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REUBEN G. SCHMALE, APPELLANT AND CROSS-APPELLEE, V. DEANNA L. SCHMALE, APPELLEE AND CROSS-APPELLANT.

482 N.W.2d 268

Filed April 10, 1992. No. S-91-820.

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

James L. Birkel, of Egr & Birkel, for appellant.

Donn K. Bieber, of Otradovsky, Bieber & Westadt, for appellee.

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

PER CURIAM.

The marital dissolution decree for Reuben G. and Deanna L. Schmale was entered on May 18, 1988, and required Reuben Schmale to pay $300 per month for support of Schmales' three children, Jason, Justin, and Jessica, whose custody was granted to Deanna Schmale. On July 24, 1991, the dissolution decree was modified and custody of Jason and Justin was placed with Reuben Schmale, while custody of Jessica remained with Deanna Schmale. Additionally, the district court ordered Reuben Schmale to pay $200 per month child support for the care and custody of Jessica.

Both parties assign error from the district court's judgment. Reuben Schmale's assignments of error may be summarized as follows: (1) The district court abused its discretion by failing to change the custody of Jessica to Reuben Schmale, and (2) the district court abused its discretion by ordering Reuben Schmale to pay $200 per month child support and not ordering Deanna Schmale to pay child support for Jason and Justin. In her cross-appeal, Deanna Schmale contends (1) the district court abused its discretion by changing custody of Jason Schmale from her to Reuben Schmale, and (2) the district court abused its discretion by declining to award an attorney fee for Deanna Schmale's lawyer.

STANDARD OF REVIEW

" 'A party seeking to modify a marital dissolution decree

concerning custody, support, or visitation of a child has the burden to show a material change of circumstances affecting the best interests of the child.' " *Pattrin v. Pattrin*, 239 Neb. 844, 844-45, 479 N.W.2d 122, 123 (1992). Accord, *Schulze v. Schulze*, 238 Neb. 81, 469 N.W.2d 139 (1991); *Huffman v. Huffman*, 236 Neb. 101, 459 N.W.2d 215 (1990).

"Appellate review of a judgment concerning modification of a marital dissolution decree is de novo on the record to determine whether the trial court abused its discretion concerning modification." *Huffman v. Huffman*, 236 Neb. at 104, 459 N.W.2d at 219. Accord *Morisch v. Morisch*, 218 Neb. 412, 355 N.W.2d 784 (1984).

> In an appeal involving an action for dissolution of marriage, an appellate court's review of a trial court's judgment is de novo on the record to determine whether there has been an abuse of discretion by the trial judge, whose judgment will be upheld in the absence of an abuse of discretion. In such de novo review, when the evidence is in conflict, the appellate court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.

Stuhr v. Stuhr, ante p. 239, 243, 481 N.W.2d 212, 214 (1992). Accord, *Pattrin v. Pattrin, supra*; *Schulze v. Schulze, supra*; *Ritter v. Ritter*, 234 Neb. 203, 450 N.W.2d 204 (1990).

Based on our de novo review, and having considered the Nebraska Child Support Guidelines, we find no abuse of discretion by the district court in its orders entered in Schmales' case.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. STEVEN L. STAHL, APPELLANT.

482 N.W.2d 829

Filed April 17, 1992. No. S-90-709.

1. **Trial: Rules of Evidence: Expert Witnesses: Appeal and Error.** Whether a witness is qualified as an expert is a preliminary question for the trial court, whose determination will be upheld unless such ruling is clearly erroneous.
2. **Trial: Rules of Evidence: Expert Witnesses.** A person may qualify as an expert by virtue of either formal training or actual practical experience in the field.
3. **Criminal Law: Trial: Juries: Appeal and Error.** 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.
4. **Trial: Evidence: Appeal and Error.** If properly admitted evidence exists to establish that which improperly admitted evidence also establishes, the error in receiving the inadmissible evidence is not grounds for reversal.
5. **Jury Instructions.** Though a trial court retains discretion in the wording of jury instructions, when an instruction from the Nebraska Jury Instructions is applicable and, from a consideration of the facts and prevailing law, the trial court determines that an instruction on a particular subject is appropriate, the instruction in the Nebraska Jury Instructions should be used.
6. **Entrapment: Proof.** Entrapment is in the nature of an affirmative defense, and thus the burden of going forward with evidence of governmental inducement is on the defendant, who need only adduce "more than a scintilla" of evidence to satisfy this initial burden.
7. **Trial: Entrapment: Evidence: Juries.** It is for the trial court to initially determine whether the defendant has produced sufficient evidence to give rise to an entrapment defense, but if the defendant produces such evidence, the question of entrapment becomes one of fact for the jury.
8. **Entrapment: Evidence: Proof.** When a person accused of crime presents evidence sufficient to raise an entrapment defense, the burden is on the State to prove beyond a reasonable doubt that the person was not entrapped.
9. **Entrapment: Verdicts: Evidence: Appeal and Error.** When reviewing jury verdicts regarding the defense of entrapment, this court will disturb the jury's findings only when the preponderance of evidence against such findings is great and they clearly appear to be wrong, or when the findings are clearly contrary to law; in other words, we must sustain the jury's verdict if, taking the view most favorable to the State, there is evidence in the record to support it.
10. **Entrapment: Words and Phrases.** Entrapment is the governmental inducement of one to commit a crime not contemplated by the individual, in order to prosecute that individual for the commission of the criminal offense.
11. **Entrapment: Intent.** Nebraska utilizes the "origin of intent" test to determine questions of entrapment.
12. _____: _____. Under the "origin of intent" test, entrapment consists of two elements: (1) government inducement of the defendant to commit the offense charged, and (2) a defendant's predisposition to commit the criminal act was

such that he was not otherwise ready and willing to commit the offense on any propitious opportunity.

13. **Entrapment: Intent: Juries.** Ultimately, the "origin of intent" test focuses on the defendant's predisposition to commit the crime, and if the jury finds that the defendant was predisposed to commit the crime, a defense of entrapment must fail.
14. **Entrapment: Intent: Proof.** In a case involving an entrapment defense, the burden is on the State to prove the defendant's predisposition beyond a reasonable doubt as part of its larger burden to prove that the defendant was not improperly induced.
15. **Entrapment: Intent: Controlled Substances: Juries.** Ready access to illicit drugs is a legitimate factor for the jury to consider on the question of predisposition to deal in such substances.
16. **Entrapment: Intent: Evidence.** A familiarity with and demonstrable orientation to the relevant activity is relevant evidence of a predisposition to engage in that activity.
17. _____: _____: _____. Inquiry into a person's willingness to participate in criminal activity, standing alone, does not constitute inducement sufficient to sustain an entrapment defense.
18. **Criminal Law: Entrapment: Police Officers and Sheriffs.** Law enforcement officers are not precluded from utilizing artifice and stratagem, such as the use of decoys or undercover agents, to apprehend a person engaged in a criminal enterprise, provided that they merely afford opportunities or facilities for the commission of an offense by one already predisposed or ready to commit it.
19. **Entrapment: Intent.** Overpersuasion, undue pressure, or coercion may indicate a reluctance or unwillingness on the part of a person to participate in the proposed criminal activity and thus a lack of predisposition to commit the crime.
20. **Effectiveness of Counsel: Proof.** To sustain a claim of ineffective assistance of counsel, the defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced his defense, that is, a demonstration of reasonable probability that, but for counsel's deficient performance, the result of the proceedings would have been different.
21. **Criminal Law: Effectiveness of Counsel.** In a criminal case, the standard for judging counsel's performance is whether the attorney performed at least as well as a lawyer with ordinary training and skill in the defense of a criminal case.
22. **Effectiveness of Counsel.** 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; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice that course should be followed.
23. **Trial: Evidence: Juries.** The trial court retains broad discretion to permit the jury to review during deliberations exhibits admitted into evidence at trial.
24. **Trial: Evidence: Juries: Appeal and Error.** In the absence of any indication in the record that the jury requested the opportunity to examine during deliberations exhibits admitted into evidence, that such evidence was sent to the jury room, or that it was in fact examined, there is no issue to review on appeal regarding the

propriety of allowing the jury such a review.

25. **Criminal Law: Trial: Motions to Dismiss: Evidence: Appeal and Error.** On a criminal defendant's motion to dismiss for insufficient evidence of the crime charged, the State is entitled to have all its relevant evidence accepted as true and every controverted fact resolved in its favor, and if, when viewed in this light, the State's evidence is sufficient to establish all the elements of the crime charged, a denial of the defendant's motion to dismiss is without error.
26. **Sentences: Presentence Reports.** Sentencing courts are required to give due consideration to the information contained in a written presentence investigation report.
27. **Sentences: Appeal and Error.** A sentence imposed within the statutory limits will not be disturbed on appeal absent an abuse of discretion by the sentencing court.
28. **Sentences: Probation and Parole: Appeal and Error.** Whether the sentence imposed is probation or incarceration is a matter within the discretion of the trial court, and a judgment denying probation will be upheld unless the trial court abuses its discretion.

Appeal from the District Court for Saline County: ORVILLE L. COADY, Judge. Affirmed.

Thomas L. Spinar for appellant.

Don Stenberg, Attorney General, and Barry Waid for appellee.

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

WHITE, J.

This is a criminal case in which the State charged the defendant-appellant, Steven L. Stahl, with knowingly or intentionally manufacturing, distributing, delivering, dispensing, or possessing with the intent to manufacture, distribute, deliver, or dispense a controlled substance, namely, marijuana. See Neb. Rev. Stat. §§ 28-416(1)(a) and 28-405(c)(10) [Schedule I] (Reissue 1988). The defendant pled not guilty and was tried and convicted by a jury of the offense charged in the Saline County District Court. The trial judge sentenced the defendant to 1 year in prison, with 8 days' credit for time spent in the county jail, and ordered him to pay the costs of the action. This appeal followed.

FACTUAL BACKGROUND

In late 1989, Robin Heyen, an investigator with the Saline

County Sheriff's Department, became involved in an undercover narcotics investigation. During the course of the investigation Heyen convinced a suspect from whom several "control buys" were made, James Barber, to cooperate with the investigation in exchange for Heyen's promise to inform the county attorney of his assistance. Pursuant to this "understanding," Barber was to introduce Heyen to other known or suspected drug users and dealers.

Heyen first met the defendant at a social gathering hosted by Barber in mid-February 1990. The defendant was accompanied by his girl friend, Terri Ockinga, and both smoked some marijuana provided by another guest at the party. Though Ockinga testified that she observed Heyen smoking marijuana, Heyen testified that he only simulated doing so in order to dispel any suspicions that he was a police officer. When the topic of conversation at the party turned to illegal substances, the defendant stated that he had some connections and could obtain drugs quite easily.

On February 27, 1990, Heyen and Barber visited the defendant at his residence in Wilber, Nebraska, and asked him if he could find them some marijuana. The defendant identified an "Uncle Les" in Omaha as a potential source of marijuana. The defendant told them that he would check around and contact them later. At that point Heyen and Barber drove back to Barber's trailer in Crete, Nebraska.

Later that evening the defendant and Ockinga arrived at Barber's trailer and asked to use the phone to call Les. The defendant told Barber that he had a credit card number to which he could bill any long-distance calls. At one point, Heyen overheard a conversation during which the defendant discussed various types, prices, and quantities of drugs, including "Thai-stick" and "acid." The defendant informed Heyen that he would go to Omaha to purchase drugs if any were available. Heyen asked the defendant to purchase some for Heyen as well, and the defendant said he would. The defendant also described the nature of a Thai-stick, a sliver of bamboo wrapped with a very potent form of marijuana, and told him that they were $14 or $15 each and that marijuana was $35 or $40 per quarter ounce.

Several hours later, either the defendant or Ockinga made another call, from which it was determined that no drugs were available that night. The caller indicated, however, that the individual who was called would call back the next day if the situation changed. The defendant instructed Heyen and Barber that if they received such a call, the person would probably speak in code and that they should contact him if it sounded like drugs were available.

The next day Barber received a phone call at his trailer from a person who told him that "the tires are in." Barber informed Heyen as to the contents of the call, and the two drove to the defendant's home in Wilber to relay the message. Upon hearing the message, the defendant opined that the caller had either Thai-stick or marijuana. He told Heyen and Barber that he and Ockinga were going to drive to Omaha to make a purchase and asked whether Heyen wanted anything. Heyen requested a quarter ounce of marijuana or three Thai-sticks, whichever was available, and asked the defendant how much it would cost. The defendant said $40 would be enough, and Heyen gave him that amount.

Following the meeting in Wilber, Heyen and Barber returned to Crete. Later that evening, the defendant arrived at Barber's trailer and tossed Heyen a small bag. The defendant said the bag contained a quarter ounce of "good weed," but warned Heyen that it was "creeper." In the vernacular of the drug trade, "creeper" apparently describes marijuana which takes a longer time before producing the desired sensation. Shortly after this encounter Heyen left the trailer and went to the Saline County Sheriff's Department, where he placed the bag in an evidence locker.

At trial, Heyen expressed his opinion that the substance in the bag was marijuana. A forensic drug chemist employed by the Nebraska State Patrol concurred in that opinion. The chemist further testified that the bag contained just under a quarter ounce of marijuana, a "common unit" in which the substance is sold.

ASSIGNMENTS OF ERROR

On appeal, the defendant argues that the trial court erred in

(1) overruling his foundational objections to certain expert testimony, (2) refusing to submit to the jury his proposed instruction regarding entrapment, and (3) imposing an excessive sentence; the defendant also urges as grounds for reversal (4) the insufficiency of the evidence to support a conviction and (5) the violation of his right to effective assistance of counsel. We affirm.

THE EXPERT TESTIMONY

For his first assignment of error the defendant argues that the trial court erred in allowing, over his objection, testimony by Officer Heyen that the substance in the bag tossed to him by the defendant was marijuana and that he knows how long "THC" remains in a person's blood. The defendant also objects to the admission of testimony by the forensic drug chemist that a quarter ounce is a common unit in which marijuana is sold.

Whether a witness is qualified as an expert is a preliminary question for the trial court. Nev. Evid. R. 104(1) (Neb. Rev. Stat. § 27-104(1) (Reissue 1989)). A trial court's ruling regarding a witness' qualification as an expert will be upheld unless such ruling is clearly erroneous. *State v. Reynolds*, 235 Neb. 662, 457 N.W.2d 405 (1990).

A person may qualify as an expert by virtue of either formal training or actual practical experience in the field. Neb. Evid. R. 702 (Neb. Rev. Stat. § 27-702 (Reissue 1989)); *State v. Loveless*, 209 Neb. 583, 308 N.W.2d 842 (1981). In *State v. Hoxworth*, 218 Neb. 647, 358 N.W.2d 208 (1984), this court held that the trial court properly admitted a police officer's testimony that a substance seized pursuant to a search warrant was marijuana. Though the officer had no experience in botany and knew little about the scientific tests used to identify marijuana, he did have 9 years' experience in law enforcement, during which time he learned " 'what it looks like and what the seeds look like.' " *Id.* at 650, 358 N.W.2d at 210. The officer had also attended approximately 50 hours of state-sponsored training which included instruction in the various properties of marijuana. Citing § 27-702 and noting that a field test performed on the substance with a "narc kit" corroborated the officer's opinion, the court found no error in admitting the

testimony.

Here, Officer Heyen testified to receiving approximately 20 hours of training in drug identification and illegal drugs through the Nebraska Law Enforcement Training Center and the Lincoln Police Academy. He also received 100 hours of additional instruction in criminal investigation and evidence, including training in drug identification, during the course of his career. Further, Officer Heyen participated in two undercover drug investigations and also acted as coordinator of all state drug control efforts for the Nebraska National Guard prior to joining the Saline County Sheriff's Department. Officer Heyen possesses as much or more formal training and practical experience in identifying marijuana as did the officer in *Hoxworth*. Given this background and the forensic chemist's corroboration of his opinion, the trial court did not err in admitting Officer Heyen's testimony regarding the nature of the substance in the bag.

Much the same analysis applies with regard to Officer Heyen's testimony regarding THC. "THC" is an abbreviation for tetrahydrocannabinol, an active ingredient in marijuana. At trial, the State asked Officer Heyen whether he submitted to a drug test after February 27, 1990. Officer Heyen responded that he tested negative for THC on March 15. The State then asked if Officer Heyen knew how long THC remains in a person's blood. After defense counsel interposed a foundational objection, the State established that, as drug enforcement coordinator for the Nebraska National Guard, Officer Heyen received training in drug testing processes from a qualified examiner. When the State repeated the original question, the defendant again objected. The defendant contends that the trial court erred in overruling the objection and admitting Officer Heyen's testimony that, based upon various factors, THC can stay in a person's system for anywhere from 1 week to 30 days.

Though this is a closer question, the trial court was not clearly erroneous in concluding that Officer Heyen's specific training in drug testing processes, combined with his extensive experience as a law enforcement officer in the area of illegal narcotics, sufficiently qualified him to testify as he did.

Further, it is difficult to see how the testimony prejudiced the defendant. The negative test result does not necessarily bolster Officer Heyen's claim that he only simulated smoking marijuana. The test occurred more than 2 weeks after the social gathering at Barber's trailer, and thus, by Officer Heyen's own testimony, any THC in his system from actually ingesting the drug could have dissipated by then. " '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. Coleman*, 239 Neb. 800, 814, 478 N.W.2d 349, 358 (1992), quoting *State v. Watkins*, 227 Neb. 677, 419 N.W.2d 660 (1988). The trial court's admission of Officer Heyen's testimony regarding THC does not constitute reversible error.

The defendant next contends that the trial court erred in allowing the forensic chemist to testify that a quarter ounce is a common unit in which marijuana is sold. Earlier in the trial, however, Officer Heyen testified, without objection, to the exact same fact. Thus, even if the chemist was unqualified to offer the challenged testimony, its admission is harmless error. " 'If properly admitted evidence exists to establish that which improperly admitted evidence also establishes, the error in receiving the inadmissible evidence is not grounds for reversal.' " *State v. Carter*, 226 Neb. 636, 644, 413 N.W.2d 901, 906 (1987), quoting *State v. Klingelhoefer*, 222 Neb. 219, 382 N.W.2d 366 (1986). The defendant's first assignment of error is without merit.

JURY INSTRUCTIONS

For his second assignment of error the defendant challenges the trial court's choice of jury instructions on the issue of entrapment. The trial court instructed the jury pursuant to NJI 14.34. The defendant requested a similar instruction based upon a proposed change in the Nebraska Jury Instructions entrapment instruction drafted by the Nebraska Supreme Court Committee on Criminal Practice and Procedure. The defendant argues that the proposed instruction is more comprehensible to a jury because it uses the phrase "already

willing" rather than "predisposition" in reference to the defendant's attitude toward committing the crime proposed by government agents.

Generally, a trial court retains discretion in the wording of jury instructions. *State v. Ring*, 233 Neb. 720, 447 N.W.2d 908 (1989); *State v. Donhauser*, 231 Neb. 114, 435 N.W.2d 186 (1989). However, we have held that whenever an instruction from the Nebraska Jury Instructions is applicable and, from a consideration of the facts and prevailing law, the trial court determines that an instruction on a particular subject is appropriate, the instruction in the Nebraska Jury Instructions should be used. *State v. Stueben, ante* p. 170, 481 N.W.2d 178 (1992); *State v. Dush*, 214 Neb. 51, 332 N.W.2d 679 (1983). Cf. *State v. Bartholomew*, 212 Neb. 270, 322 N.W.2d 432 (1982) (whenever an instruction in the Nebraska Jury Instructions is applicable, that instruction *shall* be used).

We have specifically approved the use of NJI 14.34. *State v. Byrd*, 231 Neb. 231, 435 N.W.2d 898 (1989); *State v. Bocian*, 226 Neb. 613, 413 N.W.2d 893 (1987); *State v. Lampone*, 205 Neb. 325, 287 N.W.2d 442 (1980). Moreover, in asserting that his proposed instruction is clearer than NJI 14.34, the defendant ignores the fact that the present instruction states that no inducement occurs if "the defendant was predisposed *or ready* to commit the act . . . ." (Emphasis supplied.) The defendant's proposed instruction adds nothing not properly covered by the instruction given. Therefore, the defendant's second assignment of error is without merit.

SUFFICIENCY OF THE EVIDENCE

Next, the defendant contends that the evidence is insufficient to support a verdict beyond a reasonable doubt that he was not entrapped. Specifically, the defendant argues that the record is "completely devoid of any evidence tending to show that the defendant was predisposed to sell marijuana." Brief for appellant at 15.

Entrapment " 'is in the nature of an affirmative defense,' " and thus the burden of going forward with evidence of governmental inducement is on the defendant. *State v. Parks*, 212 Neb. 635, 638, 324 N.W.2d 673, 676 (1982), quoting *State v.*

Ransburg, 181 Neb. 352, 148 N.W.2d 324 (1967). It is for the trial court to initially determine whether the defendant has produced sufficient evidence to give rise to the defense. *Parks, supra*. The defendant need only adduce " 'more than a scintilla' " of evidence to satisfy this initial burden. (Emphasis omitted.) *Id.* at 638, 324 N.W.2d at 676, quoting *United States v. Wolffs*, 594 F.2d 77 (5th Cir. 1979). In this case the trial court determined that sufficient evidence existed to raise the defense of entrapment. We need not and therefore do not address the correctness of that determination in this appeal. Cf. *State v. Swenson*, 217 Neb. 820, 352 N.W.2d 149 (1984).

When the defendant produces sufficient evidence to raise the defense, the question of entrapment becomes one of fact for the jury. *Parks, supra*. The burden is on the State to prove beyond a reasonable doubt that the defendant was not entrapped. *State v. Van Egmond*, 233 Neb. 834, 448 N.W.2d 569 (1989). When reviewing jury verdicts regarding the defense of entrapment, this court will disturb the jury's findings only when the preponderance of evidence against such findings is great and they clearly appear to be wrong, or when the findings are clearly contrary to law. In other words, we must sustain the jury's verdict if, taking the view most favorable to the State, there is evidence in the record to support it. *Parks, supra*.

Entrapment is the governmental inducement of one to commit a crime not contemplated by the individual, in order to prosecute that individual for the commission of the criminal offense. *State v. Jones*, 231 Neb. 47, 435 N.W.2d 167 (1989). Nebraska utilizes the " 'origin of intent' " test to determine questions of entrapment. *Swenson*, 217 Neb. at 823, 352 N.W.2d at 153. Under this test, entrapment consists of two elements: (1) government inducement of the defendant to commit the offense charged, and (2) a defendant's predisposition to commit the criminal act was such that he was not otherwise ready and willing to commit the offense on any propitious opportunity. *Van Egmond, supra*; *Jones, supra*; *Swenson, supra*. Ultimately, the "origin of intent" test focuses on the defendant's predisposition to commit the crime. *Swenson, supra*; *Byrd, supra*. If the jury finds that the defendant was predisposed to commit the crime, a defense of

entrapment must fail. 1 Wayne R. LaFave & Austin W. Scott, Jr., Substantive Criminal Law § 5.2 (1986). Thus, the burden is on the State to prove the defendant's predisposition beyond a reasonable doubt as part of its larger burden to prove that the defendant was not improperly induced. *Bocian, supra.*

Here, the State produced evidence that prior to any solicitations by Officer Heyen, the defendant stated that he had certain connections which enabled him to obtain drugs easily. Further, when Officer Heyen inquired about the availability of drugs, the defendant quickly identified a potential source. Ready access to illicit drugs is a legitimate factor for the jury to consider on the question of predisposition. *United States v. Dickens*, 524 F.2d 441 (5th Cir. 1975), *overruled on other grounds, United States v. Webster*, 649 F.2d 346 (5th Cir. 1981). In his conversations with Officer Heyen, the defendant was also able to quote specific prices for specific quantities of marijuana and exhibited knowledge of "Thai-stick" and "creeper," the latter an esoteric term unknown to Officer Heyen despite his extensive experience in undercover drug operations. A familiarity with and demonstrable orientation to the relevant activity also constitutes relevant evidence of predisposition. *Whiting v. United States*, 296 F.2d 512 (1st Cir. 1961).

The defendant argues that "any delivery to Officer Heyen was made only upon his specific request inducing the defendant to do so." Brief for appellant at 15. This argument ignores the fact that inquiry alone does not constitute inducement sufficient to sustain an entrapment defense. *Swenson, supra.*

> "[L]aw enforcement officers are not precluded from utilizing artifice and stratagem, such as the use of decoys or undercover agents, to apprehend a person engaged in a criminal enterprise, provided that they merely afford opportunities or facilities for the commission of an offense by one already predisposed or ready to commit it."

Van Egmond, 233 Neb. at 839, 448 N.W.2d at 572, quoting *Lampone, supra*. Certainly, overpersuasion, undue pressure, or coercion may indicate a reluctance or unwillingness on the part of the defendant to participate in the proposed criminal activity and thus a lack of predisposition. *State v. Gurule*, 194 Neb. 618, 234 N.W.2d 603 (1975). Though Ockinga testified that

Officer Heyen "pushed" the defendant and Ockinga to sell him drugs and that they were "wary" of him, Officer Heyen testified that the defendant willingly agreed to procure marijuana for him and in fact offered to do so upon hearing that "the tires are in." Officer Heyen's testimony is corroborated by tape recordings of some of the conversations and by Barber's testimony. The jury resolved the issue against the defendant, and we cannot say its verdict is unsupported by the evidence. The defendant's assignment of error regarding the sufficiency of the evidence is without merit.

INEFFECTIVE ASSISTANCE OF COUNSEL

Next, the defendant claims he received ineffective assistance of counsel, in violation of U.S. Const. Amend. VI and Neb. Const. art. I, § 11. The defendant identifies several instances of allegedly deficient performance, which are more fully discussed below.

To sustain a claim of ineffective assistance of counsel, the defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced his defense, that is, a demonstration of reasonable probability that, but for counsel's deficient performance, the result of the proceedings would have been different. *State v. Moss, ante* p. 21, 480 N.W.2d 198 (1992). See *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

In a criminal case, the standard for judging counsel's performance is whether the attorney performed at least as well as a lawyer with ordinary training and skill in the defense of a criminal case. *Moss, supra*. However,

> "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. . . ."

State v. Hawthorne, 230 Neb. 343, 347, 431 N.W.2d 630, 633 (1988), quoting *Strickland v. Washington, supra*.

The defendant begins by noting several occasions when his counsel failed to request an instruction that the jury disregard certain evidence after the trial court sustained objections thereto. The first such instance occurred when Officer Heyen described the technique of simulating marijuana use and the State asked him whether the technique is "fairly typical." After Officer Heyen's affirmative response, defense counsel objected to the question as leading and asked that the answer be stricken. The court sustained the objection but did not instruct the jury to disregard the answer. The defendant complains that his counsel should have requested such an instruction.

The defendant's argument must fail because the alleged error in no way prejudiced his case. Just prior to the exchange at issue, Officer Heyen described the simulated smoking of marijuana as a "[c]ommonly used technique in drug enforcement." Moreover, after defense counsel's objection was sustained, the State rephrased the question and elicited the exact same response. As noted earlier, if properly admitted evidence exists to establish that which improperly admitted evidence also establishes, any error in receiving the inadmissible evidence is harmless error and not grounds for reversal. *State v. Carter*, 226 Neb. 636, 413 N.W.2d 901 (1987); *State v. Klingelhoefer*, 222 Neb. 219, 382 N.W.2d 366 (1986).

