "not entitled to an instruction that in order for the defendant to be found guilty, the jury must be unanimous with regard to any one theory or the jury must find the defendant not guilty." *State v. Parker, supra* at 573, 379 N.W.2d at 261. Likewise, when a defendant is charged in an information with the crime of first degree murder, under our statute the charge may be based on either premeditated murder or felony murder, and it matters not if some jurors arrive at a guilty verdict based on proof of premeditation and some arrive at the same conclusion based on the commission of a felony by defendant. The charge arose out of one set of facts, and the verdict in this case is supported by evidence justifying either conclusion. Each juror need only be convinced beyond a reasonable doubt that defendant committed the crime of first degree murder as defined in our statute. Defendant's second assignment of error is without merit.

Defendant's third assignment of error alleges that the district

court erred in "overruling defendant's Motion in Limine and subsequent objection" at trial to Karen Niemann's testimony. Defendant made a motion in limine to exclude Niemann's testimony. The motion was overruled. A review of the record shows that he did not subsequently object to this testimony at trial. Thus, defendant did not preserve the issue on appeal. We have consistently held that when a motion in limine to exclude evidence is overruled, the movant must object during trial when the objectionable evidence is offered and may not predicate error on the admission of evidence to which no objection was made when it was offered. *State v. Nelson*, 235 Neb. 15, 453 N.W.2d 454 (1990). This assignment of error is without merit.

Defendant next contends that the district court erred in admitting evidence of his involvement with illegal controlled substances and stolen property in that it was irrelevant and prejudicial. Absent an abuse of discretion, a trial court's ruling on the admission or exclusion of evidence of other wrongs or acts will not be disturbed on appeal. *State v. Christian, ante* p. 294, 465 N.W.2d 756 (1991). Under Neb. Rev. Stat. § 27-404 (Reissue 1989), evidence of other crimes or wrongs may be admissible for the purpose of showing proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. This rule permits the use of evidence of other crimes, wrongs, or acts if such evidence is relevant for any purpose other than to show defendant's propensity or disposition to commit the crime charged. *Christian, supra; State v. Boppre,* 234 Neb. 922, 453 N.W.2d 406 (1990). The admission of evidence of defendant's use of illegal controlled substances and receipt of stolen property was not an abuse of discretion. This evidence was used to prove defendant's relationship with the victim and his motive for killing her. Defendant bought drugs from the victim on a regular basis and often sold the stolen merchandise to raise cash or traded it for drugs. There was ample evidence that defendant felt he had been cheated by the victim on either the quantity or quality of drugs he had been buying from her. It was appropriate for the State to show the nature of the dealings between defendant and the victim. If those dealings showed that defendant was a drug user and a thief, it was relevant to the

charge against defendant. The trial court did not err in admitting such evidence.

Defendant's final assignment of error is that the district court erred in not requiring the State to elect between premeditated murder and felony murder as a basis for its allegation of first degree murder. However, defendant failed to argue this matter in his brief. We will not consider errors assigned but not argued in appellant's brief. *Horst v. Johnson, ante* p. 155, 465 N.W.2d 461 (1991). In any event, the issue is disposed of by the discussion set out above concerning the possible two bases for the verdict of first degree murder reached by the jury.

The defendant's assignments of error are without merit, and the judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. CHESTER L. DOYLE, APPELLANT.

468 N.W.2d 594

Filed April 25, 1991. No. 89-859.

1. **Juvenile Courts: Jurisdiction: Waiver: Pleas: Appeal and Error.** A voluntary plea of guilty following the denial of a motion to waive jurisdiction to the juvenile court does not preclude a challenge to such action.
2. **Juvenile Courts: Jurisdiction: Waiver.** In deciding whether to grant the requested waiver and to transfer the proceedings to juvenile court, the court having jurisdiction over a pending criminal prosecution must carefully consider the juvenile's request in light of the criteria or factors set forth in Neb. Rev. Stat. § 43-276 (Reissue 1988).

Appeal from the District Court for Douglas County: JERRY M. GITNICK, Judge. Affirmed.

James J. Regan, of Kelley, Kelley & Lehan, P.C., for appellant.

Robert M. Spire, Attorney General, and Elaine A. Catlin for appellee.

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

HASTINGS, C.J.

In *State v. Doyle, ante* p. 60, 464 N.W.2d 779 (1991), because this court found that the record furnished on appeal failed to provide an adequate basis for a meaningful review by the court under Neb. Rev. Stat. § 43-276 (Reissue 1988), we remanded the cause with directions to the district court to review the record made on the motion to transfer and to set forth its findings as required by law. We further directed the district court to certify those findings to this court for further consideration of defendant's appeal.

The defendant was originally charged with four criminal counts: theft by unlawful taking, attempted robbery, and two counts of burglary, all occurring in March 1989. Pursuant to a plea bargain, defendant pleaded guilty to theft by unlawful taking and one count of burglary, in return for which the other two counts were dismissed.

Before entering pleas, the defendant had moved to transfer jurisdiction to the juvenile court, which motion was denied after a hearing. As stated in *State v. Phinney*, 235 Neb. 486, 455 N.W.2d 795 (1990), a voluntary plea of guilty following the denial of a motion to waive jurisdiction to the juvenile court does not preclude a challenge to such action.

The district court has now certified to this court an order dated February 8, 1991, in which further findings and conclusions in support of a denial of removal of the case to the juvenile court were made. We review that certified record in light of defendant's original appeal.

In deciding whether to grant the requested waiver and to transfer the proceedings to the juvenile court, the court having jurisdiction over a pending criminal prosecution must carefully consider the juvenile's request in light of the criteria or factors set forth in § 43-276. *State v. Phinney*, 236 Neb. 76, 459 N.W.2d 200 (1990). We review the record to determine whether it supports the action taken by the district court in retaining jurisdiction. See *State v. Ryan*, 226 Neb. 59, 409 N.W.2d 579 (1987).

In its six-page order, the trial court reviewed in great detail the factors involved in considering whether to retain or transfer jurisdiction under the provisions of § 43-276. Although we see no need to set forth these findings in complete detail, we summarize them as follows:

The district court was convinced that the defendant clearly understood the nature of what he was doing and, in fact, that he desired to be treated as an adult. It felt that defendant's level of maturity was such that it would be difficult to rehabilitate him before he attained the age of 19 years. The defendant has failed to accept an appropriate level of parental supervision and has failed to observe the terms of a previous probation order of the juvenile court. The district court noted that defendant had previously been placed on probation for burglary and within 2 months thereafter had engaged in the present course of unlawful conduct. The court also was convinced that the facilities for treatment and rehabilitation of the defendant through a more structured program are better available through the district court. It was also noted that the apparent motivation for the charged offenses was to use violence and unlawful conduct for the enrichment of the defendant.

The district court's conclusion that the defendant's case should not be transferred to the juvenile court is supported by appropriate evidence as detailed in the court's findings. Thus, it cannot be said that the district court abused its discretion in refusing to transfer defendant's case to the juvenile court.

The consecutive sentences imposed of 1 to 3 years and 2 to 3 years, although more than minimal sentences, are well within the limitations imposed by statute and cannot be said to be an abuse of discretion.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ULYSSES L. CRIBBS, APPELLANT.

469 N.W.2d 108

Filed April 25, 1991. No. 89-1299.

1. **Insanity: Records.** Neb. Rev. Stat. §§ 29-3701 et seq. (Reissue 1989) require the trial court to review annually the status of a person acquitted on grounds of insanity, and all records in the original proceeding or review hearings shall be made a part of the official record in the underlying case.
2. **Equal Protection: Insanity: Mental Health.** A rational basis exists for treating acquitted persons differently from other mentally ill dangerous individuals who have been committed civilly.
3. **Insanity: Records.** Neb. Rev. Stat. § 29-3706 (Reissue 1989) does not govern the release of records concerning persons acquitted on grounds of insanity, but merely makes all pleadings, evidence, and orders part of the official record in the underlying case. The release of these records is governed by the common-law right of access to judicial records.
4. **Records: Courts.** The right to inspect and copy judicial records is not absolute, but every court has supervisory power over its own records and files, and access may be denied where it is requested for improper purposes.
5. **Records: Courts: Presumptions.** Whether judicial records may be disclosed is a decision best left to the discretion of the trial court, which is in the best position to recognize and weigh the appropriate factors on both sides of the issue; the U.S. Supreme Court has recognized a presumption in favor of access to judicial records.
6. **Records.** Access to judicial records does not necessarily permit copying on demand.
7. **Judges: Words and Phrases: Appeal and Error.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system.

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

Thomas M. Kenney, Douglas County Public Defender, and Brian S. Munnelly for appellant.

Robert M. Spire, Attorney General, and Elaine A. Catlin for appellee.

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

WHITE, J.

Ulysses L. Cribbs, the defendant-appellant, was acquitted by

reason of insanity on charges of first degree murder and attempted murder. He appeals an order of the district court releasing the record of his review hearing, including psychiatric reports and medical and mental evaluations. We affirm.

BACKGROUND OF THE CASE

In 1977, Cribbs was charged with first degree murder and attempted first degree murder following a shooting incident in a public restaurant in Omaha which resulted in the death of one person and the wounding of 25 others. Cribbs was acquitted by reason of insanity and was committed to the Lincoln Regional Center.

Under state law the trial court shall annually review the status of a person acquitted on grounds of insanity. See Neb. Rev. Stat. § 29-3703(1) (Reissue 1989). All records in the original proceeding or review hearings shall be made a part of the official record in the underlying case. See Neb. Rev. Stat. § 29-3706 (Reissue 1989). After a review hearing on August 25, 1989, the district court entered an order on September 5, finding that there was clear and convincing evidence that Cribbs remained mentally ill and continued to be dangerous to himself and others, requiring continued treatment, observation, and supervision.