The same analysis applies to the defendant's next instance of alleged error. At another point in the trial the State asked Officer Heyen whether drug dealers are usually careful about to whom they sell. After Officer Heyen's affirmative response, defense counsel objected, and the trial court sustained the objection. The defendant again complains of counsel's failure to request an instruction to disregard the testimony. However, earlier in the trial Officer Heyen noted that police officers must simulate the smoking of marijuana in order to convince targeted sellers that they are legitimate buyers. Officer Heyen further testified that sellers are reluctant to sell to persons who do not appear to use drugs themselves. This testimony clearly conveyed to the jury that sellers of narcotics are careful about to whom they sell. The State's later inquiry was therefore merely cumulative, and any error in receiving Officer Heyen's testimony was harmless.

The defendant also alleges error in counsel's failure to request a limiting instruction after the trial court sustained his foundational objection to Officer Heyen's testimony that "THC" is "tetrahydrocannabinol." The defendant argues that receipt of this testimony improperly enhanced Officer Heyen's credibility in the eyes of the jury. However, as discussed earlier, Officer Heyen's formal training and practical experience in drug identification and enforcement sufficiently qualified him to testify as he did. Moreover, his testimony is cumulative because the forensic chemist also explained that THC is an abbreviation for tetrahydrocannabinol. We therefore conclude that Officer Heyen's testimony did not prejudice the defendant.

The defendant also challenges his counsel's conduct regarding a tape admitted into evidence and played for the jury at trial. The tape contains recordings of the two meetings attended by Officer Heyen, Barber, Ockinga, and the defendant on February 27, 1990. A summary of the first conversation, recorded by Officer Heyen upon leaving the defendant's residence, is also included on the tape. At trial, the court sustained the defendant's objection to this portion of the tape, and Officer Heyen's summary was not played for the jury. However, the tape remained in evidence, and the defendant argues, apparently on the assumption that the trial court sent the tape and a playback device with the jury to the deliberation room, that his counsel should have requested an instruction that the jury disregard Officer Heyen's summary of the initial meeting.

The defendant's argument on this point fails for several reasons. First, the trial court specifically instructed the jury to disregard any evidence stricken from the record. Second, the rule in a majority of jurisdictions is that the trial court retains broad discretion to permit the jury to review during deliberations exhibits admitted into evidence at trial. 3 Wayne R. LaFave & Jerold H. Israel, Criminal Procedure § 23.7(b) (1984); *State v. Frazier*, 99 Wash. 2d 180, 661 P.2d 126 (1983). Nebraska law is in accord. *Edwards v. State*, 113 Neb. 698, 204 N.W. 780 (1925). The fact that such discretion exists, however, does not require an appellate court to presume its exercise in every case. Here, there is no indication in the record that the

jury requested the opportunity to listen to the tape, that it was ever sent to the jury room, or that it was examined during deliberations. In the absence of such a record, there is no issue to review on appeal. *State v. King*, 708 S.W.2d 364 (Mo. App. 1986). Finally, the summary on the tape is essentially repetitive of Officer Heyen's testimony. Therefore, even if we presume the trial court sent the tape to the jury room, no prejudice to the defendant resulted from defense counsel's failure to take steps to prevent the jury from hearing the disputed portion. *Esterline v. State*, 707 S.W.2d 171 (Tex. App. 1986).

The defendant next argues that his counsel provided ineffective representation in failing to move to dismiss the charge either at the close of the State's case or at the conclusion of the trial. On a criminal defendant's motion to dismiss for insufficient evidence of the crime charged, the State is entitled to have all its relevant evidence accepted as true and every controverted fact resolved in its favor. *State v. Grantzinger*, 235 Neb. 974, 458 N.W.2d 461 (1990). If, when viewed in this light, the State's evidence is sufficient to establish all the elements of the crime charged, a denial of the defendant's motion to dismiss is without error. *State v. Jacobs*, 226 Neb. 184, 410 N.W.2d 468 (1987). The testimony of Officer Heyen, Barber, and the forensic chemist is sufficient to establish commission of the offense charged. Because the trial court would have properly overruled any motion to dismiss, defense counsel's failure to make such a motion did not prejudice the defendant.

Finally, the defendant contends that his counsel provided ineffective assistance in failing to call as witnesses at the sentencing hearing the authors of two letters favorable to the defendant included in the presentence investigation report. Also contained in the presentence report is a reference by the probation officer to the defendant's unstable work record. This reference is based upon information in the report regarding the defendant's loss of several jobs due in part to his unwillingness to go to work after using drugs and alcohol. However, the report also reveals the defendant's participation in a Nebraska job training center program involving his employment with the Crete Housing Authority. A representative of the job training center, as well as his supervisor at the housing authority, wrote a

letter noting the defendant's excellent attitude and work performance while involved in the program. The defendant argues that calling the authors of these letters as witnesses would have allowed him to refute the conclusions of the probation officer regarding his work activity.

Again, the defendant's argument is not well taken. First, his success in the job training program does not "refute" the fact that the defendant has an unstable work history. More importantly, we note that sentencing courts are required to give due consideration to the information contained in a written presentence investigation report. Neb. Rev. Stat. § 29-2261 (Reissue 1988). A finding of ineffectiveness based upon the failure to call as witnesses those with information favorable to the defendant which is already included in a presentence report would serve neither the defendant's interests nor those of the public in an efficient judicial system. The defendant's assignment of error regarding effectiveness of his counsel is without merit.

EXCESSIVENESS OF THE SENTENCE

Finally, the defendant argues that the trial court erred in denying the defendant's request for probation and imposing a sentence of imprisonment.

Delivery of marijuana is a Class III felony punishable by 1 to 20 years in prison, a $25,000 fine, or both. Neb. Rev. Stat. §§ 28-416(1)(a) and (2)(b), 28-405(c)(10) [Schedule I], and 28-105(1) (Reissue 1989). Cf. Neb. Rev. Stat. §§ 28-416(2)(a) and 28-401(16) and (35)(a) (Reissue 1989). In this case the trial court sentenced the defendant to 1 year in prison, with credit for 8 days spent in the county jail.

A sentence imposed within the statutory limits will not be disturbed on appeal absent an abuse of discretion by the sentencing court. *State v. Schumacher, ante* p. 184, 480 N.W.2d 716 (1992). Similarly, whether the sentence imposed is probation or incarceration is a matter within the discretion of the trial court, and a judgment denying probation will be upheld unless the trial court abuses its discretion. *State v. Tuttle*, 238 Neb. 827, 472 N.W.2d 712 (1991).

In denying the defendant's request for probation in this case,

the trial court considered the defendant's refusal to take responsibility for his acts, as exhibited by a letter addressed to the court in which the defendant states that the voice on the tape identified at trial as his was in fact Barber's. The court also noted the defendant's long history of drug and alcohol abuse and his refusal to cooperate with and ultimate discharge from an inpatient drug and alcohol abuse treatment program in December 1989. Though this is the defendant's first brush with the criminal justice system, the sentence imposed is the statutory minimum, and we cannot say the trial court abused its discretion in denying the defendant's request for probation. Accordingly, the judgment and sentence of the trial court are affirmed.

AFFIRMED.

ELLA BRANDT, APPELLANT, V. LEON PLASTICS, INC., APPELLEE.

483 N.W.2d 523

Filed April 17, 1992. No. S-91-399.

1. **Trial: Expert Witnesses.** Where the testimony of the same expert is conflicting, resolution of the conflict rests with the trier of fact.
2. **Workers' Compensation: Expert Witnesses.** The compensation court is not required to take an expert's opinion as binding and may, as may any other trier of fact, either accept or reject such an opinion.
3. **Workers' Compensation: Proof.** A workers' compensation claimant has the burden of proving by a preponderance of the evidence that the employment proximately caused an injury which resulted in disability compensable under the Workers' Compensation Act.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Jerry J. Milner, of Milner Law Office, P.C., for appellant.

D. Steven Leininger, of Luebs, Beltzer, Leininger, Smith & Busick, for appellee.

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

PER CURIAM.

The plaintiff-appellant employee, Ella Brandt, challenges the dismissal of her claim for benefits from the defendant-appellee employer, Leon Plastics, Inc., claiming the compensation court erred by (1) concluding the medical evidence was in conflict, (2) applying an improper standard of proof, and (3) concluding that she failed to sustain her burden of proof. We affirm.

Brandt is now 52 years old, has an eighth-grade education, and moved to the United States from Germany in 1958 at the age of 18. She began working for Leon Plastics in October 1979 and held but one other job in this country, when she worked as a waitress for a year. She denies suffering any injury or disabilities before she began to work for Leon Plastics.

After working as a sander at Leon Plastics for 2 years, she became an inspector on an assembly line. As such, her duties included removing parts from the line, touching them up with paint, and then passing them to the next person.

In approximately 1986, the parts Brandt worked with began to include "deck panels." Brandt described these 14-pound panels, measuring 5 feet by 3 feet, as being similar to a big tabletop with brackets on the back. Brandt lifted them over her head, set them on a table, and then inspected them. She would then place them on a 1-foot-high stool and bend over to touch up the sides. Finally, she would place them back on the table to paint the bottom before passing them on to the next person.

There is evidence that Brandt worked on these panels 3 weeks of every month in 1989. Leon Plastics set a quota of 300 panels in an 8-hour day, and Brandt worked up to 56 hours a week during the fall and winter of 1989. One worker testified that the line employees worked more overtime during that period than at any other time in the worker's 18 years with the company. The record reveals that several workers developed back pain after working with the panels and that management considered reassigning some of the workers because the activity was so hard on them.

Brandt began experiencing lower back pain within 6 months to a year prior to her last day of work on December 22, 1989. She testified that during November and December 1989 the

pain increased and began radiating into her hip and right leg. Her coworkers noticed that during this time Brandt was in pain—she walked with a limp and complained about pain and numbness in her leg. She also became uncharacteristically willing to allow others to perform the more difficult tasks.

Leon Plastics closed its plant for the Christmas holiday. On December 29, 1989, while doing some housework, Brandt decided to see a physician, as she could no longer tolerate her back pain.

Prior to this time Brandt did not report any problems to her supervisors and had continued to participate in a weekly bowling league which began in August 1989. While bowling, she used a 12-pound ball and did a lot of stooping and bending. Brandt testified that her housework on December 29 included mopping, vacuuming, and hanging out the bedding. She also gardened a small plot in her yard and mowed the lawn on occasion during the summer and fall of 1989.

Brandt also testified that she did not slip or fall or suffer any type of trauma while bowling or doing the housework on the 29th, but that her tolerance just gave out.

The physician who examined Brandt on December 29 recommended she stop working and scheduled a CAT scan for January 4, 1990. On January 2, Brandt reported for work but a foreman, who knew of her medical problems, told her to go home.

On January 4, Brandt provided her personnel manager a physician's note excusing her from work, at which time she requested some insurance forms. Brandt filled out two applications for group health plan benefits, indicating on each that her injury was not work-related. She explained that she did not check the workers' compensation box at the instruction of the personnel manager, who told her such benefits were unavailable as she had not immediately reported an accident. However, the personnel manager denied this assertion, stating that the subject of workers' compensation did not come up at all during the January 4 conversation.

On January 11, Brandt was examined by a physical therapist. The therapist indicated on a form he used that workers' compensation was not involved. Nonetheless, the

therapist testified that Brandt told him she experienced back pain while working. The therapist also stated that Brandt seemed confused as to the correct procedures for asserting a workers' compensation claim.

Brandt first raised the possibility of receiving workers' compensation benefits with her personnel manager sometime in mid-February 1990. At that time the personnel manager told her she could not claim such benefits because she failed to report the accident on January 2, when it first happened.

After physical therapy proved unsuccessful, Brandt came under the care of Drs. John A. Albers and Gordon D. Bainbridge. Bainbridge concluded that Brandt was suffering from a herniated disk and performed a laminectomy on April 2, 1990.

In letters dated August 13 and December 13, 1990, and January 10, 1991, Bainbridge wrote that, in his opinion, Brandt's injury was, to a reasonable degree of medical certainty, caused by the repetitive and cumulative trauma she sustained during her employment at Leon Plastics.

However, in a letter dated September 21, 1990, Bainbridge attributed Brandt's disability to a work-related injury occurring on December 12, 1989. Later, in a letter dated October 31, 1990, Bainbridge declared that his earlier reference to a December 12 injury was inadvertent and that date was intended only to approximate the onset of the radiating pain into her leg. The record contains no other medical evidence on the issue of causation.

The first assignment of error is resolved adversely to Brandt by the rule that where the testimony of the same expert is conflicting, resolution of the conflict rests with the trier of fact. See *Doggett v. Brunswick Corp.*, 217 Neb. 166, 347 N.W.2d 877 (1984). Thus, it was for the compensation court to determine whether to believe Bainbridge's explanation for writing that the injury occurred on two different dates. Moreover, the compensation court is not required to take an expert's opinion as binding and may, as may any other trier of fact, either accept or reject such an opinion. See, *Liberty v. Colonial Acres Nsg. Home, ante* p. 189, 481 N.W.2d 189 (1992); *Bernhardt v. County of Scotts Bluff, ante* p. 423, 482 N.W.2d 262 (1992).

Brandt's second assignment of error, which claims the compensation court employed an improper standard of proof, stems from the recitation in the compensation court's order that in cases involving a series of repeated traumas, the claimant must show that the employment exertion "contributed in some material and substantial degree to cause the injury." The order also recites, "The medical evidence is in conflict and does not establish preponderantly that plaintiff's problems are the result of a work injury in December of 1989 or of repetitive trauma." It is clear, therefore, that because of Bainbridge's contradictory history concerning when the injury manifested itself, the compensation court found his opinion unpersuasive.

Neither is there any merit in the suggestion that requiring a showing that the repeated traumas Brandt alleges to have experienced contributed in some material and substantial degree to her claimed injury somehow enhanced her burden of proof beyond that required by the law. Under the circumstances, the expression is but a different formulation of the rule that a workers' compensation claimant has the burden of proving by a preponderance of the evidence that the employment proximately caused an injury which resulted in disability compensable under the Workers' Compensation Act. *Liberty v. Colonial Acres Nsg. Home, supra*; *Phipps v. Milton G. Waldbaum & Co.*, 239 Neb. 700, 477 N.W.2d 919 (1991).

The third assignment of error, in which Brandt quarrels with the compensation court's finding that she did not sustain her burden of proof, is subsumed in the analyses of the first two assignments of error.

Accordingly, the order of dismissal entered by the compensation court is affirmed.

AFFIRMED.

WHITE, J., dissenting.

It is well established that a workers' compensation claimant complaining of a subjective injury or disability cannot recover on the basis of nonmedical evidence alone. See, *Fees v. Rivett Lumber Co.*, 228 Neb. 617, 423 N.W.2d 483 (1988); *Coco v. Austin Co.*, 212 Neb. 95, 321 N.W.2d 448 (1982); *Mack v. Dale Electronics, Inc.*, 209 Neb. 367, 307 N.W.2d 814 (1981). In *Eiting v. Godding*, 191 Neb. 88, 91-92, 214 N.W.2d 241, 244

(1974), we explained the rationale for this rule:

> 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 the testimony of skilled professional persons and cannot be determined from the testimony of unskilled witnesses having no scientific knowledge of such injuries.

The obvious corollary of this proposition is that when expert evidence regarding the cause of a subjective injury is produced and is uncontroverted, it is entitled to greater deference. As this court stated in *Mann v. City of Omaha*, 211 Neb. 583, 592-93, 319 N.W.2d 454, 459 (1982):

> [W]here the medical testimony is uncontroverted, unimpeached, and is given in matters of medical diagnosis which are peculiarly within the range of the knowledge of the expert, the compensation court is not free to substitute its own diagnosis. It is not true that in every case the uncontested opinion of an expert is binding on the trier of fact, but where, as here, the testimony is based on firsthand knowledge, is credible, and has no demonstrable weaknesses or failure of foundation, such testimony cannot be ignored.

Accord, *Sondag v. Ferris Hardware*, 220 N.W.2d 903 (Iowa 1974) (greater deference is accorded expert testimony when the issue necessarily rests on medical expertise); *Rutledge v. Industrial Commission*, 9 Ariz. App. 316, 451 P.2d 894 (1969) (in workers' compensation cases where causation is denied, uncontroverted expert opinion based on the facts is conclusive upon the trier of fact); *Ross v. Sayers Well Servicing Company*, 76 N.M. 321, 414 P.2d 679 (1966) (given the requirement that medical testimony is necessary where causation is contested, an uncontradicted medical opinion based upon the facts is conclusive upon the court); *Hill v. Culligan Soft Water Service Company*, 386 P.2d 1018 (Okla. 1963) (rule that trier of fact determines questions of causation inapplicable where only medical evidence in the record unequivocally attributes claimant's condition to an industrial accident); *Travelers Ins. Co. v. Blazier*, 228 S.W.2d 217 (Tex. Civ. App. 1950) (the

question whether the claimant suffered from polio or a heatstroke was peculiarly within the realm of scientific knowledge and thus the trial court was not authorized to make a diagnosis contrary to that of the only medical witness).

In this case only one physician offered an opinion as to the cause of Brandt's injuries. In three separate letters and during his deposition Dr. Bainbridge stated his conclusion, based upon a reasonable degree of medical certainty, that Brandt's injury resulted from cumulative and repetitive trauma arising from her employment at Leon Plastics. Despite the clarity of Dr. Bainbridge's opinion, the rehearing panel and a majority of this court characterize his statements as "conflicting." They do so based upon another letter written by Dr. Bainbridge in which he refers to Brandt's "work related injury of December 12, 1989."

Contrary to the majority's assertion, however, Dr. Bainbridge did not write that "the injury occurred on two different dates." Dr. Bainbridge made clear that the reference to a December 12 injury was inadvertent and intended only to identify the approximate date Brandt began experiencing pain radiating into her right leg. Dr. Bainbridge began treating Brandt on March 8, 1990, personally discussed her history with both her and her husband, performed surgery on April 2, 1990, and continued treating her through January 1991. His opinion as to the cause of Brandt's injury is based upon a solid foundation of firsthand knowledge. There is nothing in his attempt to pinpoint the date Brandt's pain became severe which detracts from the certainty of his opinion as to the cause of her injury.

The injury sustained by Brandt is of the type peculiarly within the knowledge of medical experts. There is no justification in law or reason for allowing the Workers' Compensation Court to simply ignore Dr. Bainbridge's conclusion that Brandt's injury resulted from work-related activity. Though judges generally lack the skill and training to competently diagnose the etiology of subjective injuries and disabilities, the majority is determined to anoint them with the power to evaluate the accuracy of uncontroverted opinions rendered by those who are so trained. I therefore cannot join in the majority's decision in this case and the sub silentio

overruling of *Mann v. City of Omaha, supra*, which it represents.

In addition, I would note that in *Heiliger v. Walters & Heiliger Electric, Inc.*, 236 Neb. 459, 461 N.W.2d 565 (1990), we rejected the proposition that an enhanced burden of proof applies in cases involving a preexisting disease or condition and disapproved of language in prior cases indicating such a burden exists. Significantly, language requiring proof that employment exertion contributed in a "material and substantial" degree to causing an injury appears in some pre-*Heiliger* cases imposing an enhanced burden of proof on the issue of causation. See, *Spangler v. State*, 233 Neb. 790, 448 N.W.2d 145 (1989); *Sellens v. Allen Products Co., Inc.*, 206 Neb. 506, 293 N.W.2d 415 (1980). See, also, *Chrisman v. Greyhound Bus Lines, Inc.*, 208 Neb. 6, 301 N.W.2d 595 (1981).

Given the decision in *Heiliger*, continued use of language regarding a "material and substantial" degree of proof is confusing and subject to the interpretation that it signifies the imposition of an enhanced burden of persuasion on the issue of causation. More to the point, the rehearing panel's finding that Brandt failed to adduce sufficient evidence of causation is perhaps only explainable as the result of its deciding the case under an enhanced burden of proof. I respectfully dissent.

GRANT, J., joins in this dissent.

MICHAEL D. KOZLIK, APPELLEE, V. EMELCO, INC., A NEBRASKA CORPORATION, APPELLANT.

483 N.W.2d 114

Filed April 23, 1992. No. S-89-885.

1. **Trial: Witnesses: Evidence: Depositions.** Where a party clearly changes his or her deposition testimony at trial on a point vital to the case in order to meet the exigencies of the trial and no rational or sufficient explanation of the change exists, the trial testimony stands discredited as a matter of law, and the party is bound by the admissions made at the deposition.
2. **Employment Contracts: Breach of Contract: Damages.** Ordinarily, the measure of damages in a suit for breach of an employment contract for personal services is the amount of salary agreed upon for the period involved, less the amount which the employee earned, or with reasonable diligence might have earned, from other employment.
3. **Contracts: Breach of Contract: Stipulations.** Provided the stipulated sum is reasonable under the circumstances, the parties to a contract may override the application of the judicial remedy for breach of a contract by stipulating, in advance, to the sum to be paid in the event of a breach.
4. **Contracts: Intent.** A court is not free to speculate about terms absent from a written contract; where the parties have clearly expressed an intent to accomplish a particular result, it is not the province of a court to rewrite a contract to reflect the court's view of a fair bargain.
5. **Contracts.** A court is not free to rewrite a contract so as to provide terms contrary to those which are expressed.
6. **Contracts: Stipulations: Damages: Penalties and Forfeitures.** The amount of damages stipulated in a contract is recoverable if the stipulation constitutes liquidated damages, but is not recoverable if the stipulation imposes a penalty.

Appeal from the District Court for Douglas County: STEPHEN A. DAVIS, Judge. Affirmed.

Daniel P. Chesire and Raymond E. Walden, of Kennedy, Holland, DeLacy & Svoboda, for appellant.

Edward F. Pohren, of Dwyer, Pohren, Wood, Heavey & Grimm, for appellee.

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

PER CURIAM.

In the bifurcated trial of this declaratory judgment action to determine the rights of the parties under a contract of employment, the jury determined that the defendant-appellant

employer, Emelco, Inc., had discharged the plaintiff-appellee employee, Michael D. Kozlik, without cause. The trial judge thereafter assessed the employee's damages at $265,397.51.

FACTS

Emelco is a Nebraska corporation engaged in the business of leasing medical equipment to Helget, Inc., another Nebraska corporation, which operates home health care divisions in Omaha, Lincoln, Des Moines, Iowa City, and Houston. Both corporations are owned by Eugene K. Helget, who serves as Emelco's president.

Kozlik began working for a certified public accountancy firm in 1978 while attending law school and became a full-time employee after his graduation in 1979. He started as a tax specialist and advanced rapidly, becoming a manager within 4 years.

Helget, Inc., was a client of the accountancy firm, and it was through this association that Helget and Kozlik became acquainted in July 1981. Within a few days of their introduction, Helget approached Kozlik about coming to work for him, but Kozlik rejected the invitation. Over the next 3 years, Kozlik performed numerous accounting services for Helget, Inc., Emelco, and Helget personally. In 1982, the accountancy firm put Kozlik in charge of the Helget "enterprises" account, which was considered to be a significant item of business.

Helget continued to extend several invitations of employment to Kozlik. Kozlik testified that Helget "asked me no less than annually and I would say probably five to ten times between July of '81 up through March of '84 if I would go to work for him . . . ." Kozlik politely declined each offer with the explanation that he had a good job and that he was happy where he was. However, in March 1984, Helget spoke of doubling Kozlik's salary and Kozlik became interested.

Helget told Kozlik that he was interested in retiring within 2 to 4 years and that, as he wanted to get his children out of Helget, Inc., and into their own businesses, he wanted to train someone to take over the business. Helget also wanted to leave Helget, Inc., in good hands so that he could be assured of a

continued retirement income from business earnings.

In May 1984, Kozlik told Helget that as this was a family business, he was concerned that Helget's children might look unfavorably on a nonfamily member assuming a managerial role. In addition, Kozlik spoke about the risks he would be taking should he leave his position as a certified public accountant and thereby abandon his clients. Kozlik told Helget that in light of this, he would need to have a written employment contract. Kozlik also asked Helget to speak with his children about the plan to have a nonfamily member assume a managerial role.

At their next meeting in June, Helget outlined some of his goals and objectives and spoke of the general duties that Kozlik would have within the corporation. Helget said that he planned to appoint Kozlik vice president of Helget, Inc., but as Helget had not yet spoken with his children, no specific provisions of the proposed contract were discussed.

In late June, after Helget had met with his children, a meeting was held to discuss contract specifics. At this time, Helget informed Kozlik that he had changed his mind and that Kozlik was to be vice president of Emelco rather than of Helget, Inc. Kozlik was generally amenable to this change.

According to Kozlik, the provisions regarding termination of his employment were discussed several times. Kozlik had communicated to Helget that undertaking this employment involved significant personal risk and sacrifice. He again stressed his concern over being a nonfamily member and "losing out" should he find himself in disagreement with other family members. In light of this concern, Helget agreed to restrict the ways in which Kozlik could be discharged, but indicated that at the same time he wanted to be able to terminate Kozlik with ease should family problems arise. Kozlik informed Helget that he did not object to this, but reminded Helget of how much Kozlik was giving up by going to work for Helget. Based on these concerns, they negotiated two separate policies regarding termination, which are contained in two paragraphs of the written 5-year employment contract executed on July 30, 1984. The first of these paragraphs provides that Kozlik may be terminated for "cause," defined as consisting of "gross

negligence or willfull [sic] misconduct," in which event Kozlik would receive no further compensation.

The second of these paragraphs sets forth the terms and conditions of termination "without cause." One clause of this paragraph permits Kozlik to terminate employment upon 30 days' notice, in which event Kozlik would receive compensation only to the date of termination. Another clause permits Emelco to terminate the contract without cause, in which event Emelco would be obligated to pay Kozlik "his regular salary . . . until the employment term shall expire on June 30, 1989." Helget personally guaranteed Emelco's obligations under the contract.

Kozlik began working for Emelco in August 1984. On October 2, 1984, Kozlik was appointed vice president of finance for Helget, Inc. Since the business viability of Emelco was dependent on the success of Helget, Inc., Kozlik was of the view, and Helget agreed, that it was necessary for Kozlik to have authority over the operations of Helget, Inc.

Although Helget initially considered Kozlik to be doing a good job, he later changed his mind. Three events bear on this change.

The first centers on problems Helget, Inc., experienced with certain liquid oxygen reservoirs Helget had purchased from Union Carbide Corporation. The manager of Helget, Inc.'s Omaha home care office, Thomas Spain, wrote a letter to U.S. Pharmacopeia (USP), reporting that the reservoirs were not delivering the required amount of oxygen. USP is an organization composed of those involved in the health sciences and related industries who help determine applicable industry standards. As a reporter for USP, Spain was required to notify it about problems found in a medical device or product. USP would then notify the manufacturer and the Food and Drug Administration (FDA).

In response to the concerns raised about its reservoirs, Union Carbide sent replacement parts and wrote Helget that it would work with his company to resolve the problem. A Union Carbide letter dated June 24, 1985, to Helget, Inc., outlined Union Carbide's plan for its "voluntary corrective action recall," and indicated that there was an August 19, 1985, deadline for completion of the repair work. Although it had

initially been decided that Union Carbide employees would make the repairs, subsequent communications establish that the Helget, Inc., employees would make them and bill Union Carbide for labor at a specified rate.

Sometime in August, Kozlik became aware that the August 19 deadline might be extended to October. In a memorandum dated September 25, 1985, to Helget, Inc.'s division managers, including Spain, Kozlik reminded the workers that the filter replacement had to be completed. The memorandum stated, in relevant part:

> In July you were all sent a number of filters that need to be inserted into the Union Carbide reservoirs. Per order from the FDA all . . . of the reservoirs we have will have to have that modification completed by October 15, 1985. Each manager will be sent an FDA form to sign (under penalty of perjury) that the filters have been instaled [sic]. Please have this done by that date.

According to Kozlik, the information regarding the FDA form, as well as the October 15 deadline, was received through conversations with representatives of Union Carbide. Spain claims that he never received the September 25 memorandum.

The evidence shows that up until the first part of October, Kozlik was still under the impression that he would receive an FDA form. A few days prior to the October 15 deadline, Kozlik discovered, through a telephone conversation with Union Carbide, that there was no official form forthcoming, and he was requested to draft one himself. Union Carbide advised him that the form was to contain language to the effect that the statement was being made "under penalty of perjury." According to Kozlik, Union Carbide

> said they needed some language in the guarantee form that would be binding, something that they could show to the Food and Drug Administration that there is a certification that the work had been done, and we had talked a little bit about what types of language would be appropriate, and they had mentioned, they kept bringing up the penalty of perjury.

On October 17, 1985, Kozlik sent another memorandum to the division managers. It advised that repairs were to have been

completed by October 15, 1985, and requested that each manager sign a guarantee of performance form, stating that the repairs had been completed. The form read:

> October 15, 1985
>
> GUARANTEE OF PERFORMANCE
>
> HELGET, INC.
>
> I do guarantee, under penalty of perjury, that all of the Union Carbide reservoirs that are being used by my patients or are unused and in my control have been modified by installing the filters that were supplied by Union Carbide Corp.

Upon receipt of the form, some of the managers complained about the perjury language. Kozlik relayed these concerns to Union Carbide and was told that a "toned down" version would be acceptable. Kozlik then drafted a revised form, reading:

> October 15, 1985
>
> Guarantee of Performance
>
> HELGET, INC.
>
> I do guarantee that, to the best of my knowledge and belief, all of the Union Carbide reservoirs that are being used by my patients or are unused and are under my control have been modified by installing the filters that were supplied by the Union Carbide Corporation.

Kozlik testified that he drafted this revised form sometime around October 22 and placed a copy of it on Spain's desk with a note, saying: "Tom: Attached is a less 'scary' statement. It has the same implications but different language." Although Kozlik had never visited with Spain about the original form, he thought that in light of the other managers' concerns, Spain might have similar concerns, and Kozlik wanted to give him the same opportunity to sign the revised form as he was giving the other managers.

Spain testified that in response to Kozlik's original form, he consulted his attorney and wrote Kozlik that he (Spain) would not sign it, since he had no personal knowledge that the work had been done and signing it would expose him to liability. Upon receiving this communication, Kozlik became angry and sent Spain a memorandum telling him to "[g]et it done & sign

the paper I gave you." Kozlik testified that he was referring to the revised form. After receiving the latest Kozlik memorandum, Spain once again sought his attorney's advice and thereafter submitted his resignation to Helget. Spain's resignation was not accepted, and he continued with his managerial duties.

Kozlik testified that Helget had never indicated to him that the Union Carbide matter had been handled incorrectly, stating that, on the contrary, Helget had "congratulated" him. Helget acknowledged that he had never told Kozlik that he was dissatisfied with the way the matter had been handled. Nonetheless, Helget testified that he was very disappointed when he learned of what he characterized as Kozlik's attempt to have the managers perjure themselves, saying: "I really was disappointed. Here was a man with all the credentials in the world . . . and now I find out that he asks an employee well down the line, a manager, to commit perjury. That really hurt."

The second major event on which Helget relies as proof that Kozlik was grossly negligent and engaged in willful misconduct involves the afterhours use of the office and telephones. In a memorandum dated April 21, 1986, Kozlik wrote Helget that he wanted to use the office telephones in the evening for a political campaign in which his father-in-law was involved. Kozlik wrote that he would ask Spain and George Johnson, a manager with Helget hospital sales, if that would be acceptable to them and that Helget should let Kozlik know if he had any objection. Helget denied that he ever received such a memorandum, but Johnson testified that Kozlik had asked him for permission to use the office for canvassing. Johnson stated that he saw no problem with it and even volunteered to "take the rap for it" if Helget were to become angry. However, prior to Kozlik's use of the telephones, Johnson spoke personally with Helget, who said that he had no problem with that.

On the first night of canvassing, Jean Soares, the bookkeeper and a 13-year employee of Helget's, was in the office. She confronted Kozlik regarding the use of the office, to which Kozlik responded that he had received permission from the managers. It was not until after the fact that Helget complained about the use of the office for political purposes,

claiming that as a result of such use, he sent a letter dated May 9, 1986, to Kozlik revoking all authority he had been given in 1984 and telling Kozlik that he would be given assignments on a day-to-day basis. Helget never thereafter gave any assignments to Kozlik.

The third event occurred in the spring of 1986, when Kozlik informed Spain that he had received a call from the Omaha office of the Federal Communications Commission (FCC) complaining about the use of profane language on Helget, Inc.'s two-way truck radios. Spain told Kozlik that he "found that hard to believe, for one, that they would call on a Saturday and that it sounded strange," but nevertheless offered to check with the drivers. Kozlik was not able to identify the FCC caller or offer further information about the call. Spain never received any written complaints from the FCC, and shortly thereafter, the issue was dropped, never being raised again between Kozlik and Spain.

However, on June 6, 1986, Helget left a message with an employee, asking Kozlik to give him the name of the person he talked with at the FCC. There was no other discussion between Helget and Kozlik about the FCC affair.

Kozlik contends he was dismissed not for cause but because the financial condition of Helget, Inc., had deteriorated to such a point that it was no longer feasible for the company to pay his salary. The contract provides that Kozlik be paid $65,000 the first year, $75,000 the second year, $85,000 the third year, $95,000 the fourth year, and $100,000 the fifth year.

A June 1986 financial report showed that Helget, Inc., had lost money at all of its offices, except one in Omaha. Kozlik wrote Helget a number of memorandums calling into question a variety of matters. On April 5, 1985, Kozlik warned that a hospital's contract with Helget, Inc., was in jeopardy because of poor service; on May 10, 1985, Kozlik argued that entering into another business venture without first solidifying Helget, Inc., would be detrimental, and pointed out that Helget, Inc., had not made a profit in 3 years; on October 10, 1985, Kozlik questioned Helget about a 1-month $12,000 loss at the Kansas City gas products company run by one of Helget's sons, but financed by Helget; on December 27, 1985, Kozlik projected

that Emelco would lose approximately $50,000 a month in 1986; and an August 9, 1986, memorandum from Kozlik noted that the Omaha office had only one backup ventilator, a situation which would create problems if new ones were not purchased.

According to Kozlik, Helget thwarted any attempts he made to bring the company into profitability. Often, Helget would propose plans that were in direct conflict with the financial health of the company. For example, Helget attempted to expand into other businesses at the expense of Helget, Inc.; continued to subsidize his son's unprofitable operation in Kansas City with financial resources critical to Helget, Inc.; allowed apparently incompetent and rude people to hold critical positions; and considered investing in a software program that had little value. Helget very seldom sat down with Kozlik to discuss a strategy; rather, Helget refused to exercise any authority or demand greater accountability from his employees.

After Helget revoked Kozlik's authority on May 9, 1986, Kozlik continued to write memorandums to Helget about business matters and about his role. Finally, in an August 15, 1986, memorandum, Kozlik referred to a conversation he had had with Helget. Apparently for the first time, Helget told Kozlik in their conversation that he was thinking of terminating him for cause. On August 25, 1986, Helget sent Kozlik a letter terminating his employment "for gross negligence and willful misconduct that occurred during your term of employment." Helget claims that it was the Union Carbide problem, the campaign use of the office, and the FCC matter which led him to dismiss Kozlik.

At Helget's suggestion, Kozlik had allowed his certified public accountancy license to lapse, and after the termination of his employment, he began to practice law. He earned $109,519.50 at this endeavor during the period from the termination of his employment to the end of the contract term.

ASSIGNMENTS OF ERROR

Emelco's assignments of error combine to claim that the trial judge erred in (1) failing to grant Emelco's motion for new trial

and (2) failing to offset Kozlik's posttermination earnings against the amount due under the contract.

DENIAL OF NEW TRIAL

The first assignment claims, in essence, that the trial judge erred in not granting Emelco a new trial because, as the consequence of Kozlik's change in testimony "to meet the necessities of the case," the verdict is "contrary to the facts."

It is true, as Emelco argues, that where a party clearly changes his or her deposition testimony at trial on a point vital to the case in order to meet the exigencies of the trial and no rational or sufficient explanation of the change exists, the trial testimony stands discredited as a matter of law, and the party is bound by the admissions made at the deposition. *State v. Robertson*, 223 Neb. 825, 394 N.W.2d 635 (1986); *Nixon v. Harkins*, 220 Neb. 286, 369 N.W.2d 625 (1985); *Momsen v. Nebraska Methodist Hospital*, 210 Neb. 45, 313 N.W.2d 208 (1981).

At the taking of his deposition, Kozlik was asked, " 'Do you remember if you used the terms when you wrote to [Spain] to sign the modified version that it contained language that was . . . less scary . . . ?' " Kozlik replied, " 'I don't recall.' " As reflected earlier, Kozlik testified at trial that he put the revised form on Spain's desk sometime around October 22, 1985, with an accompanying memorandum declaring that the revised form was "less scary" than the original form.

It is obvious, however, that the focus of the question asked at the deposition is not the same as the gravamen of the testimony offered at trial. At the deposition, the inquiry was directed toward whether the phrase "less scary" had been used; the focus of the trial testimony was not on the words used but on Kozlik's having placed a revised form on Spain's desk and when he had done so.

True, Kozlik read to the jury the accompanying memorandum, which declares that the attached form is "less scary." However, that testimony hardly qualifies as an unexplained change to meet the exigencies of the trial. Kozlik quite reasonably explained that at the time his deposition was taken, the accompanying memorandum was not given to him

and that upon later seeing the document, his memory as to the language used was refreshed.

Under the circumstances, it cannot be said that Kozlik's trial testimony was discredited as a matter of law; it therefore follows that the trial judge did not err in refusing Emelco a new trial.

DENIAL OF OFFSET

As noted earlier, with regard to the second assignment of error, Emelco urges that the trial judge erred in assessing Kozlik's damages by failing to offset Kozlik's posttermination earnings against the amount otherwise due under the contract because the termination without cause damages language is not applicable, and if it is applicable, it imposes an unenforceable penalty.

Applicability of Language.

In essence, Emelco contends that the concept of stipulated damages does not apply to employment contracts. It is true, as Emelco argues, that, ordinarily, "the measure of damages in a suit for breach of an employment contract for personal services is the amount of salary agreed upon for the period involved, less the amount which the servant earned, or with reasonable diligence might have earned, from other employment." *Stiles v. Skylark Meats, Inc.*, 231 Neb. 863, 867, 438 N.W.2d 494, 498 (1989). It is equally true, however, that parties to a contract may override the application of the judicial remedy for breach of a contract by stipulating, in advance, to the sum to be paid in the event of a breach. See, *U.S.D. No. 315 v. DeWerff*, 6 Kan. App. 2d 77, 626 P.2d 1206 (1981); *American Institute of Marketing Sys., Inc. v. Keith*, 82 N.M. 699, 487 P.2d 127 (1971). This court has consistently upheld the right of contracting parties to privately bargain for the amount of damages to be paid in the event of a breach of contract, provided the stipulated sum is reasonable in light of the circumstances. *Crowley v. McCoy*, 234 Neb. 88, 449 N.W.2d 221 (1989); *Bando v. Cole*, 197 Neb. 722, 250 N.W.2d 651 (1977); *Growney v. C M H Real Estate Co.*, 195 Neb. 398, 238 N.W.2d 240 (1976).

Nonetheless, Emelco argues that the provision requiring it to pay Kozlik his regular salary upon a termination without cause

"should be interpreted as a partial statement of the legal measure of damages for breach of an employment contract, rather than as an expression of intent by the parties to wholly replace the legal measure with a remedy of the parties' own devising" and that, therefore, the trial judge should have applied the general legal remedy for breach with an offset of Kozlik's subsequent earnings.

However, the relevant contract language is plain and unambiguous. It clearly specifies what Kozlik's damages were to be in the event that his employment was terminated without cause; nowhere does the contract suggest that those damages were to be reduced by the amount of his posttermination earnings. A court is not free to speculate about terms absent from a written contract; where the parties have clearly expressed an intent to accomplish a particular result, it is not the province of a court to rewrite a contract to reflect the court's view of a fair bargain. *Wurst v. Blue River Bank*, 235 Neb. 197, 454 N.W.2d 665 (1990). More specifically, a court is not free to rewrite a contract so as to provide terms contrary to those which are expressed. See *Kansas-Nebraska Nat. Gas Co. v. Swanson Bros.*, 215 Neb. 398, 338 N.W.2d 774 (1983).

The subject language is a bargained-for contractual provision, which is as applicable to employment contracts as to other contracts. Although in retrospect Helget may be dissatisfied with the bargain he made, it is not for this court to rewrite the contract he executed.

Enforceability of Language.

As we have concluded that the concept of stipulated damages is applicable to employment contracts, the next question is whether the amount stipulated constitutes liquidated damages and is thus enforceable, or whether it imposes a penalty and is thus unenforceable. Emelco contends that a stipulated damages provision in an employment contract which fails to provide for an offset of posttermination earnings is unreasonable and is therefore an unenforceable penalty.

In *Growney*, 195 Neb. at 401, 238 N.W.2d at 242-43, we held:

> "The question of whether a stipulated sum is for a penalty or for liquidated damages is answered by the application

> of one or more aspects of the following rule: a stipulated sum is for liquidated damages only (1) where the damages which the parties might reasonably anticipate are difficult to ascertain because of their indefiniteness or uncertainty and (2) where the amount stipulated is either a reasonable estimate of the damages which would probably be caused by a breach *or* is reasonably proportionate to the damages which have actually been caused by the breach."

(Emphasis in original.) See, also, *Bando v. Cole, supra.*

Further explanation is found in *Stanford Motor Co. v. Westman*, 151 Neb. 850, 858, 39 N.W.2d 841, 846 (1949), quoting *Yant Construction Co. v. Village of Campbell*, 123 Neb. 360, 243 N.W. 77 (1932):

> "If the damages arising from a breach of the contract are difficult of ascertainment or admeasurement, and if the stipulated amount is not disproportionate to the amount of damages that may be reasonably anticipated from the breach, it will usually be regarded as a provision for liquidated damages. On the other hand, if the damages may be easily and readily ascertained, and if the amount stipulated is more than sufficient to compensate for the breach, it will be regarded as a penalty."

Although both of the foregoing quotations focus on the reasonableness of the stipulated damages with regard to an anticipated breach of purchase contracts, we can discern no reason not to apply the same principles to employment contracts.

As noted earlier, the reasonableness of the stipulated damages can be judged as of the time the contract was formed. *Growney v. C M H Real Estate Co., supra.* The evidence demonstrates that as of that time the parties were concerned about protecting Kozlik from the early termination of his employment in view of the client base he had developed and the opportunities available to him in his position with the accountancy firm. As noted in *Waasenaar v. Panos*, 111 Wis. 2d 518, 331 N.W.2d 357 (1983), a discharged employee may suffer permanent injury to professional reputation, as well as loss of career development opportunities.

Under the circumstances, the stipulated damages were

reasonable when the contract was formed, and the trial court correctly upheld them as liquidated damages.

ORDER

For the foregoing reasons, the judgment of the trial judge is affirmed.

AFFIRMED.

CAPORALE, J., not participating in the decision.
SHANAHAN, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. SILVESTRE O. CHAVEZ, APPELLANT.

483 N.W.2d 122

Filed April 23, 1992. No. S-90-620.

1. **Motions to Suppress: Appeal and Error.** In reviewing a trial court's findings on a suppression motion, an appellate court recognizes the trial court as the "trier of fact" and takes into consideration that the trial court has observed witnesses testifying regarding such motion.
2. **Search and Seizure: Investigative Stops: Motor Vehicles: Standing.** An occupant of an automobile has a legitimate expectation to be free of unreasonable governmental intrusion so as to give the occupant standing to challenge the stop.
3. **Criminal Law: Investigative Stops: Motor Vehicles: Police Officers and Sheriffs: Probable Cause.** An investigative stop of a vehicle is justified where a law enforcement officer has a reasonable suspicion founded upon articulable facts which indicate that a crime has been committed or is being committed by occupants of the vehicle.

Appeal from the District Court for Douglas County: STEPHEN A. DAVIS, Judge. Affirmed.

Thomas Blount, of Bertolini, Schroeder & Blount, for appellant.

Don Stenberg, Attorney General, and Barry Waid for appellee.

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

GRANT, J.

Defendant-appellant, Silvestre O. Chavez, was convicted of unlawful possession of cocaine in a quantity of 7 ounces or more with intent to deliver, in violation of Neb. Rev. Stat. § 28-416(4)(a) (Reissue 1989). He was sentenced to 5 years in prison, with credit for 216 days served in jail.

Defendant timely appealed and in this court assigns five errors which may be summarized as two: (1) that the trial court erred in admitting into evidence defendant's statements made following his allegedly illegal arrest and (2) that the trial court erred in admitting physical evidence obtained after an allegedly illegal stop and arrest, a subsequent warrantless search of defendant's automobile, and a later search of his home. We affirm.

The case was tried to the court, sitting without a jury, after defendant waived his right to a jury trial. This case was submitted to the trial court on certain police and laboratory reports, pursuant to a stipulation between defendant and the State. The stipulation provided that if the appropriate officers and the State's chemist were called, they would testify as set out in their various reports. The parties also agreed that the court could consider that certain of the police witnesses were experts in the field of narcotics investigation.

There is some confusion in the record as to the facts before us. In exhibit 1, a 24-page group of police reports, there is a substantial number of lines apparently deleted from the reports by being lined out with a blue marker. The prosecutor in the case explained these markings as an "[attempt] to scratch out everything that was covered up under the Court's suppression order." There is an identical series of reports, also received in evidence at the trial, marked as exhibit 1 (for the suppression hearing), in which there is no blue lining out and in which a date has been corrected from November 9, 1989, to October 26, 1989. In determining what was before it, the trial court told counsel for both parties, "[W]e can get on with it and we'll just use that part you crossed out in Exhibit 1." Much of what the prosecutor did cross out was not covered by the suppression order. In the statement of facts in defendant's brief, at pages 7 and 10, defendant sets out much of the lined out material.

Apparently, the reports are to be considered in total.

The record before us, then, shows the following: On September 15, 1989, Omaha police officers witnessed a meeting between two men at a Dairy Queen parking lot in the area of 24th and Q Streets. The two men arrived in separate vehicles; took a brief ride together in one of the vehicles, a white Chevrolet Camaro; and returned to the lot. The passenger got out of the Camaro, and both parties immediately left the parking lot. An officer's report of this matter stated, "The actions observed . . . are consistant [sic] with those which occur during illegal narcotics transactions." The report added that a check of the license plate number revealed that the Camaro was registered to defendant.

This same report then states that on October 26, 1989, Officers Eric Buske and Doug Henry of the Omaha Police Division "met with a confidential reliable informant," who stated that defendant was a cocaine dealer.

In his brief, defendant notes parenthetically that "no evidence was adduced as to the reliability of the confidential informer or whether this person had provided the officers reliable information in the past." Brief for appellant at 7. However, in stipulating to each officer's respective report, defendant has accepted Officer Buske's conclusion that the informant was reliable. Any failure to object at trial to this conclusion has waived the issue on appeal. No error is assigned in that regard.

The informant gave an accurate description of defendant and stated that the defendant dealt in large amounts of cocaine. The informant stated that defendant would leave town every 1 to 2 weeks, on the weekend, for approximately 1 day, in order to resupply himself with cocaine. The informant stated that defendant would then deal his drugs out of a white Camaro.

The officers confirmed that defendant owned a white Camaro, as well as a green Ford LTD and a green Plymouth Sebring. At this time, narcotics officers began surveillance of the defendant and his home.

On the day after meeting with the informant, Friday, October 27, 1989, police observed the defendant drive the LTD, but defendant did not leave Omaha. The same was true on the

following weekend. On Friday, November 10, 1989, at about 4 p.m., police observed defendant and a passenger in defendant's LTD eastbound on Interstate 80, out of Omaha. Surveillance officers followed the LTD east on I-80 for approximately 40 miles, where surveillance was terminated.

At 7:30 a.m. on Saturday, November 11, 1989, police returned to the place where surveillance had been terminated the day before. Just before noon, the surveillance team spotted the LTD westbound on I-80 and followed it through Council Bluffs, Iowa, into Omaha. At approximately the 13th Street exit on I-80, Buske, who was in a marked police cruiser, pulled his car into traffic, directly behind defendant's car. Defendant's car immediately slowed from 55 to 45 miles per hour, and shortly thereafter, Buske stopped the defendant's car.

Buske's report stated:

> This traffic stop was based on the information which had been received by the confidential informant, that Silvestre CHAVEZ made short one-day trips out of town to resupply himself with cocaine.
>
> The fact that officers had observed Silvestre CHAVEZ leave the Omaha area on Friday, the 10th of November, 1989, at approximately 1600 hours and were able to observe CHAVEZ return to the Omaha area on Saturday, the 11th of November, 1989, approximately 20 hours after he had been seen leaving Omaha. This information was consistant [sic] with that provided by the confidential, reliable informant, that CHAVEZ made short, approximate one-day long trips out of town to purchase cocaine.

Based on this and upon defendant's furtiveness when Buske pulled in behind the LTD, the officer stopped the car. Buske approached the car and asked the driver for his driver's license and registration. Buske noted that the driver, defendant, was "noticeably trembling." When the officer asked defendant where he was coming from, defendant responded that he was coming from his girl friend's home in Council Bluffs.

At this point, Buske, knowing this to be untrue, knowing that defendant had been out of town as the informant had predicted, and observing defendant's nervousness, requested

permission to search defendant's car. Defendant consented and signed a typed consent form.

The preliminary search of the car uncovered no drugs, but Buske did discover a large amount of U.S. currency wrapped in a paper bag inside a white plastic sack, which was in turn placed in a gym bag in the back seat area.

When Buske asked defendant how much money was in the bundle, defendant responded, "[A]bout $18,000.00." Buske then stated that such a large amount of money is usually "associated with illegal narcotics dealing." Defendant responded, "[Y]es." Buske then asked if there were any illegal narcotics in the car. Defendant answered, "[Y]es," and then proceeded to show the officer where the narcotics were hidden.

Under the back seat of the car was a white paper sack containing 7 ounces of cocaine wrapped in aluminum foil. Defendant was arrested and put in the back seat of a marked cruiser. While in the car with defendant, Buske asked if defendant understood English and, upon confirming that defendant was fluent in English, read defendant the *Miranda* warnings.

Defendant then stated he was willing to make a statement to police. He affirmed that the gym bag was his and that he had been selling drugs for approximately 2 months. Police then transported defendant to central police headquarters.

At the station, defendant stated he began buying and selling 1/8-ounce quantities of cocaine about 2 months earlier. He later began buying larger quantities of cocaine from the Chicago, Illinois, area. Defendant described to police the wholesale and street values of the cocaine. Finally, defendant stated that at the time he was arrested, he was going to his apartment, where he would then weigh out the cocaine into individual amounts for resale.

In defendant's first summarized assignment of error, he alleges that the trial court should not have admitted into evidence the statements made "following the stop of his vehicle on November 11, 1989," because the statements were obtained after police illegally detained defendant's automobile.

In determining the correctness of a trial court's ruling on a motion to suppress evidence claimed to be constitutionally

inadmissible, an appellate court will uphold the trial court's findings of fact unless those findings are clearly erroneous. In reviewing a trial court's findings on a suppression motion, an appellate court recognizes the trial court as the "trier of fact" and takes into consideration that the trial court has observed witnesses testifying regarding such motion. *State v. Thomas, post* p. 545, 483 N.W.2d 527 (1992).

We have often stated that an occupant of an automobile has a legitimate expectation to be free of unreasonable governmental intrusion so as to give the occupant standing to challenge the stop as violative of his or her Fourth Amendment rights. *State v. Giessinger*, 235 Neb. 140, 454 N.W.2d 289 (1990). It has been further held that an investigative stop of a vehicle is justified where a law enforcement officer has a reasonable suspicion founded upon articulable facts which indicate that a crime has been committed or is being committed by occupants of the vehicle. *Id.*

Based on the information received from the confidential informant and the corroboration of that information through independent investigation and observation, Buske, with his knowledge and training as a narcotics officer, properly determined that defendant might have been engaged in criminal activity.

As stated above, no specific evidence was offered to substantiate the reliability of the informant. Nevertheless, the defendant stipulated that the police officer would testify that he "met with a confidential, reliable informant." The same police officer later stated that the information developed concerning defendant prior to the stop "was consistant [sic] with that provided by the confidential, reliable informant." Defendant did not object to that testimony. Reasonable suspicion may, in addition, be based on this information if the information received is substantially verified by independent investigation. See *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983).

In *State v. Thomas, post* at 557, 483 N.W.2d at 536, which is based on similar facts, we quoted *Alabama v. White*, 496 U.S. 325, 110 S. Ct. 2412, 110 L. Ed. 2d 301 (1990):

"Reasonable suspicion is a less demanding standard

> than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause. *Adams v. Williams* [407 U.S. 143, 92 S. Ct. 1921, 32 L. Ed. 2d 612 (1972)] demonstrates as much."

We take into account the detailed information provided by the informant and the corroboration of that information, in addition to the uncontested reliability of the informant and Officer Buske's 2 years of experience as a narcotics officer. The totality of the circumstances in this case provides more than adequate grounds for Buske's detention of defendant.

In the case before us, the reliability of the informant is not the sole basis of the officer's reasonable suspicion. The information given by the informant was sufficiently corroborated by police investigation to cause Buske and the other officers involved to suspect that on the morning of November 11, 1989, defendant was returning to Omaha after resupplying himself with cocaine and did at that time have illegal drugs in the car.

We find that police did have reasonable suspicion under *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), to detain the defendant. Defendant does not contend that his statements made to police after he was given his *Miranda* warnings were involuntarily made or that his waiver of his Fifth Amendment rights was defective. The admission of these statements was not clearly erroneous. Defendant's assignment of error in this regard is without merit.

Defendant's second assignment of error is based on the premise that the initial detention of his car was illegal. That contention has been determined to be without merit. There has been no contention that defendant's consent to search his vehicle or his later consent to search his residence was involuntarily given or the product of duress or coercion. We conclude that all evidence seized in the search was admissible, as well as any evidence that was seized from defendant's apartment following his valid consent to search. Defendant's

second summarized assignment of error is also without merit.