On September 20, a motion was filed on behalf of four daughters of one of the shooting victims, as "interested parties," seeking an order allowing the court reporter to release "any and all evidence, psychiatrist reports, medical and mental evaluations, incident reports or other documents that have been made a part of the official record herein." Following a September 28 hearing, the district court sustained the request for a copy of exhibit 1, which had been received in evidence at the August 25 hearing. The court ordered that a copy not be released until disposition of the appeal to this court.

DISCUSSION

Cribbs' sole assignment of error asserts that the district court erred in releasing the psychiatrist reports and medical and mental evaluations of the defendant. He argues that state law concerning the release of information treats differently those persons acquitted on grounds of insanity and those committed

civilly and that the law is therefore unconstitutional. At oral argument Cribbs' counsel asserted that the procedure used in this case was incorrect and that the interested parties do not have standing to request the records.

We have recently reaffirmed the constitutionality of the acquitted persons statutes in relation to the civil commitment statutes. See, *State v. Simants*, 213 Neb. 638, 330 N.W.2d 910 (1983); *Tulloch v. State, ante* p. 138, 465 N.W.2d 448 (1991). We found in both cases that a rational basis existed for treating acquitted persons differently from mentally ill dangerous individuals who have been committed civilly. Cribbs' appeal has no merit on this basis.

However, we find further that the statute complained of here, § 29-3706, is not applicable to this case. The statute does not govern the release of records, but merely makes all pleadings, evidence, and orders part of the official record in the underlying case. The statute does not purport to regulate release of trial records. As such, the release of these records is governed by the common-law right of access to judicial records, a right which has been recognized by the U.S. Supreme Court.

Neb. Ct. R. of Official Ct. Reporters 4f (rev. 1989) states as follows:

> Upon request of any person not a party to a suit, the court reporter shall, if so directed by the trial judge, furnish to such person, as expeditiously as possible, a complete typewritten transcript, or any portion thereof, of any trial or proceedings. The compensation and payment therefor shall be as prescribed in [section] e. above, as shall be the certification by the reporter.

"It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents." *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597, 98 S. Ct. 1306, 55 L. Ed. 2d 570 (1978). In that case, the court of appeals had reversed the district court and ordered the release of President Nixon's "Watergate tapes," which had been admitted into evidence and played for the jury. The court of appeals had held that Nixon's right of privacy expectation had disappeared with the public playing of the tapes and the publication of

transcripts.

While the Supreme Court reversed the court of appeals and held that the tapes could not be released, the Court did so because the passage of the presidential recordings act created an alternative means for public access to the tapes. The Court stated that the right to inspect and copy judicial records is not absolute, but that "[e]very court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes," such as in divorce cases. 435 U.S. at 598.

> It is difficult to distill from the relatively few judicial decisions a comprehensive definition of what is referred to as the common-law right of access or to identify all the factors to be weighed in determining whether access is appropriate. The few cases that have recognized such a right agree that the decision as to access is one best left to the *sound discretion of the trial court*, a discretion to be exercised in light of the relevant facts and circumstances of the particular case.

(Emphasis supplied.) 435 U.S. at 598-99.

The Court held that since it assumed that the common-law right of access applied to the tapes, it did not "undertake to delineate precisely the contours of the common-law right," 435 U.S. at 599, but noted that this was a "concededly singular case." 435 U.S. at 608.

In 1980, the U.S. Court of Appeals for the Second Circuit, faced with a request for the release of tapes played for the jury in the "Abscam" cases, noted that the Supreme Court, in the Watergate tapes case, had explicitly recognized the common-law right to inspect and copy judicial records, but had rejected it because the right had been modified by Congress' passage of legislation which specifically restricted public access. *Application of National Broadcasting Co., Inc.*, 635 F.2d 945 (2d Cir. 1980). The court of appeals held that the Supreme Court's decision did not prevent the copying and dissemination of items which had been publicly disclosed by their admission into evidence at a public session of court. In the absence of a statute, the Supreme Court recognized a " 'presumption—however gauged—in favor of public access to

judicial records'. . . with the disclosure in a particular case normally left to the 'informed discretion' of the courts . . . after 'weighing the interests advanced by the parties in light of the public interest and the duty of the courts.' " *Id.* at 950. The court of appeals agreed with the presumption in favor of public inspection.

When a federal district court held that videotapes made by a kidnapper would not be released to the public, it noted that the Supreme Court

> emphasized that the decision as to access to public records is one to be made by the trial court in light of the relevant facts and circumstances of the particular case . . . . The *Watergate* Court directs us to exercise "an informed discretion . . . with a sensitive appreciation of the circumstances," but we are cautioned that exercising our responsibility "does not permit copying on demand."

Application of KSTP Television, 504 F. Supp. 360, 361 (D. Minn. 1980). The court held that the tapes, parts of which had been played during the trial, would support sensationalism if released.

A denial of an application by CBS for copies of audiotapes admitted into evidence in a mail fraud trial was affirmed by the U.S. Court of Appeals for the Eighth Circuit, which found that the district court did not abuse its discretion in denying the application. See *United States v. Webbe*, 791 F.2d 103 (8th Cir. 1986). The court found that the common-law right of access to records of judicial proceedings and evidence does not necessarily include copying of the tapes. "[T]he decision as to access is properly handled on an ad hoc basis by the district judge, who is in the best position to recognize and weigh the appropriate factors on both sides of the issue." *Id.* at 107.

Using the guidance of these decisions, we find that our standard of review of the district court's decision to release the records is whether the trial court abused its discretion.

> "[A] judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in

> matters submitted for disposition through a judicial system."

Von Tersch v. Von Tersch, 235 Neb. 263, 273, 455 N.W.2d 130, 136 (1990). See, also, *Janik v. Gatewood*, 233 Neb. 298, 444 N.W.2d 900 (1989).

In Cribbs' case, the report in contention is from the Lincoln Regional Center and concerns his treatment and progress. It was offered and received in evidence at the August 25, 1989, review hearing, which was an open hearing. The report had been stipulated to by both the State and the defendant.

Referring to the *Application of National Broadcasting Co., Inc.*, case, the district court found that none of the exceptions to the release of information which were recognized there—"to gratify public spite or promote public scandal or harm the litigant's competitive standing or serve improper purposes" —applied to the release of the report about Cribbs.

While we encourage the district court to weigh the conflicting rights of the public and the defendant and to make explicit in the record the factors used in the decision to release evidence from judicial proceedings, we do not find that the district court's release of the records is clearly untenable or has deprived Cribbs of a substantial right. The district court did not abuse its discretion, and the order releasing the report is affirmed.

AFFIRMED.

GRANT, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. WAYNE E. ZIMA, APPELLANT.

468 N.W.2d 377

Filed April 25, 1991. No. 90-038.

1. **Trial: Jurors: Witnesses.** Juror questioning of witnesses is prohibited.
2. **Trial: Appeal and Error.** A party cannot silently tolerate error, gamble on a favorable result, and then complain that he or she guessed wrong.

3. _____: _____. A party cannot complain of error which he or she invited the trial court to commit.

Appeal from the District Court for Seward County, BRYCE BARTU, Judge, on appeal thereto from the County Court for Seward County, ALAN G. GLESS, Judge. Judgment of District Court affirmed.

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

Robert M. Spire, Attorney General, and Wynn Clemmer for appellee.

HASTINGS, C.J., WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ., and COLWELL, D.J., Retired.

CAPORALE, J.

Pursuant to findings of the county court jury, defendant-appellant, Wayne E. Zima, was adjudged guilty of failing to signal a turn, in violation of Neb. Rev. Stat. § 39-652 (Reissue 1988), and of first-offense driving while intoxicated, in violation of Neb. Rev. Stat. § 39-669.07 (Reissue 1988). This judgment was affirmed by the district court. In his appeal to this court, Zima assigns as error the district court's failure to find the county court erred on the record by permitting jurors to question witnesses, claiming this exercise deprived him of a fair and impartial jury and trial. For the reasons set forth hereinafter, we disapprove the practice of permitting jurors to question witnesses, but nonetheless affirm the judgment of the district court.

On the evening of October 18, 1988, Zima was stopped by a Seward County deputy sheriff for failing to signal his left turn from Centennial Avenue onto Highway 34 in Utica, Seward County, Nebraska. Upon reaching Zima's vehicle, the deputy noted an odor of alcohol emanating from within and the bloodshot condition of Zima's eyes. In addition, Zima was unsteady as he, upon request, walked to the deputy's patrol vehicle. Zima also had difficulty with several field sobriety tests administered by the deputy, and the deputy concluded that Zima was intoxicated, an opinion corroborated by the results of a preliminary and a subsequent, more sophisticated, breath test.