AFFIRMED.

BOSLAUGH, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V. CLIFFORD D. THOMAS, APPELLANT.

483 N.W.2d 527

Filed April 23, 1992. No. S-90-726.

1. **Motions to Suppress: Appeal and Error.** In determining the correctness of a trial court's ruling on a motion to suppress evidence claimed to be constitutionally inadmissible, an appellate court will uphold the trial court's findings of fact unless those findings are clearly erroneous. In reviewing a trial court's findings on a suppression motion, an appellate court recognizes the trial court as the "trier of fact" and takes into consideration that the trial court has observed witnesses testifying regarding such motion.
2. **Police Officers and Sheriffs: Search and Seizure: Search Warrants: Motions to Suppress: Proof.** If police have acted without a search warrant, the State has the burden to prove that the search was conducted under circumstances substantiating the reasonableness of such search or seizure.
3. **Search and Seizure: Search Warrants: Motions to Suppress: Proof.** A defendant who seeks to suppress evidence obtained pursuant to a search warrant has the burden of establishing that the search warrant is invalid so that evidence secured thereby may be suppressed.
4. **Constitutional Law: Police Officers and Sheriffs: Investigative Stops: Probable Cause.** Under *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), police can constitutionally stop and briefly detain a person for investigative purposes if the police have a reasonable suspicion, supported by articulable facts, that criminal activity exists, even if probable cause is lacking under the Fourth Amendment.
5. **Police Officers and Sheriffs: Investigative Stops: Probable Cause.** A reliable informant's tip to police concerning criminal activity may furnish a basis for reasonable suspicion supporting a *Terry* stop.
6. **Police Officers and Sheriffs: Arrests: Probable Cause.** When a law enforcement officer has knowledge, based on information reasonably trustworthy under the circumstances, which justifies a prudent belief that a suspect is committing or has committed a crime, the officer has probable cause to arrest without a warrant.
7. **Constitutional Law: Police Officers and Sheriffs: Arrests: Search and Seizure: Search Warrants: Weapons.** If there is a lawful arrest, police have authority, without a search warrant, to conduct a full search of the person arrested, and

such search is reasonable under the Fourth Amendment to the U.S. Constitution. Further, a police officer's search is not limited to searching the arrested person for weapons only; the officer may search for and seize any evidence on the arrestee's person even if such evidence is unrelated to the crime for which the arrest was made, in order to prevent concealment or destruction of evidence.

8. **Constitutional Law: Search and Seizure: Probable Cause.** A general search for evidence of any crime is prohibited by the Fourth Amendment to the U.S. Constitution and article I, § 7, of the Constitution of Nebraska, both of which provide that probable cause be shown before the search may occur.
9. **Judgments: Trial: Evidence: Proof: Appeal and Error.** In a bench trial of a law action, including a criminal case tried without a jury, erroneous admission of evidence is not reversible error if other relevant evidence, admitted without objection or properly admitted over objection, sustains the trial court's factual findings necessary for the judgment or decision reviewed; therefore, an appellant must show that the trial court actually made a factual determination, or otherwise resolved a factual issue or question, through use of erroneously admitted evidence in a case tried without a jury.
10. **Controlled Substances: Circumstantial Evidence: Intent.** Circumstantial evidence may support a finding that a defendant intended to distribute, deliver, or dispense a controlled substance in the defendant's possession.

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

J. Mark Barnett, of Jewell, Gatz, Collins, Dreier & Fitzgerald, for appellant.

Don Stenberg, Attorney General, and Barry Waid for appellee.

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

SHANAHAN, J.

As the result of a bench trial in the district court for Douglas County, Clifford D. Thomas was convicted of intending to sell crack cocaine which was in his possession, a violation of Neb. Rev. Stat. § 28-416(1)(a) (Reissue 1989).

In his pretrial motion to suppress the cocaine as physical evidence, see Neb. Rev. Stat. § 29-822 (Reissue 1989) (suppression of physical evidence obtained by unlawful search and seizure), Thomas claimed that the cocaine evidence was obtained contrary to the Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution,

through a warrantless and unreasonable search of his person, after police stopped the automobile driven by Thomas immediately before his arrest. Additionally, Thomas claimed that, although police had a search warrant for his residence, the search of his residence was unconstitutional, because police conducted an exploratory or general search. After the district court overruled the suppression motion, Thomas renewed his objection to the evidence at trial. From his conviction, Thomas appealed.

STANDARD OF REVIEW; BURDENS REGARDING SEARCHES

In determining the correctness of a trial court's ruling on a motion to suppress evidence claimed to be constitutionally inadmissible, an appellate court will uphold the trial court's findings of fact unless those findings are clearly erroneous. In reviewing a trial court's findings on a suppression motion, an appellate court recognizes the trial court as the "trier of fact" and takes into consideration that the trial court has observed witnesses testifying regarding such motion. See, *State v. Coleman*, 239 Neb. 800, 478 N.W.2d 349 (1992); *State v. Abdouch*, 230 Neb. 929, 434 N.W.2d 317 (1989); *State v. Blakely*, 227 Neb. 816, 420 N.W.2d 300 (1988); *State v. Vrtiska*, 225 Neb. 454, 406 N.W.2d 114 (1987).

"If police have acted without a search warrant, the State has the burden to prove that the search was conducted under circumstances substantiating the reasonableness of such search or seizure." *State v. Staten*, 238 Neb. 13, 21, 469 N.W.2d 112, 118 (1991). Accord, *State v. Juhl*, 234 Neb. 33, 449 N.W.2d 202 (1989); *State v. Abdouch, supra*; *State v. Vrtiska, supra*.

"[A] defendant who seeks to suppress evidence obtained pursuant to a search warrant has the burden of establishing that the search warrant is invalid so that evidence secured thereby may be suppressed." *State v. Staten*, 238 Neb. at 23, 469 N.W.2d at 119. Accord *State v. Vrtiska, supra*.

THE STOP AND SEARCH

Stopping the Vehicle.

Around 7 p.m. on November 24, 1989, Officer Mark Sundermeier, a member of the Omaha Police Department's

narcotics unit, received a telephone call from a confidential informant who told Sundermeier that, shortly before the call, the informant had observed three males who were selling crack cocaine out of a 1981 black Cadillac, bearing Nebraska license plates 1-GA252, in the vicinity of 24th and Sprague Streets in Omaha, an area with a "high level of drug activity" where "individuals will wait in cars in that area and sell to customers who come up to cars." The informant described the Cadillac's occupants, including the driver, whom he identified as "Clifford," estimated to be 24 to 25 years old. According to the informant, Clifford had shown crack cocaine to him and offered to sell the crack cocaine to the informant. Clifford told the informant that he was leaving, but would be returning to the 24th and Sprague location that evening to sell cocaine.

At the suppression hearing, and without objection, Sundermeier testified concerning the informant's reliability:

> [The informant] has provided information to me in my capacity as a narcotics officer for over two years. The informant has made numerous purchases of crack cocaine, marijuana, Ritalin and Talwin and is personally familiar with these drugs. I've used this informant on numerous occasions to obtain search warrants and to make arrests of individuals for felony drug offenses.

Sundermeier further testified that the informant has never proved unreliable.

Sundermeier relayed the information to his supervisor, Sgt. Mark Langan, and the officers decided to go in unmarked cars to 24th and Sprague and check out the informant's message about drug activity. While en route to 24th and Sprague, Sundermeier verified the license number of the 1981 Cadillac and learned that the car was registered to Kenette Kemp, whose address was 2515 Himebaugh Avenue in Omaha. On arrival at 24th and Sprague, Sundermeier and Langan searched the area for the 1981 Cadillac. When they were unable to locate the Cadillac, the officers proceeded a few blocks north to 2515 Himebaugh Avenue, arriving there at 7:15 p.m., and found the Cadillac unoccupied and parked across the street from the house on Himebaugh. After matching the Cadillac's license number with the number supplied by the informant, the

officers set up surveillance of the vehicle. Around 8 p.m., the officers observed two males walk across the street from 2515 Himebaugh Avenue and enter the Cadillac. The two men were of medium height and build and their descriptions were consistent with those given by the informant.

The Cadillac left and proceeded east on Himebaugh Avenue toward 24th Street. Sundermeier and Langan, in unmarked cars, followed the Cadillac and radioed for assistance from Officers John Neaman and Tim Anderson, who were on area patrol in a "uniformed cruiser." When the Cadillac reached 24th Street, it made a right turn and proceeded south a short distance to Taylor Street. When the Cadillac reached the intersection of 24th and Taylor and then turned west on Taylor, Langan ordered Neaman and Anderson, who were in their cruiser immediately behind the Cadillac, to initiate a traffic stop. Anderson activated the cruiser's "red lights" to effectuate the stop. Although the Cadillac slowed to approximately 5 miles per hour, it did not come to a complete stop until Sundermeier pulled his unmarked car ahead of the Neaman-Anderson cruiser and positioned his car directly in front of the Cadillac. The police officers used their three vehicles to "sandwich" the Cadillac against the curb and thereby prevent its leaving.

Search of Thomas.

Sundermeier and Langan got out of their cars in front of the Cadillac and approached that vehicle, while Officers Neaman and Anderson were simultaneously approaching from the rear of the Cadillac. As the police officers approached, Sundermeier repeatedly shouted to the occupants to place their hands where the officers could see them. When the individuals inside the car failed to comply, Sundermeier drew his revolver and pointed it at the man in the passenger seat, later identified as David Ross. While Sundermeier was walking toward the Cadillac, Ross reached into his pocket and "removed a white rock about the size of a small marble and placed it in his mouth" and "appeared to . . . begin swallowing it." As Sundermeier related, "It appeared to me to be crack cocaine." Officer Neaman, approaching from the rear of the Cadillac, came up to

the passenger-side door and attempted to open it, but discovered the door was locked. Neaman ordered Ross to unlock the door and, when Ross failed to respond, broke out the car window, reached inside and opened the door, removed Ross, and "secured" him.

During Neaman's encounter with Ross, Langan and Anderson were approaching the driver's side of the Cadillac and asked the driver, subsequently identified as Clifford Thomas, to step out of the car, which he did, and the officers conducted a pat-down search for weapons on Thomas. In the course of this pat-down search, Langan asked Thomas his name, and Thomas said, "Clifford." Langan testified that, at that point, "I immediately advised him he was under arrest in connection with crack cocaine, and I instructed Officer, I believe, Anderson to search [Thomas] incident to that arrest." While Anderson was searching Thomas, Langan "observed Officer Anderson pull a bag of crack cocaine out from the front of [Thomas'] pants. . . . It turned out to be nine grams." Later, laboratory analysis confirmed that the substance in the bag was crack cocaine. As a result of searching Thomas, Anderson also found $527 in cash located in three of Thomas' pants pockets.

After Thomas' arrest, Sundermeier asked him for permission to search "his residence at 2515 Himebaugh." Thomas told Sundermeier that he did not live at 2515 Himebaugh, but was just staying there, although Thomas did have a key to the front door of the house at that address. When Thomas rejected the officer's request to search 2515 Himebaugh, he was then placed in a cruiser and transported to the police station. A search of the Cadillac disclosed a receipt for brake work on the Cadillac, dated October 24, 1989, showing Thomas' residence as 2515 Himebaugh Avenue.

At Police Headquarters.

At police headquarters, Officer Donald Truckenbrod administered the *Miranda* warning or admonition to Thomas and then questioned him. During the interrogation, Truckenbrod told Thomas that the combination of 9 grams of crack cocaine and $527 in cash indicated that Thomas was involved in the sale of crack cocaine. Thomas responded that he

was not involved in selling cocaine, that he was only a user, and the reason he was carrying a large quantity of crack cocaine was because he "uses a great deal of cocaine."

The Search of 2515 Himebaugh.

Later in the evening of November 24, 1989, Officer Sundermeier applied for a warrant to search 2515 Himebaugh for: "Cocaine, it's [sic] derivatives, and the administering instruments. Monies and records pertaining to an illegal narcotics operation. Items of venue which would tend to identify the individuals residing or in control of said residence . . . ." To support his application, Sundermeier submitted his affidavit, setting out the need for a search warrant and recounting the events leading up to Thomas' arrest, including the information provided by the informant, the surveillance near 2515 Himebaugh, and the stop and arrest of Thomas and Ross. Further, Sundermeier's affidavit expressed that a confidential informant, who had proven reliable in the past, had been contacted and asked to purchase crack cocaine by a person who matched Thomas' description and drove a black Cadillac with Nebraska plates 1-GA252. On the basis of Sundermeier's affidavit, a search warrant was issued for 2515 Himebaugh in accordance with the scope specified in Sundermeier's application.

Sundermeier and several other officers executed the search warrant on November 24, 1989, and, in the course of the search, found, among other items, a small amount of marijuana, a .25-caliber automatic pistol, a .22-caliber single-action revolver, and several items showing Thomas' residence as 2515 Himebaugh Avenue, including merchandise receipts signed to Thomas for deliveries at the Himebaugh address and a postcard addressed to Thomas at that address.

THOMAS' TRIAL

Thomas' bench trial was conducted on stipulated evidence contained in the police report regarding Thomas' arrest, including Thomas' statement at police headquarters. However, concerning the police report, Thomas renewed his objection based on the grounds previously expressed in his suppression motion, that is, an objection to

> [a]ny and all statements or evidence contained in [the police report] that were obtained subsequent to the stop of [Thomas'] vehicle . . . on the grounds that it was obtained as a result of an illegal search, and without a valid search warrant in violation of [Thomas'] fourth amendment rights and his rights under [the] Nebraska constitution.

Additionally, Thomas objected to items seized at the 2515 Himebaugh residence as "beyond the scope of the search warrant." Further, Thomas objected to "all items seized from either the Defendant's vehicle or the premises at 2515 Himebaugh on the grounds of relevancy."

Through stipulation, the State introduced a recitation of Sergeant Langan's experience and training with the Omaha Police Department, namely, Langan had over 12 years' experience and has attended and conducted several seminars regarding drug investigations. Further, based on his experience and training, Langan, if called as a witness, would testify that 9 grams of crack cocaine is generally too large an amount for personal use, that such quantity of crack cocaine has an estimated street value of $1,800 to $2,250 and can be divided into 90 individual doses for sale or personal use, and that persons trafficking in crack cocaine will often carry large amounts of cash on their person.

ASSIGNMENTS OF ERROR

Thomas' assignments of error may be summarized as follows: (1) The police officers unconstitutionally stopped the car driven by Thomas, and therefore, the cocaine, discovered after the stop, is constitutionally inadmissible as the product of an unreasonable search and seizure; (2) the search at 2515 Himebaugh was unconstitutional; hence, evidence from the search is constitutionally inadmissible; (3) evidence obtained in the search of 2515 Himebaugh lacked probative value and, therefore, was irrelevant and inadmissible; and (4) the evidence is insufficient to sustain Thomas' conviction.

CONSTITUTIONALITY OF STOP AND SEARCH

Stop of Vehicle.

To determine whether any physical evidence is constitutionally inadmissible in Thomas' case, we must first

examine the circumstances surrounding the officers' stop of the vehicle driven by Thomas, for, if the initial stop was unconstitutional, any subsequent search and evidence obtained through that search are constitutionally inadmissible as the "fruit of the poisonous tree." *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963).

> In *Wong Sun,* the U.S. Supreme Court required exclusion not only of evidence directly produced by a constitutionally invalid search but also evidence indirectly derived from the unconstitutional search. Reference to "fruit of the poisonous tree" in *Wong Sun* is a condemnation of the government's subsequent exploitation of a prior violation of a defendant's constitutional right. As expressed in *Wong Sun,* whether evidence is the derivative product of a constitutionally invalid search turns on the question " 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.' " 371 U.S. at 488. (Quoting from J. Maguire, Evidence of Guilt (1959).)

State v. Abdouch, 230 Neb. 929, 943-44, 434 N.W.2d 317, 326 (1989).

Thomas contends that the police did not have a reasonable suspicion, supported by articulable facts, that he "had been, is or was about to be engaged in criminal activity." Brief for appellant at 12. See *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). Next, Thomas claims that his detention by police transcended the brief and limited "stop and frisk" encounter authorized by *Terry* and, instead, became a seizure, requiring probable cause rather than reasonable suspicion for an investigatory stop.

In *Terry v. Ohio, supra*, the U.S. Supreme Court stated:

> It is quite plain that the Fourth Amendment governs "seizures" of the person which do not eventuate in a trip to the station house and prosecution for crime—"arrests" in traditional terminology. It must be recognized that whenever a police officer accosts an individual and

> restrains his freedom to walk away, he has "seized" that person.

392 U.S. at 16.

Additionally, "a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possible criminal behavior even though there is no probable cause to make an arrest." *Terry v. Ohio*, 392 U.S. at 22. Thus, "under *Terry v. Ohio* . . . police can constitutionally stop and briefly detain a person for investigative purposes if the police have a reasonable suspicion, supported by articulable facts, that criminal activity exists, even if probable cause is lacking under the fourth amendment." *State v. Staten*, 238 Neb. 13, 18, 469 N.W.2d 112, 116 (1991). Accord *State v. Twohig*, 238 Neb. 92, 469 N.W.2d 344 (1991). However, *Terry* involved a police officer's firsthand observations of suspected criminal activity, whereas Thomas' case involves officers who saw no singularly suspicious activity before they halted Thomas' car, but stopped the car on the basis of a factual account from an informant and, further, based on the officers' experience in investigating drug activity and offenses.

The U.S. Supreme Court has addressed the question whether and under what circumstances an informant's tip can justifiably provide a police officer with knowledge about "specific and articulable facts which, taken together with reasonable inferences drawn from those facts," *Terry v. Ohio*, 392 U.S. at 21, furnish a basis for the limited intrusion embodied in an investigatory stop. In *Adams v. Williams*, 407 U.S. 143, 92 S. Ct. 1921, 32 L. Ed. 2d 612 (1972), a police officer on patrol duty learned from a reliable informant that Williams, seated in a nearby parked automobile, was carrying narcotics and a weapon. In light of that information, the officer went to Williams' car and asked him to open the car's door. Williams responded instead by rolling down the car's window, at which point the police officer reached to where the informant had said the weapon would be and withdrew the gun. The officer arrested Williams for unlawful possession of a firearm. As the result of the arrest, a search revealed heroin on Williams' person and in his car. In *Adams*, the Court concluded that the

evidence found on Williams and in his car was constitutionally admissible, and said:

> In *Terry* this Court recognized that "a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest." . . . The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, *Terry* recognizes that it may be the essence of good police work to adopt an intermediate response. . . . A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time.

407 U.S. at 145-46.

The *Adams* Court continued:

> [W]e believe that [the officer] acted justifiably in responding to his informant's tip. The informant was known to him personally and had provided him with information in the past. This is a stronger case than obtains in the case of an anonymous telephone tip. The informant here came forward personally to give information that was immediately verifiable at the scene. . . . Thus, while the Court's decisions indicate that this informant's unverified tip may have been insufficient for a narcotics arrest or search warrant [citations omitted], the information carried enough indicia of reliability to justify the officer's forcible stop of Williams.
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> In reaching this conclusion, we reject respondent's argument that reasonable cause for a stop and frisk can only be based on the officer's personal observation, rather than on information supplied by another person. Informants' tips, like all other clues and evidence coming to a policeman on the scene, may vary greatly in their value and reliability.

407 U.S. at 146-47.

More recently, in *Alabama v. White*, 496 U.S. 325, 110 S. Ct. 2412, 110 L. Ed. 2d 301 (1990), the Court examined the relationship between an informant's reliability and corroboration required to justify an investigatory stop based on an informant's tip. In *White*, police received a call from an anonymous informant that White would soon leave an identified apartment at a particular time in a brown Plymouth station wagon and would be traveling to a named motel. The informant said that White would be in possession of cocaine. Police officers observed a woman leave the apartment identified by the informant, get into the brown Plymouth station wagon, and drive in the general direction of the motel named by the informant. At that point, the police stopped White, informed her that she had been stopped because she was suspected of carrying narcotics, and, with White's consent, searched her purse and found cocaine. The Court in *White* first noted that an anonymous tip, standing alone, generally is insufficient to support a stop because the tip indicates nothing about the informant's reliability or basis of knowledge. In *White*, 496 U.S. at 331, the Court determined that "the anonymous tip had been sufficiently corroborated to furnish reasonable suspicion" for a *Terry* stop, and explained:

> *Adams v. Williams* [citation omitted] sustained a *Terry* stop and frisk undertaken on the basis of a tip given in person by a known informant who had provided information in the past. We concluded that, while the unverified tip may have been insufficient to support an arrest or search warrant, the information carried sufficient "indicia of reliability" to justify a forcible stop.
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> The opinion in [*Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983)] recognized that an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity inasmuch as ordinary citizens generally do not provide extensive recitations of the basis of their everyday observations and given that the veracity of persons supplying anonymous tips is "by hypothesis largely unknown, and

unknowable." . . . This is not to say that an anonymous caller could never provide the reasonable suspicion necessary for a *Terry* stop. . . . Simply put, a tip such as this one [in White's case], standing alone, would not " 'warrant a man of reasonable caution in the belief' that [a stop] was appropriate."

496 U.S. at 328-29. The Court continued in *White*:

[The Court stated] in *United States v. Sokolow*, 490 U. S. 1, 7 [109 S. Ct. 1581, 1585, 104 L. Ed. 2d 1] (1989):

"The officer [making a *Terry* stop] . . . must be able to articulate something more than an 'inchoate and unparticularized suspicion or "hunch." ' . . . The Fourth Amendment requires 'some minimal level of objective justification' for making the stop. . . . That level of suspicion is considerably less than proof of wrongdoing by a preponderance of the evidence. We have held that probable cause means 'a fair probability that contraband or evidence of a crime will be found,' . . . and the level of suspicion required for a *Terry* stop is obviously less demanding than for probable cause."

Reasonable suspicion is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause. *Adams v. Williams* . . . demonstrates as much. We there assumed that the unverified tip from the known informant might not have been reliable enough to establish probable cause, but nevertheless found it sufficiently reliable to justify a *Terry* stop. [Citation omitted.] Reasonable suspicion, like probable cause, is dependent upon both the content of information possessed by police and its degree of reliability. Both factors—quantity and quality—are considered in the "totality of the circumstances—the whole picture," *United States v. Cortez* [citation omitted], that must be taken into account when evaluating whether there is

> reasonable suspicion. Thus, if a tip has a relatively low degree of reliability, more information will be required to establish the requisite quantum of suspicion than would be required if the tip were more reliable. . . . [W]e conclude that when the officers stopped respondent, the anonymous tip had been sufficiently corroborated to furnish reasonable suspicion that respondent was engaged in criminal activity and that the investigative stop therefore did not violate the Fourth Amendment.

496 U.S. at 329-31.

This court recently examined use of a reliable informant's tip as the basis for an investigatory stop in *State v. Patterson*, 237 Neb. 198, 465 N.W.2d 743 (1991). In *Patterson* an informant with a history of supplying reliable information to police told the officers that he had seen Patterson with cocaine in a Ford Escort within the past 24 hours. After verifying that the address of Patterson's residence, his telephone number, and the registration for the Escort coincided with the information from the informant, police set up a surveillance of Patterson's house. When Patterson came out of the house and started to drive away in his Escort, police attempted to stop Patterson, who continued driving a few blocks before stopping. Officers approached Patterson's car and arrested him for possession of marijuana. At the police station, cocaine was found in Patterson's underwear. Patterson claimed that the cocaine was obtained by an unreasonable search, but this court found that the search of Patterson was reasonable, and stated:

> In *Terry v. Ohio* [citation omitted], the U.S. Supreme Court held that when a police officer suspects that criminal activity may be afoot, he may approach a person for purposes of investigating criminal behavior even though there is no probable cause to make an arrest. Nebraska has adopted this standard for investigatory stops. [Citations omitted.] . . .
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> . . . .
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> In Patterson's case, it is not necessary that we decide the issue of whether the informant's information was sufficient to provide probable cause for a warrant, since Patterson was legally stopped and arrested under the lesser

Terry standard. . . .

. . . .

When looking at the totality of the information provided by the informant, together with corroboration of this information by police, the officers had sufficient reasonable suspicion under *Terry* to stop Patterson after he left his home that evening, in order to investigate possible drug activity. . . . When Patterson failed to pull over as instructed by the officers, but instead fled from the scene, probable cause to believe Patterson was engaged in illegal drug activity arose, and the police were entitled to place him under arrest. The search of Patterson's person, whereby the cocaine was discovered in his underwear, was reasonable under the fourth amendment as a search incident to arrest.

237 Neb. at 204-06, 465 N.W.2d at 748-49.

Coursing through the preceding decisions is the proposition that a reliable informant's tip to police concerning criminal activity may furnish a basis for reasonable suspicion supporting a *Terry* stop.

As the U.S. Supreme Court, examining whether the police had sufficient facts to support an investigatory stop, stated in *Reid v. Georgia*, 448 U.S. 438, 441, 100 S. Ct. 2752, 65 L. Ed. 2d 890 (1980), "[T]here could, of course, be circumstances in which wholly lawful conduct might justify the suspicion that criminal activity was afoot." Consequently, proper focus of an inquiry is not whether specific conduct is criminal or noncriminal, but whether a police officer's suspicion is reasonably related to the activity observed, criminal or noncriminal. In *State v. Ebberson*, 209 Neb. 41, 44-45, 305 N.W.2d 904, 907 (1981), this court stated:

Police officers must have a particularized and objective basis for suspecting the person stopped of criminal activity. The assessment of the totality of circumstances includes all of the objective observations and considerations, as well as the suspicion drawn by a trained and experienced police officer by inference and deduction that the individual stopped is or has been or is about to be engaged in criminal behavior.

See, also, *State v. Davis*, 231 Neb. 878, 438 N.W.2d 772 (1989); *State v. Thomte*, 226 Neb. 659, 413 N.W.2d 916 (1987).

Thus, in Thomas' case, police had a tip from a reliable informant, not an anonymous tipster, concerning drug activity involving a specific Cadillac automobile; observed operation of the Cadillac in an area of known drug traffic; and, therefore, had a foundation for a reasonable suspicion that the car carrying Thomas was the mobile cocaine dispensary reported by the reliable informant. For that reason, stopping the car was constitutionally justified under *Terry*.

Next, Thomas contends that his detention was outside the "stop and frisk" authorized by *Terry*. Although we have concluded that the officers' stopping the car was justified under *Terry*, events after the stop brought a different standard into the picture, namely, probable cause for arrest without a warrant. "When a law enforcement officer has knowledge, based on information reasonably trustworthy under the circumstances, which justifies a prudent belief that a suspect is committing or has committed a crime, the officer has probable cause to arrest without a warrant." *State v. Blakely*, 227 Neb. 816, 821, 420 N.W.2d 300, 304 (1988). Accord, *State v. Coleman*, 239 Neb. 800, 478 N.W.2d 349 (1992); *State v. Twohig*, 238 Neb. 92, 469 N.W.2d 344 (1991); *State v. Staten*, 238 Neb. 13, 469 N.W.2d 112 (1991).

After the police ordered the Cadillac's occupants to keep their hands visible as the officers approached the car, one of the occupants, Ross, took something from his pocket, placed it in his mouth, and attempted to swallow it. According to Sundermeier, "It appeared to me to be crack cocaine." In *Sibron v. New York*, 392 U.S. 40, 66-67, 88 S. Ct. 1889, 20 L. Ed. 2d 917 (1968), the Court said,

> [D]eliberately furtive actions . . . at the approach of strangers or law officers are strong indicia of *mens rea*, and when coupled with specific knowledge on the part of the officer relating the suspect to the evidence of crime, they are proper factors to be considered in the decision to make an arrest.

The furtive activity within the Cadillac immediately after the stop, combined with the officers' experience and information,

furnished sufficient grounds for probable cause to believe that Thomas was engaged in illegal drug activity. Consequently, the police lawfully arrested him without a warrant.

> [I]f there is a lawful arrest, police have authority, without a search warrant, to conduct a full search of the person arrested and . . . such search is reasonable under the fourth amendment to the U.S. Constitution. Further, a police officer's search is not limited to searching the arrested person for weapons only; the officer may search for and seize any evidence on the arrestee's person, even if such evidence is unrelated to the crime for which the arrest was made, in order to prevent concealment or destruction of evidence.

State v. Staten, 238 Neb. at 21, 469 N.W.2d at 118. Accord, *State v. Twohig, supra*. See, also, *United States v. Robinson*, 414 U.S. 218, 94 S. Ct. 467, 38 L. Ed. 2d 427 (1973); *Chimel v. California*, 395 U.S. 752, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969).

Since there was a *Terry* stop, a subsequent lawful arrest of Thomas, and a search incident to Thomas' arrest, the cocaine evidence obtained by officers at the time of Thomas' arrest was constitutionally admissible. Therefore, Thomas' first assignment of error is without merit.

THE SEARCH OF 2515 HIMEBAUGH

In his second assignment of error, Thomas contends that police conducted an exploratory or general search of 2515 Himebaugh Avenue.

The factual content of Officer Sundermeier's search warrant affidavit was previously expressed in this opinion; therefore, restating all the facts presented through the affidavit is unnecessary. Suffice it to say, the information presented in Sundermeier's affidavit supplied the probable cause necessary for issuance of the search warrant.

"A general search for evidence of any crime is prohibited by the fourth amendment to the U.S. Constitution and article I, § 7, of the Constitution of Nebraska, both of which provide that probable cause be shown before the search may occur." *State v. Vrtiska*, 225 Neb. 454, 464, 406 N.W.2d 114, 122

(1987). Accord *State v. Traxler*, 210 Neb. 435, 315 N.W.2d 440 (1982).

> " 'The search [must] be one directed in good faith toward the objects specified in the warrant or for other means and instrumentalities by which the crime charged had been committed. It must not be a general exploratory search through which the officers merely hope to discover evidence of wrongdoing.' "

State v. Vrtiska, 225 Neb. at 464, 406 N.W.2d at 122 (quoting from *State v. Waits*, 185 Neb. 780, 178 N.W.2d 774 (1970)). Accord *State v. Traxler, supra.*

> However, when officers, in the course of a bona fide effort to execute a valid search warrant, discover articles which, although not included in the warrant, are reasonably identifiable as contraband, the officers may seize such articles whether those items are initially in plain sight or come into plain sight subsequently as a result of the officers' efforts.

State v. Vrtiska, 225 Neb. at 464, 406 N.W.2d at 122.

All the physical evidence obtained at 2515 Himebaugh Avenue was seized while the officers were acting within the scope of the search authorized by the warrant and was not discovered after cessation of an authorized search. Thus, physical evidence at 2515 Himebaugh Avenue was not seized through a general exploratory search, but was obtained as the result of a lawful search warrant. Thomas' second assignment of error is without merit.

RELEVANCY OBJECTION AND SUFFICIENCY OF OBJECTION

Relevancy.

At trial, Thomas objected to introduction of a police inventory sheet which listed items seized pursuant to the search warrant previously mentioned. The inventory sheet reflects 17 items, including Thomas' 2 firearms, $1,400 in food stamps, jewelry, and various documents which tend to show Thomas' residence as 2515 Himebaugh Avenue.

Thomas attacks admission of the inventory on the ground that it is irrelevant, i.e., "[e]vidence which is not relevant is not

admissible." Neb. Evid. R. 402, Neb. Rev. Stat. § 27-402 (Reissue 1989). "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. Evid. R. 401, Neb. Rev. Stat. § 27-401 (Reissue 1989).

> "There are two components to relevant evidence: materiality and probative value. Materiality looks to the relation between the propositions for which the evidence is offered and the issues in the case. If the evidence is offered to help prove a proposition which is not a matter in issue, the evidence is immaterial. What is 'in issue,' that is, within the range of the litigated controversy, is determined mainly by the pleadings, read in the light of the rules of pleading and controlled by the substantive law. . . .
>
> "The second aspect of relevance is probative value, the tendency of evidence to establish the proposition that it is offered to prove. . . ."

State v. Baltimore, 236 Neb. 736, 740, 463 N.W.2d 808, 812 (1990) (quoting McCormick on Evidence § 185 (Edward W. Cleary 3d ed. 1984)). Accord *State v. Messersmith*, 238 Neb. 924, 473 N.W.2d 83 (1991). "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." *State v. Lonnecker*, 237 Neb. 207, 210, 465 N.W.2d 737, 740-41 (1991). Accord, *State v. Coleman*, 239 Neb. 800, 478 N.W.2d 349 (1992); *State v. Baltimore, supra.*

The main issue in Thomas' case was whether he intended to distribute the cocaine found on his person. Documentary evidence containing information that Thomas' residence was 2515 Himebaugh Avenue tended to establish that Thomas lived at that address and, therefore, was afforded access to the Kent Cadillac used to transport individuals dealing in drugs, according to the information supplied by the reliable informant. Also, recently, in *State v. Groves*, 239 Neb. 660, 477 N.W.2d 789 (1991), this court concluded that a defendant's possession of a firearm is relevant to a prosecution on the charge that the defendant intended to distribute narcotics possessed by the defendant. Therefore, evidence of Thomas'

two firearms, found at his residence, was relevant in the case against Thomas. However, we do not see how the presence of jewelry and food stamps relates to, or tends to prove, essential elements of the charge against Thomas. First, in view of the record presented, jewelry and food stamps were not contraband referable to or related with possession of cocaine, and, hence, evidence concerning those items was immaterial in prosecuting the possession charge against Thomas. Second, we find nothing in the mere presence of jewelry and food stamps that makes it more likely that Thomas intended to distribute cocaine, especially since Thomas was not the sole occupant of 2515 Himebaugh Avenue. Consequently, with the exception of reference to Thomas' firearms and documents which tended to show Thomas' residence, the inventory sheet was irrelevant and should have been excluded.

> [I]n a bench trial of a law action, including a criminal case tried without a jury, erroneous admission of evidence is not reversible error if other relevant evidence, admitted without objection or properly admitted over objection, sustains the trial court's factual findings necessary for the judgment or decision reviewed; therefore, an appellant must show that the trial court actually made a factual determination, or otherwise resolved a factual issue or question, through use of erroneously admitted evidence in a case tried without a jury.

State v. Lomack, 239 Neb. 368, 370, 476 N.W.2d 237, 239 (1991).

Thomas has failed to show that the district court actually made a factual determination, or otherwise resolved a factual issue or question, through use of those parts of the inventory sheet or list which were erroneously received in evidence. Most assuredly, the inadmissible parts of the inventory sheet were not the only evidence against Thomas. The other evidence against Thomas, admitted without objection or properly admitted over objection, is discussed in the next section. However, before proceeding, we note the proposition expressed in the State's brief: "The admission or exclusion of evidence is a matter within the discretion of the trial court." Brief for appellee at 31. We again direct attention to *State v. Messersmith*, 238 Neb. at

936, 473 N.W.2d at 92, wherein we expressly disapproved of the expression " 'The admission or exclusion of evidence is a matter within the discretion of the trial court.' "

Thomas' third assignment of error, based on his relevancy objection, has no merit.

Sufficiency of Evidence.

Finally, Thomas contends that the evidence adduced at trial is insufficient to show his "intent" to deliver crack cocaine.

"[C]ircumstantial evidence may support a finding that a defendant intended to distribute, deliver, or dispense a controlled substance in the defendant's possession." *State v. Zitterkopf*, 236 Neb. 743, 748, 463 N.W.2d 616, 620 (1990). Accord *State v. Messersmith, supra.*

> "Circumstantial evidence to establish that possession of a controlled substance was with intent to distribute or deliver may consist of the quantity of the substance, the equipment and supplies found with it; the place it was found; the manner of packaging; and the testimony of witnesses experienced and knowledgeable in the field."

State v. Oldfield, 236 Neb. 433, 445, 461 N.W.2d 554, 562 (1990) (quoting from *State v. Turner*, 192 Neb. 397, 222 N.W.2d 105 (1974)). See, also, *State v. Lonnecker*, 237 Neb. 207, 465 N.W.2d 737 (1991); *State v. Harney*, 237 Neb. 512, 466 N.W.2d 540 (1991); *State v. Messersmith, supra.*

Thomas admitted that he was in possession of crack cocaine, but denied that he was trafficking in the drug. Thomas' intent to sell the cocaine may be inferred from the circumstantial evidence, especially Sergeant Langan's stipulated testimony. Therefore, Thomas' fourth and last assignment of error lacks merit.

CONCLUSION

Since Thomas' assignments of error are without merit, we affirm Thomas' conviction.

AFFIRMED.

BOSLAUGH, J., concurs in the result.

STATE OF NEBRASKA, APPELLEE, V. THOMAS J. KELLER, APPELLANT.

483 N.W.2d 126

Filed April 23, 1992. No. S-90-974.

Appeal from the District Court for Lancaster County, WILLIAM D. BLUE, Judge, on appeal thereto from the County Court for Lancaster County, JACK B. LINDNER, Judge. Judgment of District Court affirmed.

Calvin D. Hansen for appellant.

Don Stenberg, Attorney General, and Donald A. Kohtz for appellee.

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

PER CURIAM.

After a bench trial the Lancaster County Court found the defendant-appellant, Thomas J. Keller, guilty of driving while under the influence of alcoholic liquor, in violation of Neb. Rev. Stat. § 39-669.07 (Reissue 1988). An enhancement hearing was held and resulted in a determination that the defendant's conviction constituted his second violation of § 39-669.07. Accordingly, the trial court sentenced the defendant to serve 30 days in the county jail, fined him $500, suspended his driver's license for 1 year, and ordered him not to drive any motor vehicle for any purpose for a like period. See § 39-669.07(b). The defendant appealed to the Lancaster County District Court, which affirmed the county court's judgment. This appeal followed.

On appeal to this court, the defendant assigns as error the district court's failure to find (1) the defendant was denied effective assistance of counsel; (2) the trial court imposed an unlawful sentence by effectively revoking his driver's license for 1 year and 30 days; (3) the trial court abused its discretion in rejecting his request for probation; and (4) the evidence is insufficient to sustain the conviction.

This case involves an appeal to the district court filed after March 23, 1990, and is thus subject to the following rule of

practice established in *State v. Erlewine*, 234 Neb. 855, 857, 452 N.W.2d 764, 767 (1990): "The Supreme Court, in reviewing decisions of the district court which affirmed, reversed, or modified decisions of the county court, will consider only those errors specifically assigned in the appeal to the district court and again assigned as error in the appeal to the Supreme Court."

Notwithstanding this rule, the defendant did not specifically assign any errors in his appeal to the district court. Therefore, absent plain error appearing on the record, there is nothing for this court to review on appeal. See *State v. Nowicki,* 239 Neb. 130, 474 N.W.2d 478 (1991).

We have reviewed the record and find no plain error in this case. Accordingly, the order of the Lancaster County District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DANIEL MURATELLA, APPELLANT.

483 N.W.2d 128

Filed April 23, 1992. No. S-91-133.

1. **Probation and Parole: Sentences.** Home detention on probation, subject to electronic monitoring, is insufficiently restrictive to constitute "custody" for purposes of granting sentencing credit under Neb. Rev. Stat. § 83-1,106(1) (Cum. Supp. 1990).
2. **Sentences: Appeal and Error.** A sentence imposed within the statutory limits will not be set aside as excessive absent an abuse of discretion by the trial court.

Appeal from the District Court for Lancaster County: DONALD E. ENDACOTT, Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Scott P. Helvie for appellant.

Don Stenberg, Attorney General, and Donald A. Kohtz for appellee.

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

GRANT, J.

On June 20, 1989, defendant-appellant, Daniel Muratella, pled guilty in the district court for Lancaster County to possession of cocaine, a Class IV felony. He was placed on probation for 3 years. The probation included a requirement of 6 months' electronic monitoring, beginning August 7, 1989. Defendant violated the electronic monitoring requirement by leaving his residence for something other than an employment purpose. On April 30, 1990, defendant pled guilty to the violation, and he was reprimanded by the trial court, but his probation was continued.

On June 1, 1990, defendant again violated probation by consuming or possessing alcohol, as shown by defendant's arrest for driving while intoxicated. On October 24, 1990, defendant pled guilty to the violation of probation. On January 23, 1991, defendant's probation was revoked, and he was sentenced to 18 months to 3 years, with credit given for 167 days that defendant spent in county jail prior to his plea on the underlying possession charge.

The defendant was not given credit for the 6 months spent while he was on probation, subject to electronic monitoring. He appeals, assigning as error the excessiveness of the sentence and the district court's refusal to "grant the defendant credit for all time served in custody prior to the imposition of his sentence for the reason that the court failed to grant the defendant credit for six months spent subject to electronic monitoring as a term of the court's original order of probation." We affirm.

The use of electronic monitoring as a condition of probation is now authorized by Neb. Rev. Stat. § 29-2262 (Cum. Supp. 1990). The statute requiring sentencing credit, Neb. Rev. Stat. § 83-1,106(1) (Cum. Supp. 1990), states:

> Credit against the maximum term and any minimum term shall be given to an offender for time spent *in custody* as a result of the criminal charge for which a prison sentence is imposed or as a result of the conduct on which such a charge is based. This shall specifically include, but

> shall not be limited to, time spent in custody prior to trial, during trial, pending sentence, pending the resolution of an appeal, and prior to delivery of the offender to the custody of the Department of Correctional Services.

(Emphasis supplied.)

Whether to grant sentencing credit for time spent in home detention, subject to electronic monitoring as a condition of probation, has not previously been decided in this state. The legislative history provides no guidance.

The Illinois Supreme Court determined that a defendant is not entitled to credit for time spent on home detention as a condition of his release on bond. *People v. Ramos*, 138 Ill. 2d 152, 561 N.E.2d 643 (1990). The Illinois statute, like Nebraska's, gives credit for time spent in custody as a result of the offense for which the sentence was imposed. In *Ramos*, the court stated:

> The purpose of the credit-against-sentence provision is to ensure that defendants do not ultimately remain incarcerated for periods in excess of their eventual sentences. . . .
>
> Home confinement, though restrictive, differs in several important respects from confinement in a jail or prison. An offender who is detained at home is not subject to the regimentation of penal institutions and, once inside the residence, enjoys unrestricted freedom of activity, movement, and association. Furthermore, a defendant confined to his residence does not suffer the same surveillance and lack of privacy associated with becoming a member of an incarcerated population.

Ramos, 138 Ill. 2d at 159, 561 N.E.2d at 647.

An Illinois appellate court has interpreted *Ramos* to apply to home detention that is served as a condition of probation, as well as to home detention while released on bail. *People v. Denning*, 204 Ill. App. 3d 720, 562 N.E.2d 354 (1990). In discussing *Ramos*, that court stated:

> The court reasoned that home confinement differed in several respects from confinement in a jail or prison. In particular, it noted that an offender detained at home is not subject to the regimentation of penal institutions and, once inside the residence, enjoys unrestricted freedom of

> activity, movement, and association.
>
> While we note that here the defendant's home confinement was a condition of his probation and not part of a trial bond, we find this distinction meaningless.

Denning, 204 Ill. App. 3d at 721, 562 N.E.2d at 354-55.

A similar result was reached by a California appeals court in *People v. Reinertson*, 178 Cal. App. 3d 320, 223 Cal. Rptr. 670 (1986), which is particularly interesting in that California gives credit for time spent on probation in drug rehabilitation programs, halfway houses, and other such programs. In *Reinertson*, the court refused to give credit for time spent on home detention as a condition of probation when that probation was later revoked. See, also, *State v. Speaks*, 63 Wash. App. 5, 816 P.2d 95 (1991); *State v. Reynolds*, 168 Ariz. 580, 816 P.2d 237 (Ariz. App. 1991).

Being confined to one's home, subject to electronic monitoring, with the freedom to engage in employment and probation-related activities, is far less onerous than being imprisoned. We hold that home detention on probation, subject to electronic monitoring, is insufficiently restrictive to constitute "custody" for purposes of granting sentencing credit under § 83-1,106(1). Defendant's assignment of error in this regard is without merit.

Defendant's claim that his sentence of 18 months to 3 years was excessive is also without merit. Defendant was convicted of possession of a controlled substance, a Class IV felony. Neb. Rev. Stat. § 28-416(3) (Cum. Supp. 1986). Class IV felonies are punishable by a maximum of 5 years' imprisonment, a $10,000 fine, or both, with no stated minimum punishment. Neb. Rev. Stat. § 28-105(1) (Reissue 1985).

A sentence imposed within the statutory limits will not be set aside as excessive absent an abuse of discretion by the trial court. *State v. Brandon, ante* p. 232, 481 N.W.2d 207 (1992); *State v. Wounded Arrow, ante* p. 44, 480 N.W.2d 205 (1992). Considering the seriousness of defendant's crime, his past record, and his repeated refusal to abide by the conditions of his probation, we find that his sentence was not an abuse of the trial court's discretion and was not excessive.

AFFIRMED.

FAHRNBRUCH, J., not participating.

CHARLES WILLUHN, APPELLEE, V. OMAHA BOX COMPANY, APPELLANT.

483 N.W.2d 130

Filed April 23, 1992. No. S-91-181.

1. **Workers' Compensation: Appeal and Error.** Findings of fact by the Workers' Compensation Court on rehearing have the same force and effect as a jury verdict in a civil case and will not be set aside on appeal where there is evidence sufficient to support them.
2. **Workers' Compensation.** As trier of fact, the compensation court is the sole judge of the credibility of the witnesses and the weight to be given their testimony.
3. **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, the evidence must be considered in the light most favorable to the successful party.
4. **Workers' Compensation: Words and Phrases.** Total disability in the context of the workers' compensation law does not mean a state of absolute helplessness, but means disablement of an employee to earn wages in the same kind of work, or work of a similar nature, that he or she was trained for or accustomed to perform, or any other kind of work which a person of his or her mentality and attainments could do.
5. **Workers' Compensation.** Whether an employee is permanently totally disabled, within the meaning of the workers' compensation law, is ordinarily a question of fact to be determined by the compensation court.
6. _____. When an employee is unable to perform the work for which he was previously trained, as a result of an injury covered by the Workers' Compensation Act, the employee is entitled to vocational rehabilitation service which may be necessary to restore the worker to suitable employment.
7. _____. Whether an injured worker is entitled to vocational rehabilitation is ordinarily a question of fact to be determined by the Workers' Compensation Court.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Scott A. Burcham, of Baylor, Evnen, Curtiss, Grimit & Witt, for appellant.

J. Thomas Rowen, of Carpenter, Rowen & Fitzgerald, P.C., for appellee.

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

GRANT, J.

Defendant, Omaha Box Company, appeals from an order on rehearing by the Workers' Compensation Court. The court found that plaintiff-appellee, Charles Willuhn, was injured in the course and scope of his employment with defendant on May 3, 1988, that as a result of that injury plaintiff was temporarily totally disabled up to January 24, 1990, and that plaintiff was permanently totally disabled thereafter. The court also found that plaintiff was entitled to further vocational rehabilitation, and awarded plaintiff attorney fees in the amount of $1,500.

On appeal, defendant assigns three errors: (1) that the evidence did not support the finding that the plaintiff is permanently and totally disabled, (2) that the court erred in awarding plaintiff additional vocational rehabilitation benefits, and (3) that it was error for the compensation court to award attorney fees to the plaintiff upon rehearing. We affirm.

The record on appeal shows the following facts. Plaintiff was employed by defendant as a truckdriver. His duties included driving, loading, and unloading semitrailers. On May 3, 1988, while in the course of his employment in unloading a truck, plaintiff injured his lower back, necessitating immediate medical attention. Plaintiff's family physician, Dr. Robert Brown, ordered a conservative treatment of the injury and prescribed rest, heat, physical therapy, and medication. He also scheduled a CAT scan and a bone scan for plaintiff on May 12, 1988. The CAT scan "revealed a herniated L-5, S-1 disc with a fragment on the right."

The conservative treatment was continued, with the addition of some continuous Astramorph blocks, but plaintiff showed no improvement. Brown referred plaintiff to Dr. Daniel McKinney, a neurosurgeon, who determined that surgery was necessary to treat plaintiff's condition. On July 21, 1988, McKinney performed a right hemilaminotomy and removed the herniated lumbar disk material. Plaintiff's condition began to improve, but in November 1988, his symptoms returned. On reevaluation, Dr. McKinney found a reherniation of the disk, and performed a second operation on February 21, 1989. McKinney stated that plaintiff had to have the two lumbar disk operations to correct the problems following the injury of May

3, 1988. Plaintiff showed gradual improvement until McKinney ultimately released him from his care on December 18, 1989, and returned plaintiff to Dr. Brown. Brown determined that plaintiff reached maximum medical improvement as of January 1, 1990, and rated plaintiff as having a 27-percent permanent partial disability, with a 40-pound restriction on lifting. Brown also suggested that plaintiff should not sit, stand, or walk for periods longer than 1 hour at a time, that plaintiff should not work at unprotected heights, and that plaintiff should use caution when around moving machinery or driving automotive equipment.

McKinney stated in a letter dated January 24, 1990, that plaintiff had reached maximum medical improvement, and assigned him a 25-percent permanent partial disability rating. McKinney also restricted plaintiff's lifting to 40 pounds and suggested that plaintiff should perform jobs which did not require frequent bending or twisting. The doctors agreed that plaintiff could not return to the job that he was doing at the time of his injury.

Plaintiff was born on June 4, 1940. He completed his sophomore year in high school and quit school his junior year. Thereafter, plaintiff's work experience has been almost exclusively as a driver of large diesel trucks. Various tests and interviews reveal that he is "a very smart individual, has good abilities in those areas that would indicate the potential for some type of formal or informal training."

The rehabilitation experts in this case disagree as to the most appropriate method of vocational rehabilitation for plaintiff. Defendant's vocational rehabilitation counselor asserts that plaintiff needs only "individualized, specialized placement" efforts. This type of placement would involve contacting individual employers, educating plaintiff regarding the process of applying and interviewing with a company, setting up interviews, and following up with the client to determine how an interview went.

In contrast, plaintiff's rehabilitation counselor testified that plaintiff needs vocational retraining. This counselor contended that none of plaintiff's previous employments required any skills which are directly transferable to work which falls within

his physical restrictions, and gave the opinion that "until [plaintiff] obtains a viable and comprehensive rehabilitation effort, he is going to remain totally unemployable."

As stated above, the compensation court found that plaintiff was temporarily totally disabled up to January 24, 1990, and permanently totally disabled thereafter and that plaintiff was entitled to vocational rehabilitation services, and awarded him attorney fees.

Findings of fact by the Workers' Compensation Court on rehearing have the same force and effect as a jury verdict in a civil case and will not be set aside on appeal where there is evidence sufficient to support them. Neb. Rev. Stat. § 48-185 (Reissue 1988); *Luehring v. Tibbs Constr. Co.*, 235 Neb. 883, 457 N.W.2d 815 (1990). As trier of fact, the compensation court is the sole judge of the credibility of the witnesses and the weight to be given their testimony. *Carter v. Weyerhaeuser Co.*, 234 Neb. 558, 452 N.W.2d 32 (1990). In testing the sufficiency of the evidence to support the findings of fact made by the Workers' Compensation Court, the evidence must be considered in the light most favorable to the successful party. *Id.*

Defendant's first assignment of error is that "[t]he Nebraska Workers' Compensation Court erred in finding that the record showed a preponderance of the evidence in favor of finding the Plaintiff permanently and totally disabled."

Defendant contends that plaintiff has the burden of proving the nature and extent of his claimed disability and that where the injury is subjective, the disability must be established by expert medical testimony. This is a correct statement of law. *Osborne v. Buck's Moving & Storage*, 232 Neb. 752, 441 N.W.2d 906 (1989). In this case, although both medical experts testified that plaintiff was employable, within his physical restrictions, such a finding does not necessarily mean that plaintiff was not totally disabled within the meaning of the workers' compensation law.

We stated in *Luehring v. Tibbs Constr. Co.*, 235 Neb. at 890, 457 N.W.2d at 820:

> Total disability in the context of the workers' compensation law does not mean a state of absolute helplessness, but means disablement of an employee to

> earn wages in the same kind of work, or work of a similar nature, that he or she was trained for or accustomed to perform, or any other kind of work which a person of his or her mentality and attainments could do. [Citations omitted.]

Defendant would have us ignore the plain meaning of testimony of the two doctors. Both said that plaintiff could return to work, within the lifting and movement restrictions which they described, but both had the opinion that plaintiff could not return to the job he had been performing at the time of his injury. The very nature of the restrictions precludes plaintiff from earning similar wages in the same kind of work, or work of a similar nature, that he was trained for or accustomed to perform: freight hauling and transportation.

Nothing in the record suggests any error on the part of the Workers' Compensation Court in this respect. Whether an employee is permanently totally disabled, within the meaning of the workers' compensation law, is ordinarily a question of fact to be determined by the compensation court. *Sherwood v. Gooch Milling & Elevator Co.*, 235 Neb. 26, 453 N.W.2d 461 (1990). There is sufficient evidence to support the court's finding. We affirm the court's finding that plaintiff is permanently totally disabled. Defendant's first assignment of error is without merit.

Defendant's second assignment asserts that "[t]he Nebraska Workers' Compensation Court erred in finding that Plaintiff was entitled to further vocational rehabilitation benefits." This assignment is not premised on plaintiff's degree of disability. We have already affirmed the finding that plaintiff is totally disabled. Defendant's assignment of error is premised on the allegation that plaintiff did not cooperate fully with the rehabilitation program determined for him by defendant's rehabilitation expert.

We have held that when an employee is unable to perform the work for which he or she was previously trained, as a result of an injury covered by the Workers' Compensation Act, the employee is entitled to vocational rehabilitation service which may be necessary to restore the worker to suitable employment. *Behrens v. Ken Corp.*, 191 Neb. 625, 216 N.W.2d 733 (1974).

We have also held that a determination as to whether an injured employee is able to perform the work for which that employee was previously trained is a question of fact to be determined by the compensation court, and that determination will not be disturbed by an appellate court unless the finding is clearly erroneous. *Sherwood v. Gooch Milling & Elevator Co., supra*; *Smith v. Hastings Irr. Pipe Co.*, 222 Neb. 663, 386 N.W.2d 9 (1986). Both McKinney and Brown in this case have expressed the opinion that plaintiff could not, after his injury, perform the duties of the job which he was doing at the time of his injury. The compensation court did not err in finding that plaintiff was entitled to vocational rehabilitation.