During trial, after the parties completed their questioning of witnesses, the county court judge invited the jurors to ask questions. Zima complains of the following colloquy, which occurred at the conclusion of the parties' examination of the State's breath testing device witness:

> [JUROR]: Well now if the breath test simulator doesn't work, then what test do you use on . . . .
>
> THE WITNESS: If I have a problem with the breath simulator, then I notify the Department of Highway Safety and then they submit another one to me and then I do my checks according to what he has sent me.
>
> [JUROR]: To your knowledge, has there ever been a time when that one at the county jail hasn't worked?
>
> THE WITNESS: Not to my knowledge.
>
> [JUROR]: To mine there was.
>
> THE COURT: Now wait a minute.
>
> THE WITNESS: This is the breath simulator. This is the breath simulator. This is not the intoxilyzer or the gas chromatograph. We had a gas chromatograph at one time - - -
>
> [JUROR]: There's more than one - - -
>
> THE WITNESS: Yes, ma'am.
>
> [JUROR]: - - - machine that they run it on, that you've tried?
>
> THE WITNESS: Yes, ma'am. We had the gas chromatograph at one time, and we put that instrument out of operation and sent it back to the state because we were — we heard about the intoxilyzer 4011AS. And we've never had any problems with it, ever.
>
> [JUROR]: Okay. So more than — so they use more than one breath simulator type like that — one machine?
>
> THE WITNESS: Right, yes. Before I was the jail administrator, they used the gas chromatograph instrument over at the Seward County Detention Center. And since that period when I have become the administrator, we have put in the intoxilyzer 4011AS.
>
> [JUROR]: Now, I don't know, can I ask — I don't know if it will pertain to him or not. If — like say if you was [sic] giving me the test and I objected to that test, what

test would you do then?

THE WITNESS: Okay, the officer is the person that you'd have to talk to, the individual officer. He has the option — if there is something wrong, if it were to present itself that something were wrong, then I would put the machine out of service. I would advise the officer that there was a problem. Then it would be up to him whether or not he would go blood or urine. And then those tests would be taken to Lincoln and subjected to the Department of Health Laboratories.

[JUROR]: Okay. Thank you.

Because of the foregoing colloquy, the State, which now urges that no error occurred because of juror questioning, moved the county court judge for a mistrial. Zima, however, resisted the State's motion, stating, through counsel, "I just don't think there's sufficient grounds for a mistrial." Apparently persuaded by Zima's analysis, the county court overruled the State's motion.

Although the issue of juror questioning of witnesses is one of first impression in Nebraska, it is not without precedent. One group of jurisdictions, although it may discourage juror questioning of witnesses, holds that allowing the practice is within the discretion of the trial court. See, e.g., *U.S. v. Johnson*, 914 F.2d 136 (8th Cir. 1990); *U.S. v. Lewin*, 900 F.2d 145 (8th Cir. 1990); *State v. Johnson*, 784 P.2d 1135 (Utah 1989); *People v Heard*, 388 Mich. 182, 200 N.W.2d 73 (1972); *People v Wesley*, 148 Mich. App. 758, 384 N.W.2d 783 (1985), *aff'd* 428 Mich. 708, 411 N.W.2d 159 (1987), *cert. denied* 484 U.S. 967, 108 S. Ct. 459, 98 L. Ed. 2d 399; *Carter v. State*, 250 Ind. 13, 234 N.E.2d 650 (1968); *Lucas v. State*, 381 So. 2d 140 (Miss. 1980).

Another group of jurisdictions outlines a procedure for allowing jurors to submit written questions to the court, subject to review by the court and counsel. See, e.g., *People v. McAlister*, 167 Cal. App. 3d 633, 213 Cal. Rptr. 271 (1985); *State v. LeMaster*; 137 Ariz. 159, 669 P.2d 592 (1983); *State v. G. Barrett*, 278 S.C. 414, 297 S.E.2d 794 (1982); *Rudolph v. Iowa Methodist Medical Ctr.*, 293 N.W.2d 550 (Iowa 1980); *People v. Gates*, 97 Cal. App. 3d Supp. 10, 158 Cal. Rptr. 759

(1979). See, also, Urbom, *Toward Better Treatment of Jurors by Judges*, 61 Neb. L. Rev. 409 (1982).

Although the techniques employed by the second group of jurisdictions (1) minimize the likelihood of debacles such as that in this case, (2) may obviate the concern which would otherwise face counsel who fear that raising an objection would alienate the questioning juror, and, (3) to a lesser extent, address as well the question of juror qualification to examine witnesses, they do not deal with the more fundamental question of what effect juror questioning may have, or appear to have, on juror impartiality. Since due process requires a fair trial before a fair and impartial jury, *Simants v. State*, 202 Neb. 828, 277 N.W.2d 217 (1979), the judicial process is better served by the time-honored practice of counsel eliciting evidence which is heard, evaluated, and acted upon by jurors who have no investment in obtaining answers to questions they have posed. See *Pacific Improvement Co. v. Weidenfeld*, 277 F. 224 (2d Cir. 1921). But see *United States v. Witt*, 215 F.2d 580 (1954) (without referring to *Pacific Improvement Co.*, holds juror questioning within discretion of trial judge).

Our system is an adversary one which depends upon counsel to put before lay fact finders that which should be admitted in accordance with the rules of evidence and to keep from them that which should not be received in evidence. A change in this system whereby jurors become advocates and possible antagonists of the witnesses does not on its face suggest a fairer or more reliable truth-seeking procedure. We therefore rule that in the trial courts of this state, juror questioning of witnesses is prohibited.

However, the foregoing declaration does not end our analysis of this case, for we have held that a party cannot silently tolerate error, gamble on a favorable result, and then complain that he or she guessed wrong. See *State v. Jenson*, 232 Neb. 403, 440 N.W.2d 686 (1989). Indeed, Zima did more than remain silent, he successfully argued against a mistrial and thereby invited the very error which is the source of his present discontent. It is a well-established principle of appellate practice that a party cannot complain of error which he or she invited the trial court to commit. *State v. Ditter*, 232 Neb. 600, 441

N.W.2d 622 (1989). Zima thus cannot now complain that the outcome achieved is not the result he desired.

Accordingly, the judgment of the district court is affirmed.

AFFIRMED.

SHANAHAN, J., concurring.

Since the procedure, or more accurately, the lack of procedure, for a juror's questions of a witness in Zima's trial approached an interrogational free-for-all, there is a basis for the majority's criticism. However, if the objective of a trial, particularly a jury's factfinding role in the judicial process, is ascertaining truth, or at least probable truth, for resolution of disputed claims or contradictory contentions and positions of litigants, an absolutely prohibitive rule against all questions from jurors is as incomprehensible as it is imprudent.

Allowing a juror's question to a witness is related to two of the Nebraska Evidence Rules, namely, Rule 611(1), which provides in part, "The judge shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (a) make the interrogation and presentation effective for the ascertainment of the truth," and Rule 614(2), "The judge may interrogate witnesses, whether called by himself or by a party."

A review of decisions in other jurisdictions supplies cogent reasons for allowing a juror's questions to a witness; for example:

> [A] well informed juror serves the cause of justice. In some cases it is important to clarify a problem in a juror's mind. It may sometimes be necessary for a juror to call an important matter to the attention of court and counsel. We therefore think it is important for the trial judge to control direct questions to the witnesses by members of the jury, but we also believe jurors should be afforded the opportunity to direct any questions or problems they may have to the court.

State v. Taylor, 25 Ariz. App. 497, 500, 544 P.2d 714, 717 (1976).

> There is nothing improper about the practice of allowing occasional questions from jurors to be asked of witnesses. If a juror is unclear as to a point in the proof, it

> makes good common sense to allow a question to be asked about it. If nothing else, the question should alert trial counsel that a particular factual issue may need more extensive development. Trials exist to develop truth. It may sometimes be that counsel are so familiar with a case that they fail to see problems that would naturally bother a juror who is presented with the facts for the first time.

United States v. Callahan, 588 F.2d 1078, 1086 (5th Cir. 1979).

"As finders of fact, jurors should receive reasonable help in resolving legitimate questions which trouble them but have not been answered through [counsel's] interrogation of witnesses . . . ." *Rudolph v. Iowa Methodist Medical Ctr.*, 293 N.W.2d 550, 556 (Iowa 1980).

"[T]he interests of justice demand that jurors be well-informed with an opportunity to clarify matters they either did not hear or did not comprehend." *State v. LeMaster*, 137 Ariz. 159, 165, 669 P.2d 592, 598 (1983).

> [I]t [is] proper that a juror may ask an occasional question where something has been said by a witness which is confusing to the juror for the purpose of clarifying the matter. The extent to which the trial court may allow such questioning by the juror is a matter in the discretion of the court.

Krause v. State, 75 Okla. Crim. 381, 386, 132 P.2d 179, 182 (1942).

"The basic reason underlying [a juror's asking questions of a witness] is that the jurors are the finders of fact and any questions they may ask may help them in reaching their ultimate determination." *People v Heard*, 388 Mich. 182, 187, 200 N.W.2d 73, 76 (1972).

"Law is not an exact science . . . . Despite the majesty and gravity with which its administration is properly invested, it is a very human affair after all. It has to do not with scientific axioms or scientific formulae, but with the everyday concerns of ordinary citizens." H. MacMillan, *The Ethics of Advocacy*, in Law & Other Things 171, 174 (1971).