Whether an injured worker is entitled to vocational rehabilitation is ordinarily a question of fact to be determined by the Workers' Compensation Court. *Yager v. Bellco Midwest*, 236 Neb. 888, 464 N.W.2d 335 (1991). In the present case, the record contains the testimony of two rehabilitation consultants, one called by each party. Plaintiff's rehabilitation expert conceded that on-the-job training was a viable option for vocational rehabilitation, but suggested that plaintiff's aptitude levels, interests, and physical limitations had not been taken into account when he was presented with lists of jobs available. Though vocational testing did reveal that plaintiff was an intelligent individual, plaintiff's expert expressed concern with plaintiff's lack of familiarity with computers. He stated that the ubiquitous use of computers would require that plaintiff "at least [be] able to enter into, read, maybe [do] some light programming" on a computer. This could be accomplished, in that rehabilitation expert's opinion, through some type of short-term training. These facts led the compensation court to conclude correctly that plaintiff is not prepared to return to the workforce armed only with his ability to learn quickly.

The opinions of the two were considered and weighed by the compensation court and a determination was made. The compensation court found that plaintiff was entitled to vocational rehabilitation, and that finding is supported by the evidence.

Defendant then contends that plaintiff refused to comply with the rehabilitation plan offered by defendant's

rehabilitation counselor, and cites Neb. Rev. Stat. § 48-162.01(6) (Reissue 1988), which provides:

> Whenever the Nebraska Workers' Compensation Court or judge thereof determines that there is a reasonable probability that with appropriate training, rehabilitation, or education a person who is entitled to compensation for total or partial disability which is or is likely to be permanent may be rehabilitated . . . if the injured employee without reasonable cause refuses to undertake the rehabilitation, training, or educational program determined by the compensation court or judge thereof to be suitable for him or her . . . the compensation court or judge thereof may suspend, reduce, or limit the compensation otherwise payable . . . .

There is no evidence in the record that plaintiff has refused to undertake any "rehabilitation, training, or educational program determined by the compensation court." The record shows that plaintiff had already arranged for 3 days of evaluation and testing by a state agency to begin 2 weeks after the hearing before the three-judge panel.

The compensation court summed up the disagreement of the parties as to plaintiff's cooperation with defendant's rehabilitation service as follows:

> The defendant alleges that job placement services have not been successful because of the failure of the plaintiff to cooperate. The plaintiff alleges that he has cooperated with the defendant and further alleges that he has never been adequately tested for vocational rehabilitation services and that the job placement services furnished by the defendant did not provide suitable employment for him.

The court determined that plaintiff had not been guilty of noncooperation and found that the job placement service furnished by the defendant did not provide suitable employment for him. There is ample evidence to support that finding. Defendant's second assignment of error is without merit.

Finally, defendant asserts that it was error for the court on rehearing to award plaintiff attorney fees. Neb. Rev. Stat.

§ 48-125 (Reissue 1988) provides in pertinent part:

> If the employer files an application for a rehearing before the compensation court . . . and fails to obtain any reduction in the amount of such award, the compensation court shall allow the employee a reasonable attorney's fee to be taxed as costs against the employer for such rehearing . . . .

There was no reduction of the amount of the award to plaintiff, and therefore, in this regard defendant's third assignment of error is without merit.

We hold that the Workers' Compensation Court was correct in its findings and conclusions, and we therefore affirm.

Plaintiff is allowed a fee of $1,500 for the services of his attorney in this court.

AFFIRMED.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. JOHN M. GILROY, RESPONDENT.

483 N.W.2d 135

Filed April 23, 1992. No. S-91-696.

Original action. Judgment of suspension.

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

PER CURIAM.

This is a disciplinary proceeding. The respondent does not question the referee's findings or his recommendation of a 1-year suspension.

Respondent, John M. Gilroy, was a close personal friend of and had represented Maurice A. Ludwick in business and personal matters for many years. Respondent assisted Ludwick in securing a construction loan and, at Ludwick's request, agreed to handle the loan proceeds and pay the bills. Respondent paid the bills as Ludwick requested and obtained

lien waivers as creditors were paid.

Respondent was also retained by Ludwick to act as a general contractor for the actual construction of Ludwick's residence. Respondent considered this activity to be nonlegal in nature. Although respondent billed Ludwick for his services, he was generally not paid because, according to respondent, Ludwick had "a lot of other problems."

Respondent used Ludwick's loan proceeds for personal purposes as needed, but was always able to pay back the funds, and respondent even advanced Ludwick nearly $1,500 of his own funds at the very beginning of the construction process.

The Ludwick funds were not retained in a separate trust account. At one point, without utilization of the funds respondent would have been overdrawn by over $31,000. Ludwick admitted he fully expected that respondent would use the funds for his personal use from time to time. He additionally had agreed with respondent that the loan funds would not be kept separate from respondent's other business funds.

Formal charges were filed against the respondent, setting forth violations of the following provisions of the Code of Professional Responsibility: DR 1-102(A)(1), (3), (4), (5), and (6); and DR 9-102(A) and (B)(3). The evidence is sufficient to support these charges.

Although the evidence would justify a harsher penalty, the referee found sufficient mitigating circumstances, namely the close personal relationship and the existence of good faith, to warrant the recommendation of a 1-year temporary suspension from the practice of law. We agree.

Accordingly, the respondent is hereby suspended from the practice of law in the State of Nebraska for a period of 1 year, effective immediately. Furthermore, we order respondent to successfully complete a course on legal ethics at an accredited law school.

JUDGMENT OF SUSPENSION.

WHITE, J., not participating.

JAMES KEITGES AND CHERYL KEITGES, HUSBAND AND WIFE, APPELLANTS, V. DARRELL S. VANDERMEULEN, APPELLEE.

483 N.W.2d 137

Filed May 1, 1992. No. S-89-445.

1. **Damages.** The principle underlying allowance of damages is to place the injured party in the same position, so far as money can do it, as he would have been had there been no injury or breach of duty, that is, to compensate him for the injury actually sustained.
2. **Property: Damages.** Where the injury is such that the premises may be restored to as good condition as it was before, the measure of recovery is the fair and reasonable cost and expense of such restoration.
3. _____: _____. Where the land damaged can be returned to its prior condition by treatment, grading, or otherwise, the damage is temporary and the landowner is entitled to such expenses as part of his or her damages.
4. **Actions: Property: Damages.** In an action for compensatory damages for cutting, destroying, and damaging trees and other growth, and for related damage to the land, when the owner of land intends to use the property for residential or recreational purposes according to his personal tastes and wishes, the owner is not limited to the difference in value of the property before and after the damage or to the stumpage or other commercial value of the timber. Instead, he may recover as damages the cost of reasonable restoration of his property to its preexisting condition or to a condition as close as reasonably feasible. However, the award for such damage may not exceed the market value of the property immediately preceding the damage.
5. **Property: Damages.** If improvements have been constructed on the damaged realty, recovery for restoration of damaged trees and vegetation is limited to an amount not exceeding the market value of the land as if it were unimproved.
6. **Property: Damages: Evidence.** When there is no factual question but that the plaintiff's intended use of the property is for residential or recreational purposes and the plaintiff seeks only to recover the cost of restoring his property, evidence relating to the land's diminution in value has no relevance, although evidence of the property's value immediately before the damage is relevant.

Appeal from the District Court for Washington County: DARVID D. QUIST, Judge. Reversed and remanded for a new trial.

Barbara Thielen, of Taylor, Fabian, Thielen & Thielen, for appellants.

Terry K. Gutierrez, of Gast & Peters, for appellee.

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

BOSLAUGH, J.

This action was brought by the plaintiffs, James and Cheryl Keitges, to recover damages for the destruction of trees, shrubs, and vegetation on their property when the defendant, Darrell S. VanDermeulen, attempted to clear a path for the construction of a fence. The defendant's property is adjacent to the plaintiffs' land.

In the first cause of action of the amended petition, the plaintiffs sought treble damages under Neb. Rev. Stat. § 25-2130 (Reissue 1989) for willful trespass. In the second cause of action the plaintiffs sought damages for negligent trespass. The jury found that the defendant's trespass was not willful and returned a verdict in the amount of $3,340. The plaintiffs have appealed from that judgment.

The plaintiffs' 13 assignments of error, when summarized, allege that the district court erred in (1) failing to allow them to present evidence relating to the cost of returning their property to its condition as it existed prior to the defendant's trespass, and improperly instructing the jury on the issue of damages; (2) admitting photographic evidence offered by the defendant which depicted the site of defendant's trespass; and (3) overruling their motion for a new trial.

The record shows that the plaintiffs' land is a rectangular 10.01-acre tract of unimproved land in Washington County, which property they purchased in 1981 with the intention of someday building a house there. The southern one-third of the lot is planted in bromegrass, and the northern two-thirds of the lot is heavily wooded. At the trial, no evidence was presented to show that any of the trees on the plaintiffs' land had been deliberately planted. The evidence which was presented tends to show that the woods on the plaintiffs' land was a growth of trees and vegetation indigenous to that area. As of the date of the trial, the plaintiffs had not yet constructed a house on the land, but were using the property for recreational purposes such as "nature hikes" with their children.

The defendant, who raises thoroughbred horses, is the owner of an 11.88-acre tract of land which adjoins the east line of the plaintiffs' property. In December 1984, the defendant decided to construct a fence along the line between his land and the

plaintiffs' land. He had previously asked the plaintiffs to share in the cost of such a fence, but the plaintiffs declined to do so.

After hiring a bulldozer operator, the defendant began to clear a path through the thick woods and vegetation which existed along the boundary between their land. The defendant directed the bulldozer operator to drive the bulldozer behind him and to his left as he walked from the north to the south ahead of the bulldozer along what he thought was the boundary between their property.

After the bulldozer had traveled at least 205 feet, clearing trees and shrubbery along the way, the defendant realized he had strayed 25 to 30 feet onto the plaintiffs' property. The defendant then instructed the bulldozer operator to leave the plaintiffs' property.

Apparently undaunted by his misdirection of the bulldozer, the defendant then used a chain saw in an attempt to clear a path for the proposed fence. Despite using an Army compass, the defendant again strayed onto the plaintiffs' property, cutting down all or portions of up to 30 additional trees.

Sometime later, the plaintiffs discovered the damage which defendant had done on their land. James Keitges testified that in the damaged area "all the trees had either been knocked down, were lying on their sides, or they were uprooted leaning over halfway with the roots exposed or there were trees that had been cut down and piled in big piles with the soil." The damage covered an area at least 450 feet long and 8 to 10 feet wide. Approximately 100 trees had been damaged or destroyed.

James Keitges then contacted an Earl May Garden Center in an effort to determine whether the damage could be repaired and, if so, at what cost. Nurseryman Carl Johnson examined the damage to the plaintiffs' property and determined that it would be possible to return the damaged area to substantially the same condition as it existed prior to defendant's trespass. Johnson prepared a detailed estimate of the cost of restoring the plaintiffs' property to its prior condition, specifically itemizing the replacement trees by size and cost, and including the cost of labor and materials for replanting. However, the trial court refused to allow Johnson to testify regarding the cost or feasibility of restoring the plaintiffs' land. Plaintiffs' offer of

proof indicated that if Johnson had been allowed to testify, he would have testified that in April 1985 the reasonable cost of such restoration was $12,219.07 and that price increases had raised that amount to $13,842.80 at the time of trial.

At the trial, James Keitges testified that in his opinion, the value of the 10.01-acre tract was approximately $55,000 immediately before the damage occurred and approximately $25,000 immediately after the damage occurred.

The defendant's expert witness, Russell Nelson, testified that he had appraised the plaintiffs' property and had estimated its fair market value at $21,500. Nelson testified that in his opinion, the destruction of the trees had no effect upon the market value of the plaintiffs' property, but he was unable to support this opinion with market data relating to properties which had suffered similar damage.

The plaintiffs requested their expert witness Richard See to determine the amount of any loss in value occurring to their property as a result of the damage done by the defendant. See testified that such a determination is usually made by conducting a "before and after analysis." In attempting to conduct this analysis using a sales comparison approach, he found no properties that had suffered a similar loss and was unable to measure the market reaction to the destruction of trees using this approach. See testified that by using the "cost approach," he was able to obtain sufficient data to reach an opinion concerning the loss in value to the plaintiffs' property which resulted from the damage to the trees. However, the trial court did not allow See to testify as to that opinion. The plaintiffs' offer of proof indicated that See would have testified that using the cost approach, he would rely on a contractor's estimate and, in this case, the Earl May estimate prepared by Johnson.

The plaintiffs first contend that the trial court erred in not allowing them to present evidence relating to the cost of restoring trees and vegetation which the defendant damaged or destroyed and in improperly instructing the jury on the issue of damages. As noted previously, the district court refused to allow the plaintiffs to introduce evidence of prospective restoration costs. The district court also refused the plaintiffs'

proposed jury instruction which would have instructed the jury that the plaintiffs were "entitled to recover the reasonable cost of repairing the (property) to substantially the same condition it was in before it was damaged." Instead, the trial court instructed the jury with respect to the issue of damages as follows:

> The Defendant has admitted and the Court has determined as a matter of law, that the Defendant trespassed upon the land of the Plaintiff. The Court has also determined that the Plaintiff sustained damages as a result of that trespass. Therefore, you must decide how much money it will take to fairly and adequately compensate the Plaintiff for that damage. *In arriving at that amount of money you may consider the market value of the property before it was damaged and the market value of the property after the damage.*

(Emphasis supplied.) Although the trial court instructed the jury that it could "consider" the diminution in value of the property in determining the damages, it did not specifically instruct the jury as to the measure of damages. During a conference with counsel for the parties outside the presence of the jury, the trial court explained the reason for not permitting testimony relating to the feasibility or estimated cost of restoring the plaintiffs' land to its prior condition, and also the reason for giving the quoted instruction. The trial court stated that

> under the facts of this case to allow the jury to determine whether or not the property could be restored to its original condition would have been extremely prejudicial because of the nature of the area damaged, the fact that the evidence revealed that it was random growth, the trees were not of an ornamental type. There was no evidence that they were crop-type, cash-type trees and so, therefore, the instructions as given, I found none that fit the situation completely.
>
> The old NJI instruction as to damage to property did not work; the new NJI instruction — proposed instructions, in my opinion, do not work and so I found that they do not apply in the case and that is the reason for

the modification and my reason for giving that type of damage instruction.

The trial court may have been referring to NJI2d 4.20 through 4.30.

Apparently, the district court found that because the trees which the defendant had destroyed were not "ornamental" and were not harvested as timber, the plaintiffs could recover only the diminution in value of their land which the defendant had caused by his trespass. The court then determined that because the plaintiffs were limited to the diminution in the value of their land, evidence as to the potential feasibility and cost of restoring the property was irrelevant and prejudicial.

Thus, the question presented is whether a plaintiff is entitled to recover the cost of restoring trees and vegetation on land which he holds for residential or recreational purposes when a portion of a natural woods is destroyed. The issue appears to be one of first impression in Nebraska.

Other jurisdictions have fashioned various rules to deal with similar questions. See, generally, Annot., 95 A.L.R.3d 508 (1979). While some courts in other states have awarded restoration costs, a distinction has sometimes been made with respect to the types of trees which have been damaged. For example, in *The Rector Etc. of St. Christopher's v. C. S. McCrossan, Inc.*, 306 Minn. 143, 235 N.W.2d 609 (1975), the Supreme Court of Minnesota departed from its prior rule that the damages for destruction of trees and shrubbery is the diminution in the value of the land, and held that "where trees and shrubbery have aesthetic value to the owner as ornamental and shade trees or for purposes of screening sound and providing privacy, replacement cost may be considered to the extent that the cost is reasonable and practical." *Id.* at 146, 235 N.W.2d at 611. However, in a companion case decided the same day as *Rector*, the same court found the diminution in value of the land to be the proper measure of damages where destroyed trees were "for the most part, quite small, ill-formed, and not particularly desirable as shade trees or ornamental trees but did serve to prevent erosion and act as a sound barrier." *Baillon v. Carl Bolander & Sons Co.*, 306 Minn. 155, 157, 235 N.W.2d 613, 615 (1975). In the *Baillon* case the court stated, "To adopt

the replacement rule would here conceivably involve an expense greatly out of proportion to the actual damage to the real estate." *Id.*

Similarly, in *Kebschull v. Nott*, 220 Mont. 64, 714 P.2d 993 (1986), the Supreme Court of Montana found that the proper measure of damages for injury by fire to approximately 5.8 acres of natural, unimproved land consisting mainly of underbrush and noncommercial trees was the difference between the market value of the property before and after the fire. The court noted that in ascertaining the proper measure of damages, "a determining factor is whether the destroyed trees have any value apart from the land where they stood." 714 P.2d at 995.

Likewise, in *Kapcsos v. Hammond*, 13 Ohio App. 3d 140, 468 N.E.2d 325 (1983), the Court of Appeals of Ohio found the proper measure of damages to be "the difference between the fair market value of the property prior to the trespass and the fair market value of the property after the trespass," *id.* at 142, 468 N.W.2d at 327, where the trees in question were "a woodland mix and were not particularly unique to the parcel," and where no evidence was presented that the trees were "in any way ornamental or rare," *id.* at 141, 468 N.W.2d at 327. However, in *Denoyer v. Lamb*, 22 Ohio App. 3d 136, 490 N.E.2d 615 (1984), a different three-judge panel of that court later held the following with respect to a woods characterized as a mature climax forest:

> [I]n an action for compensatory damages for cutting, destroying and damaging trees and other growth, and for related damage to the land, when the owner intends to use the property for a residence or for recreation or for both, according to his personal tastes and wishes, the owner is not limited to the diminution in value (difference in value of the whole property before and after the damage) or to the stumpage or other commercial value of the timber. He may recover as damages the costs of reasonable restoration of his property to its preexisting condition or to a condition as close as reasonably feasible, without requiring grossly disproportionate expenditures and with allowance for the natural processes of regeneration within

a reasonable period of time. [Citations omitted.]

Id. at 138, 490 N.E.2d at 618. In explaining its holding in *Denoyer*, the court also stated:

> The cardinal rule of the law of damages is that the injured party shall be fully compensated. [Citation omitted.] If an owner is to be fully compensated for temporary (reparable) damage to his property, then what he expects from the use of it is a vital factor.
>
> "* * * The owner of property has a right to hold it for his own use as well as to hold it for sale, and if he has elected the former he should be compensated for an injury wrongfully done him in that respect, although that injury might be unappreciable to one holding the same premises for purposes of sale.* * * " *Gilman v. Brown* (1902), 115 Wisc. 1, 8, 91 N.W. 227, 229.
>
> . . . Shade and ornamental trees used for a specific, identifiable purpose are compensable. Annotation (1979), 95 A.L.R. 3d 508. Recovery, however, has not been limited to trees used for "specific uses." It has been awarded when the owner's personal use is neither specific nor measurable by commercial standards, and when the trees form a part of an ecological system of personal value to the owner. *Heninger v. Dunn*, [101 Cal. App. 3d 858, 162 Cal. Rptr. 104 (1980)] (two hundred twenty-five trees and vegetative undergrowth destroyed in remote mountain land to make a new road that actually enhanced the value of the land as a whole); *Roark v. Musgrave* (1976), 41 Ill. App. 3d 1008, 355 N.E. 2d 91 (rough and hilly land accessible only by horse or four-wheel-drive vehicle) . . . *Morris v. Ciborowski* (1973), 113 N.H. 563, 311 A. 2d 296 (personal residential and recreational use); *Huber v. Serpico* (1962), 71 N.J. Super. 329, 339-340, 176 A. 2d 805, 810 (fifty trees cut in a "rear triangular protrusion" from the main residential lot); *Thatcher v. Lane Constr. Co.*, [21 Ohio App. 2d 41, 254 N.E.2d 703 (1970)] (trees on the rear of a residential lot). A nurseryman's testimony about the "purchase value" of comparable trees and shrubs, including planting, has been allowed. *Tatum v. R & R Cable, Inc.* (1981), 30 Wash.

App. 580, 583, 636 P.2d 508, 511.

Denoyer v. Lamb, 22 Ohio App. 3d at 139-40, 490 N.E.2d 619-20.

In addition to the cases discussed in *Denoyer*, some examples of other instances where restoration costs have been allowed include *Gross v. Jackson Tp.*, 328 Pa. Super. 226, 476 A.2d 974 (1984) (damage to hedges and shrubs sustained when township widened road); *Bangert v. Osceola County*, 456 N.W.2d 183, 190 (Iowa 1990) (trees maintained for "sentimental and historic reasons, for shade and windbreaks, as well as for environmental, wildlife and special landmark purposes"); and *Revels v. Knighton*, 305 Ark. 109, 805 S.W.2d 649 (1991) (replacement cost and treble damages awarded for destruction of six to eight shade trees). Other jurisdictions have also allowed compensation for the aesthetic value of destroyed trees. See, e.g., *Kroulik v. Knuppel*, 634 P.2d 1027 (Colo. App. 1981).

A number of courts have cited with approval the Restatement (Second) of Torts § 929 (1979) in deciding that injured parties may be entitled to recover the cost of replacing damaged trees. That section of the Restatement reads in part:

> (1) If one is entitled to a judgment for harm to land resulting from a past invasion and not amounting to a total destruction of value, the damages include compensation for
>
> (a) the difference between the value of the land before the harm and the value after the harm, *or at his election in an appropriate case, the cost of restoration that has been or may be reasonably incurred* . . . .

(Emphasis supplied.) The Restatement, *supra* at 544.

The rule set forth in the Restatement is consistent with this court's decision in *"L" Investments, Ltd. v. Lynch*, 212 Neb. 319, 327, 322 N.W.2d 651, 656 (1982), quoting *Schiltz v. Cullen-Schiltz & Assoc., Inc.*, 228 N.W.2d 10 (Iowa 1975), wherein this court stated:

> "[T]he principle underlying allowance of damages is to place the injured party in the same position, so far as money can do it, as he would have been had there been no injury or breach of duty, that is, to compensate him for the

injury actually sustained . . . .

. . . .

"Where the injury is such that the premises may be restored to as good condition as it was before, the measure of recovery is the fair and reasonable cost and expense of such restoration."

While the *Lynch* case involved damage to a building, this court has employed similar reasoning with respect to unimproved land. In *Kula v. Prososki*, 228 Neb. 692, 424 N.W.2d 117 (1988), a political subdivision's action caused the flow of surface water off the plaintiff's land to be impeded, which, in turn, resulted in expenses for crop replanting and treatment of the land to eliminate the chemical problems and salt caused by the ponding of water. In determining the proper measure of damages, this court stated: "It is our belief, and we so hold, that where the land damaged can be returned to its prior condition by treatment, grading, or otherwise, the damage is temporary and the landowner is entitled to such expenses as part of his or her damages." *Id.* at 697-98, 424 N.W.2d at 121.

In the present case, the defendant argues that because the trees which he damaged could be characterized as "random growth" indigenous to the area rather than "ornamental or rare" trees, the plaintiffs' damages must be limited to the diminution in the market value of the land. However, we believe that is an artificial distinction. One person's unsightly jungle may be another person's enchanted forest; certainly the owner of such land should be allowed to enjoy it free from a trespasser's bulldozer. Indeed, a trespasser should not be allowed, with impunity, to negligently or willfully wreak havoc on a landowner's natural woods, and the landowner's attempted recovery for such injury should not be entirely frustrated by the fact that the market does not reflect his personal loss.

Thus, we hold that in an action for compensatory damages for cutting, destroying, and damaging trees and other growth, and for related damage to the land, when the owner of land intends to use the property for residential or recreational purposes according to his personal tastes and wishes, the owner

is not limited to the difference in value of the property before and after the damage or to the stumpage or other commercial value of the timber. Instead, he may recover as damages the cost of reasonable restoration of his property to its preexisting condition or to a condition as close as reasonably feasible. However, the award for such damage may not exceed the market value of the property immediately preceding the damage. See *"L" Investments, Ltd. v. Lynch*, 212 Neb. 319, 322 N.W.2d 651 (1982). If improvements have been constructed on the damaged realty, recovery for restoration of damaged trees and vegetation should be limited to an amount not exceeding the market value of the land as if it were unimproved.

Furthermore, under this rule, when there is no factual question but that the plaintiffs' intended use of the property is for residential or recreational purposes and the plaintiff seeks only to recover the cost of restoring his property, evidence relating to the land's diminution in value has no relevance, although evidence of the property's value immediately before the damage is relevant.

The record before us shows that there is no question in this case but that the plaintiffs held their land for residential and recreational use. They purchased the land in 1981 with the intention of building a house on the property, and although no construction had begun at the time of the trial, the testimony of James Keitges shows that the plaintiffs still intend to construct a house after they have completely paid for the land. The record also shows that James Keitges has a degree in biological science and that he and his family use their 10-acre lot as a family retreat for "nature hikes" and "nature study." Thus, we believe that the plaintiffs are entitled to recover the cost of replacing trees and vegetation damaged or destroyed by the defendant, and they must be allowed to present evidence of the feasibility and cost of such restoration.

Although our decision here eliminates the need to consider the plaintiffs' third summarized assignment of error and that portion of the plaintiffs' second summarized assignment of error which relates to the measure of damages, we consider that part of the plaintiffs' second assignment of error which involves an issue likely to arise during a retrial of this case.

The defendant offered 18 photographs of the damaged area which were taken 4 years after his trespass, admitting that they did not fairly and accurately represent the damage as it appeared at the time it occurred in 1984. Defendant offered these photographs to show the types of trees which were present in the area which was damaged. The plaintiffs objected to the introduction of the photographs, arguing that any probative value the photographs may have had was outweighed by the prejudice that would result from their submission to the jury. See Neb. Rev. Stat. § 27-403 (Reissue 1989).

In their brief, the plaintiffs argue that the submission of the photographs to the jury was unduly prejudicial because the defendant's foundational testimony regarding the photographs described the pictures as depicting the "damaged area," "the path of the bulldozer" and "regrowth." Brief for appellants at 21. However, the trial court properly cautioned the jury

> to remember the testimony of the witnesses. [The photographs] were taken four years after the incident in question and they are not to be used by you in considering what the damage was in December of 1984, after the incidents in question. They are merely being received to show you the type of trees involved in there.

It is difficult to understand the need for all 18 photographs, many of which are largely duplicative of each other, to show the types of trees which grew in the area damaged by the defendant. However, the plaintiffs do not object to the cumulative nature of this evidence. Given the trial court's admonition that the photographs were offered only to show the types of trees damaged, we cannot say that the trial court abused its discretion in admitting such evidence. See *State v. Messersmith*, 238 Neb. 924, 473 N.W.2d 83 (1991).

The judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

STATE OF NEBRASKA, DEPARTMENT OF ROADS, APPELLEE, V. JACK MELCHER, DOING DUSINESS AS J & B ENTERPRISES, APPELLANT, AND LINCOLN COUNTY, NEBRASKA, INTERVENOR-APPELLEE.

483 N.W.2d 540

Filed May 1, 1992. No. S-89-818.

1. **Equity: Appeal and Error.** In an equity action, matters of fact are reviewed by an appellate court de novo on the record.
2. _____: _____. In the review of an equity action, the appellate court reaches a conclusion independent of the factual findings of the trial court; however, where the credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the circumstance that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
3. **Appeal and Error.** As to questions of law, an appellate court has the obligation to reach its own independent conclusion.
4. **Constitutional Law.** A court ordinarily will not consider constitutional challenges in the absence of a specification of the provision that is claimed to be violated.
5. **Constitutional Law: Rules of the Supreme Court: Statutes: Notice.** The Supreme Court will ordinarily not consider constitutional questions in the absence of compliance with Neb. Ct. R. of Prac. 9E (rev. 1991), which requires that a party presenting a case involving the federal or state constitutionality of a statute file and serve a separate written notice thereof with the Supreme Court Clerk at the time of filing such party's brief.
6. **Statutes: Intent: Appeal and Error.** In construing a statute, an appellate court considers the statutory objective to be accomplished, the problem to be remedied, or the purpose to be served, and places on the statute a reasonable construction which best achieves the purpose of the act, rather than a construction which defeats that purpose.
7. **Statutes.** Generally, when statutory language is plain and unambiguous, no judicial interpretation is needed to ascertain a statute's meaning, so that, in the absence of a statutory indication to the contrary, words used in a statute will be given their ordinary meaning.
8. _____. A statute is open for construction when the language used requires interpretation or may reasonably be considered ambiguous.
9. **Motor Vehicles: Words and Phrases.** For the purposes of Neb. Rev. Stat. § 39-2602(2) (Reissue 1988), the word "wrecked" relates to the outward appearance of a vehicle; a wrecked vehicle is one which is seriously damaged in its outward appearance.
10. _____: _____. For the purposes of Neb. Rev. Stat. § 39-2602(2) (Reissue 1988), a scrapped vehicle is one which has no value whatsoever as a vehicle, but the only worth of which is in the value of its metal for remelting or remanufacturing.
11. _____: _____. For the purposes of Neb. Rev. Stat. § 39-2602(2) (Reissue 1988), a ruined vehicle is one which, through destruction or disintegration, has

become formless, useless, or valueless.

12. _____: _____. For the purposes of Neb. Rev. Stat. § 39-2602(2) (Reissue 1988), a junked vehicle is one which is no longer intended or in condition for legal use upon the public highway.

13. _____: _____. For the purposes of Neb. Rev. Stat. § 39-2602(2) (Reissue 1988), a dismantled vehicle is one which has been stripped of its furnishings or equipment.

Appeal from the District Court for Lincoln County: DONALD E. ROWLANDS II, Judge. Reversed and remanded with direction.

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

Robert M. Spire, Attorney General, and K. Osi Onyekwuluje for appellee.

Joe W. Wright, Deputy Lincoln County Attorney, for intervenor-appellee.

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

CAPORALE, J.

I. INTRODUCTION

The district court enjoined the defendant-appellant, Jack Melcher, doing business as J & B Enterprises, from maintaining certain operations which the plaintiff-appellee, State of Nebraska, Department of Roads, asserts constitute the use of real property as a junkyard, in violation of Neb. Rev. Stat. § 39-2601 et seq. (Reissue 1988). The intervenor-appellee, Lincoln County, avers that the operations also constitute use of the property as a junkyard or salvage yard, in violation of certain of its zoning regulations. Melcher claims, in summary, that the district court erred (1) in failing to declare the act unconstitutional, (2) in concluding that the evidence established a violation of the act and of the regulations, and (3) in failing to find that his past use of the property permits him to continue his operations. We reverse, and remand with direction.

II. SCOPE OF REVIEW

As a suit for an injunction, this is an action in equity and, as

to matters of fact, is reviewed by an appellate court de novo on the record. *City of Newman Grove v. Primrose, ante* p. 70, 480 N.W.2d 408 (1992); Neb. Rev. Stat. § 25-1925 (Supp. 1991). In such review, the appellate court reaches a conclusion independent of the factual findings of the trial court; however, where the credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the circumstance that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. See *State v. Nebraska Assn. of Pub. Employees*, 239 Neb. 653, 477 N.W.2d 577 (1991).

However, as to questions of law, an appellate court has the obligation to reach its own independent conclusion. See *City of Newman Grove v. Primrose, supra.*

III. FACTS

The property consists of approximately 5.96 acres of Lincoln County, which the record places at the northwest corner of Lincoln County road L56D and Interstate 80 at the Brady Interchange, mile marker 199, within 1,000 feet of the State's right-of-way.

Kent Peterson, a former in-law of Melcher's, leased the property from Rich and Virginia Peckham on December 10, 1968. Peterson then proceeded to build and operate a gas station, a drive-in diner, and a campground with restrooms for campers. Peterson later erected a steel building from which he operated a maintenance shop and, subsequent thereto, built a second gas station in front of the repair shop. All this was completed by 1970.

In order to attract business, Peterson placed several inoperable automobiles in front of his shop, "so it looked like someone was there." On occasion, travelers on the Interstate would leave their automobiles for repair, fail to pay, and abandon them. Peterson thought that one year he "ended up with just about 50 cars," although he did not leave all of them sitting on the property.

Through a series of photographs, Peterson identified vehicles and farm equipment which he had placed on the property in 1969 or 1970 and which were still in place as of the

date of trial, June 28, 1989. Although Peterson noted that there could be more vehicles than he could remember, he specifically recalled a "[t]hresher, corn sheller, [a] wagon [and a] pickup truck." When asked whether vehicles had been sitting on the property since 1969 or 1970 "in various states of repair or dismantling," Peterson responded in the affirmative. Moreover, according to Peterson, it was not uncommon for people to work on their own vehicles in the campground located on the property.

In 1972, Peterson subleased part of the property to Carol Shearer and her husband. Peterson testified that it was not uncommon for automobiles to be repaired outside the shop while the Shearers subleased the property. However, Carol Shearer testified that she had no knowledge of her husband repairing automobiles outdoors.

Peterson also attested that the Shearers operated the business as a junkyard, as they dismantled automobiles and sold parts. Carol Shearer admitted that she and her husband operated a maintenance garage on Peterson's property from August 1972 until September 1974, but claimed that there were no old, nonworking automobiles on the premises while they sublet the premises. Photographs taken in 1972 corroborate Shearer's testimony in this regard. In addition, several aerial photographs taken on May 14, 1973, depict approximately 12 automobiles on the property and, according to Shearer, show "no excess of any vehicles or any other trash." She stated further:

> When we moved there — when we moved in and when we moved out, the premises were kept tidy and neat at all times. My husband was very meticulous about having things neat. There was never anything left lying around. Motors were disposed of and tires were disposed of. It was never left in a mess.

After the Shearers left the property in 1974, Peterson managed the businesses until 1978. Melcher first subleased one of the gas stations in 1976 and purchased the property in 1982.

Peterson opined that the "general nature of the business" had not changed between 1969 and February 1978, when Melcher took over. Melcher also testified there was no substantial change in the nature of the business when he started

occupying the premises, except for the addition of a machine facility.

In approximately 1986 or 1987, Melcher began purchasing old military equipment. As a result of his growing collection of military vehicles, he formed the "Brady Museum Foundation," a Nebraska nonprofit corporation. Melcher set aside a portion of the property for the display of military and other vehicles.

When asked whether all of the automobiles on the premises were there for repairs, Melcher responded:

> Some of them are. Some of them are there because they are on a display status. In other words, we have some vehicles there that have been hit with land mines. People don't realize the force of a land mine so you have to have the bent iron in a sense, with the jagged edges to show the public what force a land mine has and what it can do.
>
> Some of the vehicles there, the people have asked to park them there to sell them. Some are waiting to be picked up after repairs. Some are my personally owned vehicles.

Melcher further testified that on occasion the police department asks him to pick up vehicles from the Interstate; he brings these to his property, where he puts them "in storage." Melcher asserted that he does not dismantle automobiles or sell parts from old vehicles. He claimed that as of the date of trial, only 5 of the 25 to 30 automobiles on the property were inoperable.

The most recent pictures show that in addition to vehicles, on the property there are a mobile home, a trailer camper, and other assorted objects such as tires, automobile parts, and miscellaneous equipment. Aerial photographs taken since 1978 reveal a substantial increase over a period of time in the number of automobiles dotting the property. A photograph dated May 3, 1978, shows approximately 10 vehicles on the property; a photograph dated March 11, 1981, shows approximately 23 vehicles; a photograph dated June 5, 1984, shows approximately 25 vehicles; and a photograph dated March 29, 1988, shows approximately 40 vehicles.

Noel Brown, a special permits technician with the Department of Roads, testified that until 1972, the Peterson

property was clean, "not junked up, you might say." Brown explained that between 1972 and 1984, the property began "to get an accumulation of acquired extra things." Finally, in 1984, Brown visited with Melcher because of the "vast accumulation of abandoned motor vehicles, other assorted nonferrous, dismantled, stored automobiles. It looked like an automobile graveyard." At that time, Brown suggested that Melcher get a permit to operate his business. However, Peterson testified that to his knowledge neither he nor Melcher ever operated the property as a junkyard or salvage yard. In any event, Melcher did not obtain a permit, so in 1987 Brown asked for a departmental review as to whether Melcher's use of the property was in violation of law. Nonetheless, Brown admitted that, as shown by photographs, approximately six of the vehicles which were on the property in 1969 or 1970 were still there in 1987, 1988, and 1989.

Bob L. Mann, who owns a cabin near the Melcher property, claimed that up to 1971 the property was in a clean state but that since that time the condition of the property has deteriorated. However, a number of witnesses, including Brown, testified that the general nature of the businesses conducted on the property has undergone no substantial change since their inception.

IV. ANALYSIS

With the foregoing background, we are ready to analyze the various issues presented by Melcher's summarized assignments of error.

1. Constitutionality of Act

In connection with the first summarized assignment of error, Melcher claims that the definitions of "junk," "automobile graveyard," and "junkyard" contained in § 39-2602 are vague and overbroad, in violation of a constitutional provision or provisions which he does not identify in any way. Not only will a court ordinarily not consider constitutional challenges in the absence of a specification of the provision that is claimed to be violated, *State v. Burke*, 225 Neb. 625, 408 N.W.2d 239 (1987), but Melcher failed to comply with Neb. Ct. R. of Prac. 9E (rev. 1991), which requires that a "party presenting a case involving

the federal or state constitutionality of a statute must file and serve a separate written notice thereof with the Supreme Court Clerk at the time of filing such party's brief."

Accordingly, this appeal presents no constitutional issues for us to consider. *Line v. Line*, 228 Neb. 700, 423 N.W.2d 790 (1988); *Groene v. Commissioner of Labor*, 228 Neb. 53, 421 N.W.2d 31 (1988).

2. Claimed Violations

(a) The Act

The State claims Melcher is in violation of § 39-2603, which provides: "No person shall locate or maintain a junkyard, any portion of which is within one thousand feet of the nearest edge of the right-of-way of any interstate or primary highway, without obtaining a permit from the department."

(i) Nature of Operations

Section 39-2602(3) defines "junkyard" as "an establishment or place of business which is maintained, operated or used for storing, keeping, buying or selling junk or for the maintenance or operation of an automobile graveyard, and includes garbage dumps and sanitary fills." Thus, in order to apply this statute to Melcher, the evidence must establish that he has an "establishment or place of business" in which he stores, keeps, buys, or sells junk, or which he operates or maintains as an automobile graveyard.

The origin of Nebraska's junkyard statute is found in 23 U.S.C. § 136 (1988), part of the federal Highway Beautification Act, which ties federal funding of state highways to state adherence to the requirements of the federal act. The stated purpose of the federal act is to "protect the public investment in such highways, to promote the safety and recreational value of public travel, and to preserve natural beauty." § 136(a).

The declared purpose of Nebraska's act is to promote

> public safety, health, welfare, convenience and enjoyment of public travel, to protect the public investment in public highways, and to preserve and enhance the scenic beauty of lands bordering public highways, it is declared to be in

> the public interest to regulate and restrict the location and maintenance of junkyards . . . .

§ 39-2601.

It is with that declared purpose in mind that we examine the relevant definitions of our act, which are essentially identical to those of the federal act.

In performing that task we 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 act, rather than a construction defeating that purpose. *State v. Seaman*, 237 Neb. 916, 468 N.W.2d 121 (1991). Generally, when statutory language is plain and unambiguous, no judicial interpretation is needed to ascertain a statute's meaning, so that, in the absence of a statutory indication to the contrary, words used in a statute will be given their ordinary meaning. *State v. Salyers*, 239 Neb. 1002, 480 N.W.2d 173 (1992). However, a statute is open for construction when the language used requires interpretation or may reasonably be considered ambiguous. *Coleman v. Chadron State College*, 237 Neb. 491, 466 N.W.2d 526 (1991).

State ex rel. State Highway Com'n v. Finch, 664 S.W.2d 53 (Mo. App. 1984), involved a statutory definition identical to ours. The defendants therein were in the business of repairing machinery, building woodworking machinery, and repairing sawmill and pallet equipment. The undisputed evidence is that the property was littered with automobile parts, corrugated steel scraps, and trash. However, the defendants argued that as they neither bought nor sold junk, they were not in the junkyard or salvage yard business. The court found otherwise, writing:

> It was sufficient, however, for the Commission to show, as it did, that the defendants were storing or keeping the junk on their premises. The definition of junkyard contained in § 226.660(4) [identical to Nebraska's definition] is satisfied not only by the buying or selling of junk but also by the storing or keeping of it on the area or place of business involved.

664 S.W.2d at 55, 56.

Our de novo review of the evidence persuades us that at no time did Melcher or his predecessors sell vehicles or other items for scrap, nor did they dismantle vehicles and sell the parts. We conclude from the testimony that the vehicles on the property have accumulated over the years as a result of the breakdowns of vehicles which the owners abandoned, the police requests that Melcher haul vehicles off the Interstate, the storage of vehicles, and the collecting of vehicles for display. Additionally, in the early days, Peterson placed automobiles on the lot for advertising purposes.

Nonetheless, in accordance with the rationale of *Finch*, we conclude that although Melcher is not in the business of buying and selling vehicles, he nonetheless maintains and operates an establishment which is used to store or keep vehicles.

The question thus becomes whether the activity constitutes a junkyard. In order for his operation to be such, he must maintain or operate an automobile graveyard, or store or keep junk.

(ii) Nature of an Automobile Graveyard

As defined by the act, the phrase "automobile graveyard" refers, in relevant part, to an establishment used for storing "wrecked, scrapped, ruined or dismantled motor vehicles or motor vehicle parts." § 39-2602(2). Melcher's property can be considered an automobile graveyard only if his vehicles are described by one of the adjectives used in this definition.

"Wrecked" has been defined by a number of courts. Most recently, the Supreme Court of New Hampshire, in interpreting its version of the federal act, stated that " 'wrecked automobile' may refer to one that appears to be seriously damaged." *State v. Bryant*, 127 N.H. 69, 72, 498 A.2d 322, 324 (1985). The court reasoned that since the federal act is concerned with "preservation of natural beauty" along a highway, only automobiles which are externally and visibly damaged would fall under the statute. *Id.* Automobiles which are wrecked internally are not to be so considered. In *Nat. Cas. Co. v. Mitchell*, 162 Miss. 197, 203, 138 So. 808, 809 (1932), the court stated that "in ordinary speech an automobile is said to be wrecked when it is disabled or seriously damaged, although it

may not be totally destroyed or rendered incapable of use." Finally, The American Heritage Dictionary 1393 (2d college ed. 1985) defines "wreck" as to "tear down or dismantle. . . . To bring to a state of ruin; disable or destroy."

The intent behind the subject act being to enhance the scenic beauty of lands bordering public highways, we conclude that the word "wrecked" relates to the outward appearance of a vehicle. Accordingly, a wrecked vehicle is one which is seriously damaged in its outward appearance.

The exhibits before us do not reveal any wrecked vehicles on Melcher's property.

Next, we consider the definition of "scrapped." "Scrap," as defined in The American Heritage Dictionary, *supra* at 1102, is "[d]iscarded waste material, esp. metal suitable for reprocessing." The definition of the verb is to "break down into parts for disposal or salvage." *Id.*

No cases defining "scrap" were found. However, several cases define "scrap metal," which definition is useful in considering the definition of a scrapped vehicle.

According to *Cooperage, Etc., Co. v. Rubinsky*, 180 Mich. 413, 147 N.W. 456 (1914), scrap metal does not include any material which can be repaired. " 'Scrap iron consists of old, worn-out, obsolete, broken, and cut iron or dismantled machinery, and parts thereof, entirely unfit for original use and having no commercial value except for remelting purposes.' " *Atchison, T. & S. F. Ry. Co. v. United States*, 98 F.2d 457, 458 (8th Cir. 1938). In *Sheftel v. People*, 111 Colo. 349, 356, 141 P.2d 1018, 1022 (1943), scrap metal is defined as metal which, "regardless of whether it is new and unused . . . has no peculiar value to those dealing in it by reason of its form or other inherent characteristic, except as material for remanufacture . . . ." From these cases, we conclude that a scrapped automobile is an automobile which has no value whatsoever as a vehicle, but the only worth of which is in the value of its metal for remelting or remanufacturing. As an example, an automobile which has been smashed by a compressor is a scrapped automobile.

None of the exhibits in the present case show vehicles on Melcher's property which satisfy the definition of "scrapped."

"Ruin" has a more readily understandable definition.

Returning to The American Heritage Dictionary, *supra* at 1076, we find the word is defined as the "[t]otal destruction or disintegration rendering something formless, useless, or valueless." The verb "ruin" is to "destroy or demolish completely" or to "harm irreparably." *Id.* Thus, a ruined vehicle is one which, through destruction or disintegration, has become formless, useless, or valueless.

Again, the exhibits here do not indicate that there are any ruined vehicles on the Melcher property.

Finally, an automobile graveyard may be evidenced by the presence of dismantled vehicles. "Dismantle" means to "strip of furnishings or equipment. . . . To put an end to in a gradual systematic way." The American Heritage Dictionary, *supra* at 406. The photographs of Melcher's property reveal that there are a few dismantled automobiles. One photographic exhibit shows a blue sedan missing a door, side panels, and a hood. Another depicts a blue automobile without doors and without a roof over the passenger compartment. Yet another photograph portrays the frame of a military vehicle, but this may be one of the vehicles Melcher was repairing. No other dismantled vehicles are shown on the photographic exhibits.

Thus, we must conclude that while none of the vehicles on Melcher's property are scrapped, ruined, or wrecked, several are dismantled. Consequently, Melcher's property partially meets the definition of an automobile graveyard, a definition which takes a narrow approach and covers no more than two or three of Melcher's vehicles.

(iii) Nature of Junk

As defined in the act, "junk" is "old or scrap copper, brass, rope, rags, batteries, paper, trash, rubber debris, waste or junked, dismantled, or wrecked automobiles . . . ." § 39-2602(1).

An Ohio court has defined "junked automobiles" as those "hav[ing] outlived their usefulness as automobiles and . . . entered the state of waste or discarded material." *Goodman v. Youngstown*, 24 Ohio L. Abs. 696, 699 (1937). The Alaska Supreme Court has defined "junk car" as "one which cannot be economically repaired." *Osness v. Dimond Estates, Inc.*, 615

P.2d 605, 608 (Alaska 1980).

The common usage of the verb "junk" is to "throw away or discard as useless; scrap." The American Heritage Dictionary, *supra* at 694. *City of Shelton v. Simone*, No. CV89-02-83-08S, 1990 WL 261981, at *1 (Conn. Super. Nov. 7, 1990), suggests that junked automobiles are "unregistered motor vehicles which are no longer intended or in condition for legal use upon the public highway." We conclude that junked vehicles are those no longer intended or in condition for legal use upon a public highway. The registration status is a factor to be considered on the issue of the intent to use the vehicle.

Under these definitions, the vehicles on Melcher's property are junked. Not only have a number of the vehicles been sitting on the property since 1969 or 1970, other vehicles, a mobile home, and a trailer camper have been sitting on the property for an extended period of time. The vehicles are not being used for parts, nor are they being rebuilt. Rather, with the possible exception of those which are part of the museum display, they merely sit on the property, serving no useful function or economic purpose. As Melcher articulated no plan for using these antiquated automobiles and trailers, they can only be defined as junk.

The State's case in this regard is further enhanced by the considerable accumulation of tires, automobile parts, and miscellaneous machinery which sits on the property. When these smaller items are considered in combination with the approximately 30 vehicles on the property, the State has more than satisfied its burden of showing that Melcher is operating without a permit an establishment which is used for the storage or keeping of junk.

We therefore conclude from our de novo review of the evidence that Melcher's use of the property is in violation of § 39-2603.

(b) The Regulations

The Lincoln County zoning regulations do not list either a junkyard or a salvage yard as a permitted use at the location in question. Lincoln County Zoning Regulations art. III, § 3.51 (1983), defines junk or salvage yard as:

> A lot, parcel or tract of land, including buildings, used primarily for the collection, storage and sale of waste paper, rags, scrap metal, or other discarded material; or for the collecting, dismantling, storage *and* salvaging of machinery or vehicles not in running condition, or for the sale of parts thereof.

(Emphasis supplied.)

Under this definition, Melcher's property cannot be described either as a junkyard or as a salvage yard. The use of the conjunctive "and" implies that either facility must collect, dismantle, store, *and* salvage the vehicles; that is, all four things listed must be done. As stated in *In re Petition of G. Kay, Inc.*, 219 Neb. 24, 26, 361 N.W.2d 182, 184 (1985), quoting *Rapid Film Service, Inc. v. Bee Line Motor Freight*, 181 Neb. 1, 146 N.W.2d 563 (1966):

> "We believe the correct interpretation of the language involved herein, in context, is that the word 'and' means along with, also, or as well as. The word 'and' is 'A conjunction connecting words or phrases expressing the idea that the latter is to be added or taken along with the first.' Black's Law Dictionary (4th Ed.), p. 112. . . ."

The evidence presented in this case does not demonstrate that Melcher used his property primarily for dismantling, collecting, storing, and salvaging vehicles. As a result, the definition does not encompass Melcher's activities.

However, Lincoln County Zoning Regulations art. XXXII, § 32.3 (1983), also prohibits the "permanent outside repair or repair storage" of automobiles, the violation of which is a nuisance. The evidence persuades us that from the inception of the businesses in 1969, outside repair has been done at least by Peterson, Melcher, and people who "would want to work on their own equipment as they came through." Thus, Melcher's operations contravene this regulation.

3. Effect of Earlier Use

(a) With Respect to Act

Section 39-2606 provides that a

> junkyard lawfully in existence on August 27, 1971, which is within one thousand feet of the nearest edge of the

right-of-way and visible from the main-traveled way of any interstate or primary highway shall be screened by the department so as not to be visible from the main-traveled way of such highway, the cost of which shall be paid in full by the department.

Thus, the issue is whether Melcher has established that the property was a junkyard prior to passage of the act. See *Cossell v. Hempfield Township*, 106 Pa. Commw. 404, 526 A.2d 475 (1987) (landowners have burden of proving that a lawful nonconforming use existed at time ordinance was established). The difficulty with providing an answer to whether a junkyard existed prior to the passage of the act is in the need to determine the amount of junk required to make a junkyard.

Although the act does not provide a direct answer, its purpose to improve the aesthetic appearance of major roadways suggests that perhaps the act was intended to prohibit the presence of even a single junked vehicle within 1,000 feet of an interstate or other primary highway. Further guidance is found in the law of other jurisdictions.

Under a local ordinance in Hempfield Township, Pennsylvania, property " 'having one (1) or more used, unlicensed and inoperable automobiles or other vehicles thereon shall in any event be deemed a "junkyard" . . . .' " *Cossell v. Hempfield Township*, 526 A.2d at 478. Kittery, Maine's ordinance provides that an automobile graveyard exists when the property has three or more unserviceable, discarded, wornout, or junked motor vehicles. *Town of Kittery v. Dineen*, 591 A.2d 236 (Me. 1991). Sandgate, Vermont's ordinance prohibits the storage of junk cars, which is " 'more than one inoperable motor vehicle . . . stored on any lot for a period in excess of thirty days unless within a building or totally screened from view . . . .' " *Town of Sandgate v. Colehamer*, 156 Vt. 77, 80, 589 A.2d 1205, 1207 (1990). The Kentucky junkyard statute forbids any property from having five or more " 'junked, wrecked or nonoperative automobiles' " without a permit. *Dawson v. Com., Dept. of Transp., Etc.*, 622 S.W.2d 212, 214 (Ky. 1981). Finally, *City of Shelton v. Simone*, No. CV89-02-83-08S, 1990 WL 261981 (Conn. Super. Nov. 7, 1990), only requires two automobiles to be on the premises in

order to be defined as a junkyard.

Thus, although the act does not set the specific number of junked vehicles needed to constitute a junkyard, a review of other statutes and ordinances affirms that in some cases only one such vehicle is necessary.

Without establishing the exact number of junked vehicles required to constitute a junkyard, it suffices to say that the evidence presented establishes to our satisfaction that there were at least four to six inoperable vehicles, in addition to several pieces of old farm equipment, on the property prior to August 27, 1971.

Consequently, the property was a junkyard before the act was adopted and falls within the protection provided by § 39-2606. Melcher therefore may continue to use the property as he has in the past; it is the State's obligation to screen the property from public view, as required by that section of the act.

(b) With Respect to Regulations

Lincoln County is bound by Neb. Rev. Stat. § 23-173.01 (Reissue 1991), which provides: "The use of a building, structure, or land, existing and lawful at the time of the enactment of a zoning regulation . . . may, except as provided in this section, be continued, although such use does not conform with the provisions of such regulation . . . ."

The zoning regulations involved were enacted on June 13, 1983. As noted in part IV 2(a)(iii), the evidence persuades us that prior to this date vehicles were repaired outside. We are additionally persuaded that vehicles were stored on the property before that date. Consequently, Melcher may continue to do as he has done.

V. RULING

Because of the past use of the property, we, as first said in part I, reverse the judgment of the district court. We further remand with the direction that the district court vacate its injunction and dismiss the cause both as to the State and the county.

REVERSED AND REMANDED WITH DIRECTION.

JOSEPHINE KRAUS, APPELLANT, V. AMERICAN CHARTER FEDERAL SAVINGS AND LOAN ASSOCIATION, APPELLEE.

483 N.W.2d 144

Filed May 1, 1992. No. S-89-845.

1. **Summary Judgment.** Summary judgments are appropriately granted where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.
2. **Contracts: Intent.** When a written contract is expressed in unambiguous language, the intention of the parties must be determined from the content of the contract document.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Affirmed.

Ken Dudek for appellant.

Stephen H. Nelsen, of Cline, Williams, Wright, Johnson & Oldfather, for appellee.

BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

WHITE, J.

STATEMENT OF THE CASE

Appellant, Josephine Kraus, brought an action against appellee, American Charter Federal Savings and Loan Association, to recover $26,000, plus interest and penalties, in certificates of deposit which appellee had set off against a debt that appellant's son owed to American Charter.