In its opinion, the majority has mentioned decisions from other jurisdictions, including appellate decisions from eight states and one federal circuit court, which permit a juror's

question to a witness. To be added to the decisions mentioned by the majority are the following 14 decisions from state appellate courts and 5 decisions of federal circuit courts, all allowing juror questions to a witness in some manner: *Ratton v. Busby*, 230 Ark. 667, 326 S.W.2d 889 (1959); *Ferrara v. State*, 101 So. 2d 797 (Fla. 1958); *Story v. State*, 157 Ga. App. 490, 278 S.E.2d 97 (1981); *Stamp v. Commonwealth*, 200 Ky. 133, 253 S.W. 242 (1923); *State v. Crawford*, 96 Minn. 95, 104 N.W. 822 (1905); *Sparks v. Daniels*, 343 S.W.2d 661 (Mo. App. 1961); *State v. Rodriguez*, 107 N.M. 611, 762 P.2d 898 (1988); *Sitrin Bros. v. Deluxe Lines*, 35 Misc. 2d 1041, 231 N.Y.S.2d 943 (1962); *State v. Howard*, 320 N.C. 718, 360 S.E.2d 790 (1987); *State v. Sheppard*, 100 Ohio App. 345, 128 N.E.2d 471 (1955); *Krause v. State, supra*; *Reese v. Pittsburgh*, 313 Pa. 32, 169 A. 366 (1933); *Byrge v. State*, 575 S.W.2d 292 (Tenn. Crim. App. 1978); *Green v. Rudsenske*, 320 S.W.2d 228 (Tex. Civ. App. 1959); *U.S. v. Nivica*, 887 F.2d 1110 (1st Cir. 1989); *United States v. Witt*, 215 F.2d 580 (2d Cir. 1954); *DeBenedetto v. Goodyear Tire & Rubber Co.*, 754 F.2d 512 (4th Cir. 1985); *United States v. Callahan, supra*; *United States v. Gonzales*, 424 F.2d 1055 (9th Cir. 1970).

Consequently, research on the point indicates that there are decisions from 22 state courts and 6 federal circuit courts which allow the practice of a juror's question to a witness. It appears that, with the exception of Nebraska, as reflected by today's decision, no appellate court, state or federal, has rejected the practice of juror questions in all circumstances and imposed an entire embargo on that practice. Although good sometimes comes from marching to the beat of a different drummer, the majority's drumbeat is drowned out by the band of courts in other jurisdictions which allow the practice of juror questions to a witness.

From the decisions in those jurisdictions allowing juror questions to a witness, there evolve a practical procedure and guidelines which reduce prospects for a mistrial, new trial, or reversal based on such questions to a witness. At the outset, a trial court must consider whether juror questions to any witness will assist the jury in its role as fact finder. A decision to allow or reject questioning from a jury is within the trial court's

discretion. If the court decides to allow questions from the jury, then before any testimony the court must inform the jury that if a juror has a question for clarification of a witness' testimony, the juror's written question shall be presented to the court, which determines whether the judge, and only the judge, will ask the witness a question submitted by a juror. After a witness testifies, a jury would have to be given suitable time to formulate questions in reference to the testimony given, but must be instructed that any question is a juror's independent decision, to be made without discussing the content of the question with any other member of the jury. The juror's written question would then be given to the bailiff for delivery to the judge. The court and counsel must examine the submitted question or questions with an opportunity, on the record but out of the jury's hearing, for counsel's objection to any question. If the court rules that the submitted question or questions will result in inadmissible testimony, the judge shall inform the jury that the court declines to interrogate the witness through use of the jury-submitted questions. However, if a submitted question will elicit admissible testimony, and after the judge has asked the jury-submitted question, counsel shall have the opportunity to interrogate the witness on the subject raised by the juror's question and the witness' answer. In this manner, the court may scrupulously control interrogation of a witness. See, *State v. G. Barrett*, 278 S.C. 414, 297 S.E.2d 794 (1982); *Rudolph v. Iowa Methodist Medical Ctr.*, 293 N.W.2d 550 (Iowa 1980); *United States v. Callahan*, 588 F.2d 1078 (5th Cir. 1979); *State v. LeMaster*, 137 Ariz. 159, 669 P.2d 592 (1983); *Story v. State*, 157 Ga. App. 490, 278 S.E.2d 97 (1981); *People v. Gates*, 97 Cal. App. 3d Supp. 10, 158 Cal. Rptr. 759 (1979); *State v. Taylor*, 25 Ariz. App. 497, 544 P.2d 714 (1976).

Inherent in a categorical condemnation of the practice which allows a juror's question to a witness is a skepticism concerning every trial judge's capability to manage interrogation and a suspicion about a jury's analytical and deductive capacities.

It is a myth that only courts and counsel possess a map for the journey toward truth in a trial. The blindfold on Justice is not a gag. Hence, a juror's question to a witness, in accordance with the procedure and guidelines suggested, should be a part of Nebraska practice.

JAMES ROAN EAGLE, APPELLEE, V. STATE OF NEBRASKA, APPELLANT.

468 N.W.2d 382

Filed April 25, 1991. No. 90-459.

1. **Workers' Compensation.** 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.
2. **Workers' Compensation: Appeal and Error.** In considering whether evidence sustains a finding for an award or dismissal by the Nebraska Workers' Compensation Court on rehearing, an appellate court does not reweigh evidence, but considers the compensation court's award or dismissal in a light most favorable to the successful party and resolves evidential conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.
3. **Workers' Compensation: Proof.** For an award based on disability, a claimant must establish, by a preponderance of the evidence, that the employment proximately caused an injury which resulted in disability compensable under the Workers' Compensation Act.
4. _____: _____. An employee has the burden to show the cause-and-effect relationship involving employment, an industrial injury, and disability.
5. **Workers' Compensation.** An employee who is injured to the extent that the employee cannot perform services other than those which are so limited in quality, dependability, or quantity that a reasonably stable market for the services is nonexistent may be classified as totally disabled.
6. _____. Whether an injured employee has reached maximum physical recovery after medical treatment is, generally, a factual question for the Workers' Compensation Court.
7. _____. Whether a claimant has sustained disability which is total or partial and which is temporary or permanent is a question of fact.
8. **Limitations of Actions: Proof.** A defendant alleging the statute of limitations as an affirmative defense has the burden to prove such defense.
9. **Workers' Compensation.** As a general rule, an employee may recover compensation for a new injury, or aggravation of an injury, which results from medical or surgical treatment of the employee's compensable injury if an intervening independent cause does not break the chain of causation between the employee's original injury and the new or aggravated injury.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Robert M. Spire, Attorney General, and Douglas J. Peterson for appellant.

Leonard G. Tabor for appellee.

HASTINGS, C.J., WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ., and COLWELL, D.J., Retired.

SHANAHAN, J.

The State of Nebraska appeals from an award on rehearing by the Nebraska Workers' Compensation Court in favor of James Roan Eagle. We affirm.

STANDARD OF REVIEW

> "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. [Citations omitted.] 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. [Citations omitted.] 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. [Citations omitted.] 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."

Heiliger v. Walters & Heiliger Electric, Inc., 236 Neb. 459, 460-61, 461 N.W.2d 565, 568 (1990). Accord, *Fees v. Rivett Lumber Co.*, 228 Neb. 617, 423 N.W.2d 483 (1988); *Mendoza v. Omaha Meat Processors*, 225 Neb. 771, 408 N.W.2d 280 (1987). See, also, Neb. Rev. Stat. § 48-185 (Reissue 1988).

In considering whether evidence sustains a finding for an award or dismissal by the Nebraska Workers' Compensation Court on rehearing, an appellate court does not reweigh evidence, but considers the compensation court's award or dismissal in a light most favorable to the successful party and resolves evidential conflicts in favor of the successful party,

who is entitled to every reasonable inference deducible from the evidence. Cf. *Rahmig v. Mosley Machinery Co.*, 226 Neb. 423, 412 N.W.2d 56 (1987).

BACKGROUND FOR ROAN EAGLE'S ACCIDENT

Before the accident, the Game and Parks Commission of the State of Nebraska had employed Roan Eagle for 4 years as a wrangler at the Fort Robinson State Park near Crawford, Nebraska. A wrangler is a cowboy in charge of saddle horses. In addition to wrangling, Roan Eagle's duties included taking "tourists out on trail rides, horse back out in the hills," tours which might last for several hours.

On June 26, 1986, Roan Eagle, on horseback, was accompanying a dozen tourist trail riders in the hills near Fort Robinson, when Roan Eagle's horse "spooked and started bucking." Roan Eagle was thrown from his horse, struck the ground, and sustained injury to his right leg, which injury produced pain in the "middle of [his] hip."

Another wrangler rode ahead to Fort Robinson. On Roan Eagle's arrival at the fort, he was transported by rescue unit to the Crawford hospital and then to the hospital at Alliance, Nebraska, for orthopedic attention.

ROAN EAGLE'S INJURY

Dr. Chris Wilkinson, an orthopedist, attended Roan Eagle and diagnosed the injury as "a closed proximal femoral fracture which is basically an intertrochanteric subtrochanteric comminuted fracture." The femur, or thigh bone, transmits weight of a person's trunk from the hip to the lower extremities and is comprised of the femoral head, neck, two processes or prominences called the greater trochanter and lesser trochanter, and a shaft. The femoral head is smooth and globular, forming more than half a sphere, and fits into and articulates with the acetabulum, a cup-shaped formation of the hip bone, to form a ball-and-socket joint. The femur's neck lies between the femoral head and shaft. The greater trochanter is located laterally at the base of the femoral neck and slightly above the lesser trochanter on the nearly opposite side of the shaft.

On June 27, Dr. Wilkinson surgically reduced the somewhat transverse or oblique fracture of the shaft in Roan Eagle's right

femur, a fracture which was located just below the femoral neck between the trochanters. After aligning the femoral fragments, Dr. Wilkinson secured the reduction by laterally countersinking two "cortical screws" in the femur's shaft, one above and the other below the fracture. Over the cortical screws, Dr. Wilkinson laid a contoured six-hole metal plate against the femur, drilled six holes into the shaft, and inserted cortical screws through the plate into the shaft, with three screws above and three screws below the fracture. A 3³/₄-inch "lag screw" was then implanted into the femur's head and by a compression screw was tightened to extend through the femoral head and neck into the femur's shaft at the fracture site.

Roan Eagle was then transferred to the Crawford hospital and eventually returned to his home. For the remainder of 1986, Roan Eagle made monthly trips to Chadron for postoperative checkups by Dr. Wilkinson. In the course of those visits, Dr. Wilkinson noted that Roan Eagle's pain persisted in the right hip, and "fluoroscoped the hip to see if it was possible to see any position in which the leg [sic] screw protruded from the head into the joint. I could not tell on any angle or amount of rotation" that the screw had protruded into the hip joint. Roan Eagle's pain continued virtually unchanged until December 1986 when Dr. Wilkinson, without further "radiographs," rendered the assessment that Roan Eagle was "doing well as far as I can tell," although Roan Eagle had not returned to work at that time. Since Roan Eagle's hip was apparently mending, Dr. Wilkinson expressed the opinion that "it'll be a year before he is really back to normal and possibly as long as two years before he has his strength built up and can resume unlimited activities." Dr. Wilkinson recommended that Roan Eagle "not lift anything and carry only light objects."

On one of Roan Eagle's visits in the forepart of 1987, Dr. Wilkinson told Roan Eagle that he was "pretty good" and decided to leave the metal implant in Roan Eagle's femur, but suggested that Roan Eagle not do any heavy lifting. It was not until June 1988 that Roan Eagle returned to work for the State, this time as an operator of a power lawnmower, but, on account of pain from getting on and off the mower, was unable to continue this employment. His hip started "hurting [him]

more" in the last part of 1988. At that point Roan Eagle found that he was unable to walk for any appreciable distance and that his hip pain was increasing, necessitating Roan Eagle's use of a wheelchair or cane for locomotion. Roan Eagle filed his action in the Nebraska Workers' Compensation Court on June 26, 1989.

Roan Eagle then returned to Dr. Wilkinson on July 25, 1989. Dr. Wilkinson reviewed Roan Eagle's orthopedic history and noted that Roan Eagle had been unable to return to work. Also, Dr. Wilkinson concluded that, throughout his previous treatment of Roan Eagle, "[a]t no point . . . could the lag screw head be demonstrated to impinge onto the joint." During his further examination of Roan Eagle on the July 1989 visit, Dr. Wilkinson observed "some motion about the lag screw," but was unable to determine the exact extent of the lag screw's movement in the femoral head. At that point, Dr. Wilkinson became disturbed on account of Roan Eagle's persistent pain and was concerned about "penetration of the joint by the lag screw." In view of limited suitable radiographic equipment, Dr. Wilkinson suggested that Roan Eagle travel to Scottsbluff for a "CT [computerized tomography] scan of the hip" to ascertain the extent of hip damage from the lag screw. Subsequently, on September 28, 1989, Roan Eagle visited a Scottsbluff orthopedist, but when Roan Eagle was unable to provide an advance payment of $1,500 for orthopedic services, he received no further medical attention.

When the accident happened, Roan Eagle was a 53-year-old manual laborer with a 10th grade education. Although he applied for reemployment with the State, he was turned down. According to Dr. Wilkinson's evaluation on July 25, 1989, Roan Eagle sustained a "13% impairment of the whole person," a rating which was subject to revision depending on a further determination whether to retain the metallic implants, especially the lag screw which protruded into Roan Eagle's hip joint. Also, Dr. Wilkinson expressed that Roan Eagle's "impairment rating of course is not a disability rating as a patient with a small impairment may have a large disability, depending on his education and pain tolerance and the type of work that he does."

Before the rehearing on April 17, 1990, the State paid most of Roan Eagle's medical expenses and some benefits for Roan Eagle's temporary total disability. The State's last payment for Roan Eagle was made to the Crawford hospital in March 1987.

AWARD ON REHEARING

In its amended answers, the State raised the issue of the statute of limitations expressed in Neb. Rev. Stat. § 48-137 (Reissue 1988), which, in pertinent part, states:

> In case of personal injury, all claims for compensation shall be forever barred unless, within two years after the accident, the parties shall have agreed upon the compensation payable under the Nebraska Workers' Compensation Act, or unless, within two years after the accident, one of the parties shall have filed a petition . . . . When payments of compensation have been made in any case, such limitation shall not take effect until the expiration of two years from the time of the making of the last payment. . . .

The State offered no evidence to contradict testimony from Roan Eagle's witnesses, especially the medical information from Dr. Wilkinson.

The compensation court found that Roan Eagle sustained a compensable injury on June 26, 1986. Subject to a credit for payments already made by the State, the court ordered the State to pay benefits for Roan Eagle's temporary total disability before the rehearing and so long as Roan Eagle remained "totally disabled for an indefinite future period of time." Also in its award, the Workers' Compensation Court stated:

> The principal issue herein is whether the plaintiff's claim is barred by the statute of limitations. . . . [T]he last payment of benefits . . . was made in March, 1987. . . . The plaintiff's treating doctor was Dr. Chris E. Wilkinson who treated the plaintiff until December 16, 1986 and did not see the plaintiff again until July 25, 1989. [Dr. Wilkinson] felt it would be a year before the plaintiff would really be back to normal and possibly as long as two years before the plaintiff has his strength built up and can resume unlimited activities. There is no evidence to indicate that

the plaintiff would have any permanent disability until Dr. Wilkinson's report of July 25, 1989. Since the plaintiff did file his petition within two years of the time that he again became disabled and had a claim to make, his claim is not barred by the statute of limitations.

ASSIGNMENTS OF ERROR

In its main assignment of error, the State contends that the Workers' Compensation Court erred by finding that Roan Eagle's claim was not barred by the statute of limitations. Also, the State contends that the Workers' Compensation Court erred by awarding Roan Eagle benefits for temporary total disability beyond July 25, 1989, when Dr. Wilkinson assessed Roan Eagle's disability to the body as a whole.

Thus, the State does not contend that Roan Eagle did not sustain a compensable injury on June 26, 1986, and does not question its obligation, imposed by the award, that the State pay Roan Eagle's medical expenses and benefits for his temporary total disability before Dr. Wilkinson's evaluation on July 25, 1989.

ROAN EAGLE'S BURDEN TO PROVE COMPENSABILITY

"[F]or an award based on disability, a claimant must establish, by a preponderance of the evidence, that the employment proximately caused an injury which resulted in disability compensable under the Workers' Compensation Act." *Heiliger v. Walters & Heiliger Electric, Inc.*, 236 Neb. 459, 468-69, 461 N.W.2d 565, 572-73 (1990). See *Mendoza v. Omaha Meat Processors*, 225 Neb. 771, 408 N.W.2d 280 (1987). "An employee has the burden to show the cause-and-effect relationship involving employment, an industrial injury, and disability." *Fees v. Rivett Lumber Co.*, 228 Neb. 617, 621, 423 N.W.2d 483, 486 (1988). Accord *Rosemann v. County of Sarpy*, *ante* p. 252, 466 N.W.2d 59 (1991).

"Compensable disability is generally defined as inability, as the result of a work-connected injury, to perform or obtain work suitable to claimant's qualifications and training." 2 A. Larson, The Law of Workmen's Compensation § 57.22(a) at 10-129 (1989).

> An employee who is injured to the extent that the employee cannot perform services other than those which are so limited in quality, dependability, or quantity that a reasonably stable market for the services is nonexistent may be classified as totally disabled. . . . Hence, the test for a worker's employability after a compensable injury is whether the worker can compete in the open and normal labor market for the worker's services.

Sherard v. Bethphage Mission, Inc., 236 Neb. 900, 912, 464 N.W.2d 343, 351 (1991).

"[W]hether an injured employee has reached maximum physical recovery after medical treatment is, generally, a factual question for the Workers' Compensation Court." *Heiliger v. Walters & Heiliger Electric, Inc., supra* at 472, 461 N.W.2d at 574. "Whether a claimant has sustained disability which is total or partial and which is temporary or permanent is a question of fact." *Sherard v. Bethphage Mission, Inc., supra* at 912, 464 N.W.2d at 351.

STATUTE OF LIMITATIONS

" 'A defendant alleging the statute of limitations as an affirmative defense has the burden to prove such defense.' " *Millman v. County of Butler*, 235 Neb. 915, 935, 458 N.W.2d 207, 219 (1990) (quoting from *League v. Vanice*, 221 Neb. 34, 374 N.W.2d 849 (1985)). Accord *Georgetowne Ltd. Part. v. Geotechnical Servs.*, 230 Neb. 22, 430 N.W.2d 34 (1988); *Van Burg v. Van Engen*, 76 Neb. 816, 107 N.W. 1006 (1906).

THE NATURE OF ROAN EAGLE'S INJURY

In *Williams v. Dobberstein*, 182 Neb. 862, 865, 157 N.W.2d 776, 778-79 (1968), this court stated that "[p]ain alone is not compensable under our statute, and disability is the basic factor which gives rise to a claim for compensation." Accordingly, a claimant must give notice and file a petition " 'within the statutory period after he had knowledge that compensable disability resulted from the original accident.' " *Williams, supra* at 865, 157 N.W.2d at 778 (quoting *Welke v. City of Ainsworth*, 179 Neb. 496, 138 N.W.2d 808 (1965)). Accord *Borowski v. Armco Steel Corp.*, 188 Neb. 654, 198 N.W.2d 460 (1972).

Our review of Nebraska decisions indicates that Roan Eagle's case appears to be the first instance for this court's consideration of the question whether medical treatment for an initial and compensable injury may result in a subsequent compensable injury under the Nebraska Workers' Compensation Act.

No one doubts that Roan Eagle sustained a serious work-related injury on June 26, 1986, and required the orthopedic care and treatment rendered by Dr. Wilkinson. Although Roan Eagle experienced leg pain during his postoperative visits to Dr. Wilkinson in 1986, nothing in Dr. Wilkinson's observations, including radiographic examinations, indicated that Roan Eagle's fractured femur, supported by the metallic implants, was not knitting in the best medical expectations. Consequently, Dr. Wilkinson expressed the orthopedic belief, imparted to Roan Eagle, that the femur was mending, although Roan Eagle's recuperation might last as long as 2 years. That medical optimism was reaffirmed in 1987 when Dr. Wilkinson decided to leave the implants in Roan Eagle's femur, but cautioned Roan Eagle against heavy lifting. Throughout this time, according to Dr. Wilkinson, a radiographic examination of Roan Eagle's hip would not have disclosed any movement or rotation by the lag screw in the femoral head. However, when pain compelled Roan Eagle to return to Dr. Wilkinson, the physician was concerned about the persistent pain in the area of Roan Eagle's hip and, on examination of radiographic films of the fracture site on June 26, 1989, discovered that the previous expectations of a good medical result from the metallic implants had vanished. There was "motion about the lag screw," which accounted for the lag screw's protrusion into Roan Eagle's hip joint. Even then, with his limited radiographic equipment, Dr. Wilkinson was unable to ascertain the exact extent of the painful protrusion; hence, Dr. Wilkinson suggested computerized tomography for Roan Eagle to obtain a complete and precise picture of the now-evident injury. At that point and for the first time, Dr. Wilkinson estimated Roan Eagle's disability as "13% impairment of the whole person," with the proviso that his impairment rating might be revised in light of future surgery

involving the metallic implants.

Professor Larson has noted that it is "uniformly held that aggravation of the primary injury by medical or surgical treatment is compensable." 1 A. Larson, The Law of Workmen's Compensation § 13.21(a) at 3-574 to 3-575 (1990). Larson further comments: "Fault on the part of the physician . . . even if it might amount to actionable tortiousness, does not break the chain of causation." 1 A. Larson, *supra*, § 13.21(b) at 3-584. See, also, 82 Am. Jur. 2d § 337 (1976).

Courts in several jurisdictions have expressed that, as a general rule, an employee may recover compensation for a new injury, or aggravation of an injury, which results from medical or surgical treatment of the employee's compensable injury if an intervening independent cause does not break the chain of causation between the employee's original injury and the new or aggravated injury; for example, see, *Roberts v. Krupka*, 246 Kan. 433, 790 P.2d 422 (1990); *Martin v Ford Motor Co*, 401 Mich. 607, 258 N.W.2d 465 (1977); *Turner v. Guiliano*, 350 Mass. 675, 216 N.E.2d 562 (1966); *Yount v. United Fire & Casualty Co.*, 256 Iowa 813, 129 N.W.2d 75 (1964); *Matter of Kestenbaum v. Dunrite Painting Co.*, 10 N.Y.2d 838, 178 N.E.2d 430, 221 N.Y.S.2d 728 (1961); *Ortkiese v. Clarson & Ewell Engineering*, 126 So. 2d 556 (Fla. 1961); *Shortridge v. Bede*, 51 Wash. 2d 391, 319 P.2d 277 (1957); *Heaton v. Kerlan*, 27 Cal. 2d 716, 166 P.2d 857 (1946); *Matter of Compensation of Sparks*, 60 Or. App. 397, 653 P.2d 1002 (1982); *American Smelting & Refining Co. v. Industrial Com'n*, 25 Ariz. App. 532, 544 P.2d 1133 (1976). Consequently, we now hold that, as a general rule, an employee may recover compensation for a new injury, or aggravation of an injury, which results from medical or surgical treatment of the employee's compensable injury if an intervening independent cause does not break the chain of causation between the employee's original injury and the new or aggravated injury.

Since Roan Eagle's disability, established on July 25, 1989, was directly traceable to the femoral injury on June 26, 1986, there is an unbroken chain of causation between the original injury and the eventual disability from Roan Eagle's hip injury. The medical evidence supports a conclusion that Roan Eagle's

disability, discovered in July 1989, resulted from medical or surgical treatment of Roan Eagle's compensable injury. Thus, the State failed to prove that Roan Eagle's petition was untimely filed after the established existence of Roan Eagle's disability. Consequently, the findings by the Nebraska Workers' Compensation Court are not clearly erroneous and are sustained under the record.

BENEFITS PAYABLE TO ROAN EAGLE

Apparently alluding to Roan Eagle's abortive effort to work for the State as an operator of a power lawnmower and Dr. Wilkinson's reference to Roan Eagle's disability as a "whole person," the State argues that the Workers' Compensation Court erred in awarding Roan Eagle benefits for total disability after July 25, 1989, the date of Dr. Wilkinson's evaluation of Roan Eagle's injury and disability.

Bearing in mind that Roan Eagle was a wrangler, we fail to see any similarity between a power lawnmower and a horse. Even though horses eat hay, sitting astraddle those animals is anything but soft. With the left foot in a stirrup, swinging the right leg over a horse's back and settling into the saddle for hours of riding does place a strain on a rider's legs and hips and is far more physically strenuous than doing a turn around the turf on a power mower.

Dr. Wilkinson has displayed a keener insight into the Nebraska Workers' Compensation Act than has the State, for he recognized that a physical "impairment rating . . . is not a disability rating as a patient with a small impairment may have a large disability, depending on his education and pain tolerance and the type of work that he does." Dr. Wilkinson's observations about a disability coincide with this court's expressions concerning compensable total disability. See *Sherard v. Bethphage Mission, Inc.*, 236 Neb. 900, 464 N.W.2d 343 (1991). Moreover, in reference to disability, we have stated that an employee's disability "is not necessarily determined by a physician's evaluation and assessment of the employee's loss of bodily function." *Heiliger v. Walters & Heiliger Electric, Inc.*, 236 Neb. 459, 470, 461 N.W.2d 565, 573 (1990). Accord *Sherard v. Bethphage Mission, Inc., supra*. In view of the record and the

standard of review for this court, we cannot conclude that the Nebraska Workers' Compensation Court, as the sole judge of witness credibility and the weight to be given a witness' testimony, was clearly erroneous in its finding that Roan Eagle is presently totally disabled and entitled to periodic payments for total disability until there is a determination whether Roan Eagle has sustained a permanent impairment of earning power or earning capacity on account of any disability to his body as a whole. See Neb. Rev. Stat. § 48-121(1) and (2) (Reissue 1988). In the course of periodic payment of benefits to Roan Eagle, the State may seek a modification of the award if there is information justifying a modification. See Neb. Rev. Stat. § 48-141 (Reissue 1988). In the meantime, the anatomical fact remains: In the design of the articulating surfaces of the human hip, there is no tolerance for a protruding lag screw.

ATTORNEY FEE

The award of the Nebraska Workers' Compensation Court is supported by the evidence, is not clearly erroneous, and is, therefore, affirmed. Since the State of Nebraska has failed to reduce the amount of Roan Eagle's award reviewed in this appeal, we order the State of Nebraska to pay Roan Eagle $3,000 to be applied toward the fee of Roan Eagle's lawyer for services in this court. See Neb. Rev. Stat. § 48-125(1) (Reissue 1988) (attorney fee for employee when employer appeals and fails to obtain a reduction of an award to the employee).

AFFIRMED.

IN RE INTEREST OF C.P., J.P., AND M.P., CHILDREN UNDER 18 YEARS OF AGE.

STATE OF NEBRASKA, APPELLEE, V. S.P., APPELLANT.

468 N.W.2d 596

Filed April 25, 1991. No. 90-738.

Appeal from the Separate Juvenile Court of Douglas County: COLLEEN R. BUCKLEY, Judge. Affirmed.

Elizabeth C. Schrock for appellant.

James S. Jansen, Douglas County Attorney, and Elizabeth G. Crnkovich for appellee.

HASTINGS, C.J., WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ., and COLWELL, D.J., Retired.

COLWELL, D.J., Retired.

The mother of three minor children appeals an August 6, 1990, order terminating her parental rights. She assigns as error the failure to prove (1) that she failed to rehabilitate herself as ordered and (2) that termination was in the children's best interests. We affirm.

"This court reviews factual questions de novo on the record in an appeal from a judgment terminating parental rights." *In re Interest of A.B. et al.*, 236 Neb. 220, 221, 460 N.W.2d 114, 115 (1990).

On August 22, 1988, the State filed a petition on behalf of C.P., born July 1, 1983; J.P., born July 31, 1986; and M.P., born September 11, 1987, alleging the children to be within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1988), being under 18 years of age and lacking proper parental care by reason of the fault or habits of their custodial mother, namely, alcohol abuse, unemployment, and failure to care for the children. Following the juvenile court's determination that the appellant's children were within the meaning of § 43-247(3)(a), various plans for appellant's rehabilitation were ordered and reviewed at hearings between December 19, 1988, and December 14, 1989. These plans required the appellant to follow the recommendations of counselors and to complete alcohol dependency treatments, to maintain housing and employment, and to visit her children (who were living with her sister) on a regular basis. None of these basic plans were effectively followed by appellant; in fact, she resisted them.

On March 14, 1990, a motion to terminate parental rights was filed pursuant to Neb. Rev. Stat. § 43-292(6) (Reissue 1988), and after notice and hearing, the termination order was entered because reasonable efforts under the court's direction had failed to correct the conditions leading to the court's

involvement with the case. Appellant's main argument on appeal is that she should be given more time to rehabilitate herself.

> A parent's failure to make reasonable efforts to comply with a court-ordered plan of rehabilitation designed to reunite the parent with the child is an independent reason to justify termination of parental rights, and when a parent is unable or unwilling to rehabilitate herself within a reasonable period of time, the best interests of the child require termination of parental rights.

In re Interest of V.M., 235 Neb. 724, 727, 457 N.W.2d 288, 291 (1990).

The children cannot be made to wait indefinitely for the appellant to rehabilitate herself in order to parent them. *In re Interest of V.M., supra.*

We find the evidence is clear and convincing that the appellant failed, and in some instances refused, to comply with the orders of the juvenile court, particularly in that she failed and refused to complete chemical dependency programs; she continued excessive use of intoxicants; she had a poor work record; she did not maintain a home; and she rarely visited her children, who lived with her sister; and, further, that it is in the children's best interests to terminate the appellant's parental rights.

The judgment is affirmed.

AFFIRMED.

BERTHA L. HOHNSTEIN, APPELLEE, V. W.C. FRANK, A CORPORATION, AND U.S. INSURANCE GROUP, AN INSURANCE CORPORATION, APPELLANTS.

468 N.W.2d 597

Filed April 25, 1991. No. 90-957.

1. **Workers' Compensation: Appeal and Error.** The findings of fact made by the Nebraska Workers' Compensation Court on rehearing have the same force and effect as a jury verdict in a civil case and will not be reversed or set aside unless clearly wrong.

2. **Workers' Compensation: Evidence: Appeal and Error.** In testing the sufficiency of the evidence to support the findings of fact made by the Workers' Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party.
3. **Workers' Compensation.** A finding upon rehearing by the Workers' Compensation Court regarding whether an applicant's incapacity has increased under the terms of Neb. Rev. Stat. § 48-141 (Cum. Supp. 1990) is a finding of fact.
4. **Workers' Compensation: Proof.** An applicant seeking modification of a worker's compensation award must prove by a preponderance of the evidence that the increase in his or her incapacity is due solely to the injury resulting from the original accident.
5. _____: _____. In proving an increase in incapacity, the applicant must prove by a preponderance of the evidence that there now exists a material and substantial change for the worse in the applicant's condition—a change in circumstances that justifies a modification—distinct and different from that for which an adjudication had been previously made.
6. **Workers' Compensation: Expert Witnesses.** Unless the character of an injury is plainly apparent, an injury is a subjective condition, and an expert opinion is required to establish the causal relationship between an incident and the injury, as well as any claimed disability consequent to such injury.
7. _____: _____. When the subject matter is wholly scientific or so far removed from the usual and ordinary experience of the average man that expert knowledge is essential to the formation of an intelligent opinion, only an expert can competently give opinion evidence as to the cause of the physical condition. The pathological cause of an ailment is a scientific question upon which it is necessary to obtain scientific knowledge, and only the opinions of experts are of value.
8. **Workers' Compensation: Expert Witnesses: Proof.** Where the claimed injuries are of such a character as to require skilled and professional persons to determine the cause and extent thereof, the question is one of science. Such a question must necessarily be determined from testimony of skilled professional persons and cannot be determined from the testimony of unskilled witnesses having no scientific knowledge of such injuries. The employee must show by competent medical testimony the causal connection between the alleged injury, the employment, and the disability.
9. **Workers' Compensation: Expert Witnesses.** A medical expert's testimony need not be couched in the magic words "reasonable degree of medical certainty or a reasonable probability."
10. **Workers' Compensation: Evidence: Expert Witnesses.** For medical testimony to be the basis for an award, it must be sufficiently definite and certain that a conclusion can be drawn that there was a causal connection between the accident and the disability.
11. **Judgments.** When an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in a future lawsuit.

12. **Workers' Compensation: Expert Witnesses.** An expert witness' good faith self-contradiction presents a question of fact to be resolved by the Workers' Compensation Court.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Melvin C. Hansen, of Hansen, Engles & Locher, P.C., for appellants.

Robert M. Brenner, of Robert M. Brenner Law Office, for appellee.

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

FAHRNBRUCH, J.

W.C. Frank, a corporation, as employer, and its insurer, U.S. Insurance Group, appeal a Workers' Compensation Court order increasing Bertha L. Hohnstein's compensation benefits. We affirm.

This action was brought pursuant to Neb. Rev. Stat. § 48-141 (Cum. Supp. 1990), which provides that any award payable periodically to an injured employee may be modified after 6 months from the date of the award, where there is an increase in incapacity due solely to the injury.

The appellants' two assignments of error merge to allege that the majority of a workers' compensation rehearing panel erred in awarding Hohnstein benefits for an increase in incapacity and for medical expenses occurring subsequent to entry on February 1, 1989, of her original workers' compensation award.

In reviewing the decision of the Nebraska Workers' Compensation Court, this court is guided by the following principles: "The findings of fact made by the Nebraska Workers' Compensation Court on rehearing have the same force and effect as a jury verdict in a civil case and will not be reversed or set aside unless clearly wrong. [Citations omitted.]" *Neneman v. Falstaff Brewing Corp., ante* p. 421, 422, 466 N.W.2d 97, 98 (1991). "In testing the sufficiency of the evidence to support the findings of fact made by the Workers' Compensation Court after rehearing, the evidence must be

considered in the light most favorable to the successful party. [Citations omitted.]" *Id.* A finding upon rehearing by the Workers' Compensation Court regarding whether an applicant's incapacity has increased under the terms of § 48-141 is a finding of fact. See, *Gomez v. Kenney Deans, Inc.*, 232 Neb. 646, 441 N.W.2d 632 (1989); *Grauerholz v. Cornhusker Packing Co.*, 230 Neb. 641, 432 N.W.2d 831 (1988).

On December 7, 1988, a single judge of the Workers' Compensation Court held a hearing on Hohnstein's petition for workers' compensation benefits. In her petition, filed on April 21, 1988, Hohnstein prayed for benefits to be awarded as the result of a May 10, 1983, accident arising out of and in the course of her employment with W.C. Frank. The appellants voluntarily paid Hohnstein temporary total disability benefits through September 19, 1986, and paid medical bills incurred by Hohnstein in the amount of $15,474.38. After that hearing, a single judge of the Workers' Compensation Court entered an order on February 1, 1989, which was not appealed. The one-judge court found:

> The issues involved in this case are the relationship of plaintiff's injuries incurred on October 2, 1986, to the original incident [and] the extent of plaintiff's disability . . . .
>
> The evidence in this case is that the plaintiff has had extensive problems with her right knee dating back to 1972. In 1972, the plaintiff was run over by a drunk[en individual] on a horse, and suffered injuries to her knees for which surgery was subsequently performed in 1975. The plaintiff apparently recovered from this incident, and on May 10, 1983, plaintiff injured her right knee when she slipped on some ice at her place of employment [at W.C. Frank] while cutting a cake for a children's birthday party, and injured her right knee. On November 9, 1983, plaintiff underwent a total right knee replacement. On November 2, 1985, plaintiff underwent surgery for removal of a staple and a bony prominence on the right knee. On June 7, 1985, plaintiff underwent surgery for replacement of portions of the right knee prosthesis. On December 2, 1986, the plaintiff underwent surgery for

> replacement of the floating patellar button on the right knee. The above dates and surgeries are the main treatment dates, however, the plaintiff additionally has a very extensive [history of] hospital, doctor's . . . and emergency room visits for other problems that she has had with this right knee. . . . On October 2, 1986, the plaintiff slipped and incurred a chipped bone to her left foot for which a leg cast was applied. The Court finds . . . that the October 2, 1986 fall was directly related to the previous accident and subsequent surgery due to the surgical instability on the right knee which caused the fall, and that the defendants should be responsible for the medical expenses and temporary total disability from that date.

The court further found that as a result of the accident of May 10, 1983, Hohnstein was temporarily totally disabled for $122^{2}/_{7}$ weeks and sustained a 10-percent permanent partial disability to the right lower extremity. The court based its finding of a 10-percent permanent partial disability on medical expert testimony that Hohnstein had a 40-percent loss of physical function, of which 30 percent was attributable to the 1972 accident and 10 percent to the 1983 incident. The court ordered that the appellants pay certain of Hohnstein's past and future medical expenses. The appellants did not appeal the February 1, 1989, order and it became final.

On June 21, 1989, as Hohnstein, who was employed at the Skyport Restaurant in Scottsbluff as a cook and waitress, was walking to her car in a parking lot after work, her right knee "gave out," and she fell. Prior to June 21, Hohnstein had been experiencing pain and instability in her right knee. She described the instability as causing her right knee to "give way," resulting in her "grab[bing] something to keep from going down." There was evidence that the parking lot had a level black surface. Hohnstein testified that June 21 was a clear day and that there were no obstructions.

After her fall of June 21, Hohnstein contacted her doctor. She received a cortisone shot in her right knee on June 22. Because of continuing pain in that knee, Hohnstein went to a hospital emergency room in the early morning hours of June 23 and again that evening. Hohnstein underwent a right knee

arthroscopy and partial synovectomy on July 5, 1989. The knee was again totally replaced on September 21, 1989.

On September 18, 1989, Hohnstein filed an application to modify the award entered on February 1, 1989, "on the ground of an increase in incapacity due solely to the [May 10, 1983,] injury." A single judge of the Workers' Compensation Court found that Hohnstein's knee problems encountered after February 1, 1989, were a result of her injury suffered on May 10, 1983, and that there had been a material and substantial change in her condition. As a result, the judge awarded Hohnstein temporary total disability benefits from and including June 22, 1989, for so long as she would remain totally disabled and ordered the appellants to pay the medical expenses set forth in the order. The order was entered on February 20, 1990.

The appellants timely appealed that order to a rehearing panel of the Workers' Compensation Court. At the time of rehearing on April 17, 1990, Hohnstein had not worked and had been on crutches since June 21, 1989. At the rehearing, Hohnstein testified that her right knee was very sore, swollen, painful, and unstable. She further testified that since the date of her original award, she had not suffered any injuries or accidents which affected her right knee. At the time of the rehearing, Hohnstein's physician was considering a fusion operation which would entail joining the femur and tibia as one bone by a bone grafting. A fusion would totally remove any joint function, so that Hohnstein would walk with an entirely stiff-kneed gait. On September 19, 1990, a majority of the rehearing panel affirmed as modified the order of the single judge. In substance, the modification increased the weekly benefits by $2 and changed the amount payable for medical bills.

As stated, the statutory authority for this action is § 48-141. Under § 48-141, an applicant seeking modification of a worker's compensation award must prove by a preponderance of the evidence that the increase in his or her incapacity is due *solely* to the injury resulting from the original accident. *Gomez v. Kenney Deans, Inc.*, 232 Neb. 646, 441 N.W.2d 632 (1989).

In proving an increase in incapacity, the applicant must

> prove by a preponderance of the evidence that "there now exists a material and substantial change for the worse in the applicant's condition—a change in circumstances that justifies a modification, distinct and different from that for which an adjudication had been previously made."

Id. at 648, 441 N.W.2d at 634 (quoting *Wilson Concrete Co. v. Rork,* 216 Neb. 447, 343 N.W.2d 764 (1984)). As applied to this case, the issue for the Workers' Compensation Court was whether Hohnstein sustained an increase in disability since the court's award of February 1, 1989, which was due solely to her injury of May 10, 1983.

The appellants do not dispute that Hohnstein adduced sufficient evidence to support the Workers' Compensation Court's award regarding the question of whether there existed a material and substantial change for the worse in her condition. It is sufficient to restate that after the original award was entered, Hohnstein had undergone a right knee arthroscopy and total knee replacement, and a fusion operation was likely. The appellants' contention in this appeal is that the medical expert testimony adduced failed to show that Hohnstein's worsened condition was caused solely by the employment-related accident of May 1983.

The appellants' argument necessarily raises the question of whether medical expert evidence was required in order for Hohnstein to prove that her increase in incapacity was due solely to the 1983 accident. It is well established that "unless the character of an injury is plainly apparent, an injury is a subjective condition, and an expert opinion is required to establish the causal relationship between an incident and the injury as well as any claimed disability consequent to such injury. [Citations omitted.]" *Sherwood v. Gooch Milling & Elevator Co.*, 235 Neb. 26, 34, 453 N.W.2d 461, 467 (1990). Accord, *Fees v. Rivett Lumber Co.*, 228 Neb. 617, 423 N.W.2d 483 (1988); *Mendoza v. Omaha Meat Processors*, 225 Neb. 771, 408 N.W.2d 280 (1987); *McCann v. Holy Sepulchre Cemetery Assn.*, 205 Neb. 444, 288 N.W.2d 45 (1980). When the subject matter is wholly scientific or so far removed from the usual and ordinary experience of the average man that expert knowledge is essential to the formation of an intelligent opinion, only an

expert can competently give opinion evidence as to the cause of the physical condition. *McCann, supra*. The pathological cause of an ailment is a scientific question upon which it is necessary to obtain scientific knowledge, and only the opinions of experts are of value. *Id*. It has also been asserted:

> [W]here the claimed injuries are of such a character as to require skilled and professional persons to determine the cause and extent thereof, the question is one of science. Such a question must necessarily be determined from testimony of skilled professional persons and cannot be determined from the testimony of unskilled witnesses having no scientific knowledge of such injuries. The employee must show by competent medical testimony the causal connection between the alleged injury, the employment, and the disability.

Hamer v. Henry, 215 Neb. 805, 809, 341 N.W.2d 322, 325 (1983).

The record reflects that Hohnstein's knee operation was "complicated by a rather serious condition of morbid obesity." Recalling that the hearing which resulted in the award of February 1, 1989, was had on December 7, 1988, it is noteworthy that on December 10, 1988, Hohnstein fell, resulting in pain and spasm in her lower back. It is simply beyond the ken of laypersons what effect the obesity and back injury had on the internal workings of Hohnstein's right knee. The fact that Hohnstein was overweight during the period of time for which she received treatment for her knee does not detract from the need for medical expert testimony on the issue at hand. Even without those further complications, medical expert testimony was required to show that the giving way of Hohnstein's knee on June 21, 1989, was due to the work-related accident of May 10, 1983. The pathological cause of Hohnstein's right knee problems suffered after the entry of the original award as those problems related to her employment accident in 1983 presented a scientific question upon which it was necessary to obtain medical expert evidence.

Next to be considered is whether Hohnstein's medical expert evidence sufficiently demonstrated the causal connection between the 1983 accident at W.C. Frank and her increased

incapacity suffered after February 1, 1989. In the recent case of *Fuglsang v. Blue Cross*, 235 Neb. 552, 555, 456 N.W.2d 281, 284 (1990), this court asserted, "[W]e reaffirm the standard that expert medical testimony must be based on a reasonable degree of medical certainty or a reasonable probability, and we decline to extend that standard further. [Citations omitted.]" That rule flows from the requirement that a decision cannot be based upon guess or speculation. *Fuglsang, supra*. While we reassert that the foregoing language of *Fuglsang* is the preferred formulation of the test, a medical expert's testimony need not be couched in the magic words "reasonable degree of medical certainty or a reasonable probability." In *Lane v. State Farm Mut. Automobile Ins. Co.*, 209 Neb. 396, 411, 308 N.W.2d 503, 512 (1981), we explained:

> Although it is generally stated that medical testimony must be given with "reasonable medical certainty," we have been unable to find any Nebraska case which specifically so states. It has frequently been held that medical testimony couched in terms of "possibility" is not sufficient, although when such testimony is in terms of "probability" it is sufficient.

See, also, *Hare v. Watts Trucking Service*, 220 Neb. 403, 370 N.W.2d 143 (1985); *Welke v. City of Ainsworth*, 179 Neb. 496, 138 N.W.2d 808 (1965). It is wise to recall:

> In the area of certain disabilities it is impossible for a reputable doctor to testify with absolute certainty that one cause and one cause alone is the reason for the disability. Medical diagnosis is not that exact a science. Even though in most instances a certain result may follow, to be accurate the medical expert hedges by the use of the words "probably due."

Welke, supra at 502-03, 138 N.W.2d at 812. In the final analysis, for medical testimony to be the basis for an award, it must be sufficiently definite and certain that a conclusion can be drawn that there was a causal connection between the accident and the disability. *Gilbert v. Sioux City Foundry*, 228 Neb. 379, 422 N.W.2d 367 (1988).

The principal medical expert evidence on the issue at hand was the depositional testimony of Dr. Paul Phillips. Dr. Phillips

is an orthopedic physician who had been treating Hohnstein's knee since 1983. Dr. Phillips testified that his answers were based on a reasonable degree of medical probability or certainty. Regarding the present issue, Dr. Phillips testified:

> Q. . . . [W]as her [Hohnstein's] condition as you examined it in '89 and '90 now all tied back the same way to the May 10th of '83 fall? I mean, was there any new accident, any new injury that occurred?
>
> A. No, there were no other new injuries that I know of.
>
> . . . .
>
> Q. And I want to understand some of the—what the answers to the questions that Mr. Hansen posed to you, he was always posing them back to May 10th of '83, and whether you're guessing at what could have happened or not happened, these injuries or this condition and the surgeries, her condition she's in today, were these all, in your medical opinion to a reasonable degree of medical probability, a result of the fall of May 10th of '83?
>
> . . . .
>
> A. Well, she certainly has had these problems after the fall and one would assume they were causally related.

In essence, Dr. Phillips' recited testimony is that nothing occurred after entry of the award in February 1989 that would have caused the problems Hohnstein later experienced and that Hohnstein's knee problems were causally related to the compensable accident of 1983. The foregoing testimony was sufficiently definite and certain that a conclusion can be drawn that there was a causal connection between the 1983 accident and knee problems which Hohnstein was encountering at the time of this modification action. Admittedly, Dr. Phillips testified at times during his deposition that due to Hohnstein's knee injuries suffered before 1983, he could not state with a reasonable degree of medical certainty or probability that her knee problems occurring after her original award were caused solely by the accident of 1983. For two reasons, this is of no consequence. First, since it was not appealed, the parties were bound by the compensation court's February 1, 1989, order, wherein the court found that Hohnstein had recovered from her pre-1983 knee injury and that Hohnstein's knee problems

occurring between May 10, 1983, and the hearing date of December 7, 1988, were the result of the May 10, 1983, accident at W.C. Frank. See *Gottsch v. Bank of Stapleton*, 235 Neb. 816, 458 N.W.2d 443 (1990) (when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in a future lawsuit). Therefore, Dr. Phillips' testimony regarding the effect of Hohnstein's 1972 accident on her condition at the time of rehearing was irrelevant. Second, an expert witness' good faith self-contradiction presents a question of fact to be resolved by the Workers' Compensation Court. *Heiliger v. Walters & Heiliger Electric, Inc.*, 236 Neb. 459, 461 N.W.2d 565 (1990); *Vredeveld v. Gelco Express*, 222 Neb. 363, 383 N.W.2d 780 (1986).

Considering the evidence in the light most favorable to Hohnstein, we determine that the record reflects that the panel majority was not clearly wrong in finding that Hohnstein's increase of incapacity was due solely to the accident at W.C. Frank in 1983. Accordingly, its judgment is affirmed. Hohnstein is further awarded attorney fees in the amount of $2,500 for the services of her attorney in the appeal to this court. See Neb. Rev. Stat. § 48-125 (Reissue 1988).

AFFIRMED.

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