FACTS

Appellant owned six certificates of deposit to which she and her now-deceased husband had contributed 100 percent of the principal. Appellant's son's name also appeared on the certificates as joint owner.

Prior to the purchase of the two most recent CD's, appellant's son signed two promissory notes for a total principal amount of $30,000. Appellant neither signed nor guaranteed these notes. After the final two CD's were purchased, appellant signed, as codebtor, her son's third promissory note for a principal value of $49,686. Incorporated in the third note was a disclosure statement granting American

Charter a security interest in the first three CD's she purchased, collectively valued at $65,000, plus interest. The note also granted permission for the institution to use funds on deposit to set off the debt should the "entire balance of this loan" be declared due and payable.

After all three of the son's notes had been declared delinquent by American Charter, it set off the entire debt against appellant's CD's and refunded the remaining cash after satisfaction of the debt.

American Charter contended that it had a security interest in any money Kraus and her son had on deposit with American Charter to secure the indebtedness evidenced by the credit agreement and any other debts owed to American Charter by Kraus and/or her son.

The district court granted summary judgment in favor of American Charter.

ASSIGNMENTS OF ERROR

Appellant Kraus alleges that the district court erred in both overruling appellant's motion for summary judgment and sustaining appellee's, and in determining that the security agreement signed by appellant granted appellee a right of setoff against her CD's for the debts of her son.

DISCUSSION

Summary judgments are appropriately granted where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Peterson v. Minden Beef Co.*, 231 Neb. 18, 434 N.W.2d 681 (1989).

The security agreement, which both Kraus and her son signed, is patently unambiguous in its terms. It stated, in pertinent part:

> If I miss a payment or violate one of the terms of this agreement, you can declare the entire balance of this loan due and payable at once. . . .
>
> . . . If you declare the entire balance of this loan due, funds which I have on deposit with you can be used to pay what I owe.

As we have stated, when a written contract is expressed in unambiguous language, the intention of the parties must be

determined from the content of the contract document. See *Clemens Mobile Homes, Inc. v. Anderson*, 206 Neb. 58, 291 N.W.2d 238 (1980). Both provisions are unambiguous standing on their own; however, they are clarified even further by the following definitional section within the agreement:

> ACCELERATION: If I am in default, you may declare to be immediately due and payable the remaining balance of this loan and accrued interest, plus any unpaid Late Charges, to be paid by me under this Note and Security Agreement. I agree that default on this loan shall constitute default on all of my obligations to American Charter . . . regardless of payment status on those other accounts.
>
> MEANING OF WORDS: The words, "I", "me", and "my", mean each and all who sign this Note as Borrower and all those who sign this Note and Security Agreement as guarantor. The words "you", "your", and "yours" mean American Charter . . . .

Kraus agreed to pledge her funds held on deposit with American Charter, and the provisions are clear and legally binding on her. It is unfortunate that Kraus did not understand the consequences and ramifications of cosigning for her son's debt.

We affirm the decision of the district court in its entirety.

AFFIRMED.

HASTINGS, C.J., not participating.

JUDY F. PAPPAS, APPELLANT, V. GEORGE A. SOMMER, APPELLEE.

483 N.W.2d 146

Filed May 1, 1992. No. S-89-1157.

1. **Motions to Dismiss: Pleadings.** A pretrial motion to dismiss is not permitted.
2. **Motions to Dismiss: Demurrer: Pleadings.** Under appropriate circumstances, an irregular motion to dismiss may be treated as a demurrer.
3. **Demurrer: Pleadings.** A demurrer goes only to those defects which appear on the face of the petition.

4. _____: _____. 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.
5. _____: _____. After a demurrer is sustained, leave to amend the petition is to be given, unless it is clear that no reasonable possibility exists that the plaintiff will be able to correct the deficiency.

Appeal from the District Court for Scotts Bluff County: ALFRED J. KORTUM, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

J. Murry Shaeffer, P.C., for appellant.

Francis L. Winner, P.C., for appellee.

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

CAPORALE, J.

The plaintiff-appellant, Judy F. Pappas, asserts the district court improvidently dismissed her cause for the damages purportedly arising from the alleged professional negligence of the defendant-appellee, attorney George A. Sommer. More specifically, Pappas claims, in effect, that the district court erroneously concluded (1) that she lacked standing to sue and (2) that it lacked subject matter jurisdiction. We affirm in part, and in part reverse and remand for further proceedings.

Pappas alleges in her petition that she, in accordance with the negligent advice Sommer gave her, executed documents which rendered her liable on the debt of another and which subjected her interest in certain real estate to the judgment lien arising out of that debt. According to the petition, it became necessary, as a consequence of the foregoing, for Pappas to "file a personal bankrupcty [sic] action."

Sommer responded by filing a "Motion to Dismiss," asserting that the district court lacked subject matter jurisdiction because "[t]he claim described is part of a bankrupt estate pending in the U.S. Bankruptcy Court," jurisdiction over which had not been removed to the district court.

The district court suggested the motion should be treated as a

demurrer, but nonetheless received in evidence a copy of Pappas' bankruptcy filing, which recites that relief was being sought under chapter 11 of the federal Bankruptcy Code.

The district court explained in its ruling that because Pappas' negligence cause had accrued prior to the bankruptcy filing, the cause had become an asset of the bankruptcy estate and thus could not be pursued by Pappas in her own right.

The district court correctly recognized that a pretrial motion to dismiss is not permitted. Neb. Rev. Stat. § 25-803 (Reissue 1989); *United States Fire Ins. Co. v. Affiliated FM Ins. Co.*, 225 Neb. 218, 403 N.W.2d 383 (1987); *Nelson v. Sioux City Boat Club*, 216 Neb. 484, 344 N.W.2d 634 (1984); *Blitzkie v. State*, 216 Neb. 105, 342 N.W.2d 5 (1983). It also correctly recognized that under appropriate circumstances, such an irregular motion may be treated as a demurrer. *United States Fire Ins. Co., supra*; *Voyles v. DeBrown Leasing, Inc.*, 222 Neb. 250, 383 N.W.2d 36 (1986).

However, the district court ignored the rule that a demurrer goes only to those defects which appear on the face of the petition. *Houska v. City of Wahoo*, 227 Neb. 322, 417 N.W.2d 337 (1988); *Smick v. Langvardt*, 216 Neb. 778, 345 N.W.2d 830 (1984). 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. *Matheson v. Stork*, 239 Neb. 547, 477 N.W.2d 156 (1991), quoting *Hecker v. Ravenna Bank*, 237 Neb. 810, 468 N.W.2d 88 (1991).

Thus, having elected to treat Sommer's irregular motion as a demurrer, the district court erred in admitting the copy of Pappas' filing in the bankruptcy court. The district court could properly consider only the factual allegations in Pappas' petition and the reasonable implications of those allegations. We so confine our analysis.

We know from the petition that Pappas' negligence action accrued prior to the bankruptcy filing. All assets of the debtor become the property of the bankrupt estate upon

commencement of the bankruptcy proceeding. 11 U.S.C. § 541 (1988). See, e.g., *In re Dow*, 132 B.R. 853 (S.D. Ohio 1991) (cause of action for attorney's alleged malpractice in filing bankruptcy petition constituted estate property). As Pappas' negligence cause constituted property she owned when she filed for bankruptcy relief, the cause became the property of the trustee of the bankruptcy estate, and it was the trustee's obligation to "collect and reduce" its value to money and not Pappas' obligation to do so. 11 U.S.C. § 704(1) (1988).

In arguing against this proposition, Pappas calls to our attention that as a debtor in possession of the bankrupt estate under chapter 11 of the code, bankruptcy rule 6009, 11 U.S.C. app. rule 6009 (1988), grants her, as well as the trustee, the authority to prosecute the malpractice claim. Rule 6009 does indeed provide that, with or without court approval, either a trustee or a debtor in possession may commence and prosecute on behalf of the estate any action or proceeding before any tribunal.

However, as the petition does not allege the type of bankruptcy relief Pappas sought, we cannot know that the filing was under chapter 11. Moreover, as the petition does not so allege, we cannot know that Pappas is in possession of the bankruptcy estate. Without that knowledge, we must apply the general rule that the property of the bankrupt belongs to the trustee of the estate.

Neb. Rev. Stat. § 25-301 (Reissue 1989) provides that, with an exception not involved here, every "action must be prosecuted in the name of the real party in interest . . . ." Not only does the caption of the petition not recite that the negligence action is brought on behalf of the bankruptcy estate, the petition fails to allege that Pappas prosecuted the lawsuit for and on behalf of the estate. Accordingly, the district court correctly concluded that Pappas lacked standing to bring this lawsuit in her own name and on her own behalf. See, e.g., *Collins v. Federal Land Bank of Omaha*, 421 N.W.2d 136 (Iowa 1988) (legal malpractice claims based on attorney's alleged negligent advice and conduct on behalf of clients accruing before bankruptcy filing became property of bankruptcy estate and could not be pursued by clients on their own behalf).

However, our analysis does not end with that determination, for the rule is that after a demurrer is sustained, leave to amend the petition is to be given, unless it is clear that no reasonable possibility exists that the plaintiff will be able to correct the deficiency. See, *St. Paul Fire & Marine Ins. Co. v. Touche Ross & Co.*, 234 Neb. 789, 452 N.W.2d 746 (1990); *Kane v. Vodicka*, 238 Neb. 436, 471 N.W.2d 136 (1991); *Schmuecker Bros. Implement v. Sobotka*, 217 Neb. 114, 348 N.W.2d 130 (1984); *Fowler v. Nat. Bank of Commerce*, 209 Neb. 861, 312 N.W.2d 269 (1981); *Newman Grove Creamery Co. v. Deaver*, 208 Neb. 178, 302 N.W.2d 697 (1981).

Thus, while the district court correctly sustained Sommer's demurrer, it erred in failing to grant Pappas an opportunity to amend her petition. Accordingly, we affirm the district court's sustainment of the demurrer, but reverse its order of dismissal and remand the cause for further proceedings consistent with this opinion.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V. LARRY A. ROKUS, APPELLANT.

483 N.W.2d 149

Filed May 1, 1992. No. S-90-1198.

1. **Convictions: Appeal and Error.** In determining whether evidence is sufficient to sustain a conviction in a jury trial, an appellate 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.
2. **Verdicts: Appeal and Error.** On a claim of insufficiency of evidence, an appellate court will not set aside a guilty verdict in a criminal case where such verdict is supported by relevant evidence. Only where evidence lacks sufficient probative force as a matter of law may an appellate court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt.
3. **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.

4. **Intent: Words and Phrases.** The intent involved in conduct is a mental process and may be inferred from the conduct itself, the actor's language in reference to the conduct, and the circumstances surrounding an incident.
5. **Intent: Juries.** From circumstances around a defendant's voluntary and willful act, a jury may infer that the defendant intended a reasonably probable result of his or her act.
6. **Intent: Weapons.** Intent to kill may be inferred from deliberate use of a deadly weapon in a manner reasonably likely to cause death.
7. **Intent: Weapons: Juries.** A firearm equipped with an operational safety device and requiring heavy trigger pull or pressure on the trigger for firing may be considered by the jury with other evidence to determine whether a defendant's discharging a firearm was intentional or accidental.

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

Thomas M. Kenney, Douglas County Public Defender, and Kelly S. Breen for appellant.

Don Stenberg, Attorney General, and Delores Coe-Barbee for appellee.

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

SHANAHAN, J.

A jury in the district court for Douglas County convicted Larry A. Rokus of the second degree murder of Joseph A. Kashuba, which is a violation of Neb. Rev. Stat. § 28-304(1) (Reissue 1989): "A person commits murder in the second degree if he [or she] causes the death of a person intentionally, but without premeditation."

Rokus' sole assignment of error is that the evidence is insufficient to sustain a finding that he intentionally killed Kashuba.

BACKGROUND FOR THE FATALITY

Late in the evening of February 1, 1990, Rokus and Kashuba, both adults, visited a friend's residence where they and two others drank beer and were listening to music when the subject of conversation turned to one of the party's interest in purchasing a firearm for self-protection. Rokus left and returned with his .44-caliber Magnum double-action revolver, a

shoulder holster, and a supply of hollow-point bullets for the revolver. A hollow-point bullet flattens on contact with living tissue and produces great internal damage.

The .44 Magnum can be fired in two different modes, single action and double action. In the single-action mode, the revolver's hammer is pulled back by hand until a spring mechanism locks the hammer in its cocked position. The hammer is released by pulling the revolver's trigger, allowing the hammer to move forward and drive the firing pin against the primer of a cartridge in the revolving cylinder. Firing the revolver in its double-action mode is accomplished by pulling the revolver's trigger, which compresses the mainspring as the hammer moves backward; however, as the hammer reaches its most rearward position, it is not locked in the cocked position, but immediately starts forward to strike the revolver's firing pin. In normal operation, firing the revolver in its single-action mode requires $4^1/_2$ pounds of pressure on the trigger, while $11^3/_4$ pounds of pressure must be applied on the trigger to fire the revolver in its double-action mode.

Rokus, after ascertaining that the revolver was unloaded, passed the revolver among Kashuba and the others for their inspection. Sometime later, the others left Rokus and Kashuba in the dining room of the residence. At approximately 5 a.m. on February 2, Rokus appeared at the residence of John and Paula Hansen, who lived approximately four blocks from the house where Rokus had been showing the .44 Magnum to Kashuba, and pounded on Hansens' front door while he was screaming: "I need help. I have shot someone. I have killed them. God forgive me." When Rokus persisted in pounding on the door, John Hansen called 911 for police assistance.

Responding to Hansen's call, Omaha police officers Wayne Melcher and Shane Farrow arrived at Hansens' and found Rokus, who ran up to the police cruiser and exclaimed: "Oh, My God, I just shot my friend. My God, you have to help me. He is dying." Rokus then handed Melcher a registration slip for the .44 Magnum, gave the officer two bullets for the revolver, and told the officer that he had thrown the revolver into a storm sewer.

Although Rokus was unable to supply the address where the

shooting had occurred, he did give police a telephone number through which the officers obtained the address. Officers Melcher and Farrow, with Rokus, proceeded to the site of the shooting and, on arrival at the scene, found Kashuba's lifeless body on the dining room floor. Melcher used the telephone at the residence to summon investigators from the homicide unit of the Omaha Police Division.

Several members of the police division arrived to conduct an investigation into the shooting. Kashuba's body was lying on the floor near a dining room wall in which there was a bullet hole and an embedded "slug" approximately 38 inches from the floor's surface. A chair was tipped over near the body. A wound was located near the base of Kashuba's skull. Those circumstances led police to conclude that Kashuba was sitting in a chair near the wall when the bullet struck the base of Kashuba's skull, passed through his head, and then entered the wall near the chair. Melcher directed that Rokus be taken to police headquarters. Kashuba's body was removed for an autopsy while the police investigation continued, leading officers to the .44 Magnum found on the ground near an abandoned garage about three blocks from the scene of the fatality.

While Officer Victoria Mailander was transporting Rokus in a police cruiser to headquarters, Rokus, without any inquiry from Mailander, stated that he hoped "everyone is okay" and that the shooting was "an accident." Rokus continued to talk to Mailander and told her that "he brought [the .44 Magnum] over [to Kashuba] and when he handed it to him he [Rokus] forgot it was loaded and it went off."

INTERROGATION OF ROKUS

Around 8:30 a.m. at police headquarters, Officer James Wilson read a "Rights Advisory Form," that is, the *Miranda* warning and admonition, to Rokus and commenced questioning him. In the course of this interrogation, Rokus said that he had wanted to show Kashuba how to load the .44 Magnum; therefore, he placed six hollow-point bullets in the revolver's cylinder and handed the loaded revolver to Kashuba. As Rokus described the situation, after Kashuba had examined

the loaded revolver, he began "handing it back to [Rokus], butt first, the barrel towards Mr. Kashuba, and the gun . . . discharged." In response to Rokus' description of the shooting, Wilson said that in view of the fact that the Magnum was a "wheel gun or a cylinder type revolver," Wilson "had problems with that story." At that point, Rokus acknowledged that he "had lied" and that the shooting actually occurred as Rokus was demonstrating a quick draw from the shoulder holster, which he was wearing, and when Rokus "quick drawed," the revolver discharged the bullet that struck Kashuba. After additional questioning, the interrogation ended.

Somewhat contemporaneous with the interrogation of Rokus, Dr. Blaine Roffman completed an autopsy on Kashuba and concluded that Kashuba had sustained "a contact gunshot wound in the back of the head, which exited on the top of the head causing massive skull fractures and brain destruction." When the police learned about Dr. Roffman's conclusions concerning Kashuba's wounds, Officer Wilson, with Officer Robert Sklenar, decided to resume questioning Rokus, who, again, was supplied with the *Miranda* warning or admonition. Wilson informed Rokus concerning Kashuba's wounds and told Rokus that the account of the shooting related by Rokus in the earlier interrogation was "not matching up" with the results of the autopsy. Rokus responded that Kashuba was killed while the pair was "playing Russian roulette." Wilson asked how anyone could play Russian roulette with six bullets in the cylinder chambers of the fatal revolver, and Rokus answered that he and Kashuba "were simply pointing the gun at each other's heads and not pulling the trigger." Rokus then told the officers that while engaged in Russian roulette, he pointed the .44 Magnum at Kashuba, and the gun discharged. Rokus maintained that he did not intend to pull the trigger and that the shooting was an accident. Later in the course of this second interrogation, Rokus gave still another version of the shooting: Rokus, while Kashuba had his head turned away from Rokus, "took the gun out of the holster, placed it to the back of [Kashuba's] head," and said, "Surprise, mother fucker," as Rokus pulled the trigger.

ROKUS' TRIAL

In Rokus' trial, Dr. Roffman testified that his main findings in the autopsy pertained to Kashuba's head,

> where the first thing noted was a large eleven by four centimeter area of skull bones protruding and lacerations of brain substance through the left parietal area of the skull, small bullet fragments were present throughout the skull, and the posterior occipital area of the skull, approximately seven centimeters above the nape of the neck, was a contact gunshot wound of the skin . . . a contact gunshot wound in the back of the head approximately three inches above the nape of the neck on top of the head, just slightly to the left. There was massive destruction of bone and brain being blown out. So there was a huge gaping defect. The defect would measure two by five inches. When a probe was passed from the entrance gunshot wound through the exit wound, the probe passed and showed the course was perpendicular and direct from the entrance wound to the exit wound.

Further, in explaining the characteristics of a contact wound, Dr. Roffman testified:

> Entrance gunshot wounds, particularly when they occur over a hard surface, namely the head, when the skull is underlying it with very thick bone and the gun is pressed up tightly against that area, when the gun is exploded the gases go into that wound and back flow and produce a back flash of powder and gases and blow out that entrance wound. Instead of being a nice, round, delineated entrance wound, it produced what's known as a star-shaped pattern because the gases that blow back, plus the bone, because of all these gases that come from the gun, it produces a star-shaped pattern and the skin is split in several areas and blows back and produces a contact gunshot wound in the head area.

Dr. Roffman concluded that Kashuba "[d]ied of a contact gunshot wound in the back of the head, which exited on the top of the head causing massive skull fractures and brain destruction."

A firearms expert testified for the State regarding his

conclusions reached after examining and testing Rokus' .44 Magnum revolver. According to the firearms expert, the revolver was not defective and would not fire accidentally, since there was a fully operational safety device to prevent accidental discharge of the revolver. When asked if the revolver could be accidentally discharged, the expert answered, "Not under any circumstance that I could think of, unless a hard blow was dealt to the hammer to somehow overcome" the revolver's safety.

In his testimony, Rokus related that after Kashuba was shot, Rokus ran out of the house and down the street instead of using the telephone at the residence where the shooting had occurred. As Rokus ran from the scene of the shooting, he unloaded the revolver and later threw the bullets and gun away. Notwithstanding the different accounts given during his interrogation, Rokus testified that he had approached from behind Kashuba, who was sitting in a chair, pulled the .44 Magnum from its shoulder holster on Rokus, and then put the revolver to Kashuba's head, "just joking around," and said, "Surprise," as the gun discharged. Rokus had believed that the revolver was "unloaded" when he put the firearm to Kashuba's head and could not recall whether the revolver had been cocked.

STANDARD OF REVIEW

> In determining whether evidence is sufficient to sustain a conviction in a jury trial, an appellate 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. Fleck, 238 Neb. 446, 447, 471 N.W.2d 132, 134 (1991). Accord, *State v. Schumacher, ante* p. 184, 480 N.W.2d 716 (1992); *State v. Witt*, 239 Neb. 400, 476 N.W.2d 556 (1991); *State v. Tuttle*, 238 Neb. 827, 472 N.W.2d 712 (1991); *State v. Zitterkopf*, 236 Neb. 743, 463 N.W.2d 616 (1990).

> On a claim of insufficiency of evidence, an appellate court will not set aside a guilty verdict in a criminal case

> where such verdict is supported by relevant evidence. Only where evidence lacks sufficient probative force as a matter of law may an appellate court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt.

State v. Fleck, 238 Neb. at 447, 471 N.W.2d at 134. Accord, *State v. Schumacher, supra*; *State v. Witt, supra*; *State v. Tuttle, supra*; *State v. Zitterkopf, supra*; *State v. Robertson*, 223 Neb. 825, 394 N.W.2d 635 (1986).

PROOF OF INTENT TO KILL

The focal point in Rokus' appeal is his contention that he did not intentionally cause Kashuba's death.

" '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. Jasper*, 237 Neb. 754, 763, 467 N.W.2d 855, 862 (1991). See, also, *State v. Witt, supra*; *State v. Fleck, supra*. "A defendant may be convicted by circumstantial evidence which establishes the defendant's guilt beyond a reasonable doubt. The State is required to establish the defendant's guilt for the crime charged, but is not required to disprove every hypothesis consistent with the defendant's presumed innocence." *State v. Blue Bird*, 232 Neb. 336, 339, 440 N.W.2d 474, 476 (1989). Accord, *State v. Witt, supra*; *State v. Fleck, supra*.

"Intent is the state of the actor's mind when the actor's conduct occurs." *State v. Pierce*, 231 Neb. 966, 971, 439 N.W.2d 435, 440 (1989). Accord *State v. Craig*, 219 Neb. 70, 361 N.W.2d 206 (1985). "*Intentionally* means willfully or purposely, and not accidentally or involuntarily." *State v. Schott*, 222 Neb. 456, 462, 384 N.W.2d 620, 624 (1986). Accord, *State v. Pettit*, 233 Neb. 436, 445 N.W.2d 890 (1989); *State v. Pierce, supra*. "The intent involved in conduct is a mental process and may be inferred from the conduct itself, the actor's language in reference to the conduct, and the circumstances surrounding an incident." *State v. Pierce*, 231 Neb. at 971, 439 N.W.2d at 440. Accord, *State v. Witt, supra*; *State v. Tuttle, supra*; *State v. Swigart*, 233 Neb. 517, 446 N.W.2d 216 (1989). "When an element of a crime involves

existence of a defendant's mental process or other state of mind of an accused, such elements involve a question of fact and may be proved by circumstantial evidence." *State v. Hoffman*, 227 Neb. 131, 140, 416 N.W.2d 231, 237 (1987). Accord *State v. Witt, supra*.

From circumstances around a defendant's voluntary and willful act, a jury may infer that the defendant intended a reasonably probable result of his or her act. See, *People v. Bartall*, 98 Ill. 2d 294, 456 N.E.2d 59 (1983); *People v Getch*, 50 N.Y.2d 456, 407 N.E.2d 425, 429 N.Y.S.2d 579 (1980). Consequently, the court in *United States v. Kimmel*, 777 F.2d 290, 292 (5th Cir. 1985), approved the following instruction:

> "As a general rule it is reasonable to infer that a person ordinarily intends the natural and probable consequences of his knowing acts. The jury may draw the inference that the accused intended all the consequences which one standing in like circumstances and possessing his knowledge should reasonably have expected to result from any act of conscious omission and any such inference drawn is entitled to be considered by the jury in determining whether or not the government has proved beyond a reasonable doubt that the defendant did possess the required intent."

Cf., *State v. Jasper, supra* (constitutionally prohibited instruction that requires an inference adverse to a criminal defendant); *Francis v. Franklin*, 471 U.S. 307, 105 S. Ct. 1965, 85 L. Ed. 2d 344 (1985) (constitutionally prohibited use of a mandatory presumption that a criminal defendant intended probable consequences of the defendant's acts).

Circumstances surrounding the fatal shot from Rokus' revolver allow and support the inference that Rokus intended to shoot and kill Kashuba. The jury was entitled to find that Kashuba was seated in a dining room chair while Rokus was approaching from behind Kashuba. From the location of the contact wound on Kashuba's head, the jury could infer that the fatal hollow-point bullet was fired at point-blank range from the .44 Magnum's muzzle at the base of Kashuba's skull; hence, Rokus was deliberately pointing the revolver at Kashuba when the weapon discharged. None can argue that a hollow-point

bullet fired from a .44 Magnum is not a life-threatening projectile. Intent to kill may be inferred from deliberate use of a deadly weapon in a manner reasonably likely to cause death. See, *Furr v. State*, 308 Ark. 41, 822 S.W.2d 380 (1992) (homicidal intent may be inferred from the type of weapon used, the manner of its use, and the nature and location of the wounds); *Rhinehardt v. State*, 477 N.E.2d 89 (Ind. 1985) (intent to kill may be inferred from use of a deadly weapon in a manner reasonably likely to cause death); *State v. Noble*, 425 So. 2d 734 (La. 1983) (defendant's shooting the victim in the head at close range may be a basis for the jury's inference that the defendant intended the victim's death); *Raspberry v. State*, 275 Ind. 504, 417 N.E.2d 913 (1981) (intent to kill may be inferred from the use of a deadly weapon in a manner likely to cause death); *State v. Price*, 365 N.W.2d 632 (Iowa App. 1985) (intent to kill may be inferred from the use of a deadly weapon); *People v. Evans*, 92 Ill. App. 3d 874, 416 N.E.2d 377 (1981) (intent to kill may be inferred from a defendant's use of a deadly weapon to harm the victim). The .44 Magnum was equipped with a fully operational safety, had no defects, and required substantial pressure on the trigger for firing, especially if the revolver was in its double-action mode, namely, 11 3/4 pounds of pressure had to be applied to the trigger to discharge the revolver. A firearm equipped with an operational safety device and requiring heavy trigger pull or pressure on the trigger for firing may be considered by the jury with other evidence to determine whether a defendant's discharging a firearm was intentional or accidental. See *State v. Martin*, 195 Conn. 166, 487 A.2d 177 (1985). See, also, *State v. Hamilton*, 478 So. 2d 123 (La. 1985) (a firearm's requiring substantial trigger pull to fire the weapon, i.e., more than 4 1/2 pounds pressure on the trigger, was a circumstance which the jury could consider in determining whether the defendant deliberately discharged the firearm); *People v. Quiles*, 172 A.D.2d 859, 569 N.Y.S. 2d 215 (1991) (a firearm's operable safety mechanism and requisite 7 to 7 1/2 pounds of trigger pressure to fire the weapon were circumstances which may establish a defendant's intent to kill the victim); *Turner v. State*, 805 S.W.2d 423 (Tex. Crim. App. 1991) (heavy trigger pressure required to discharge a firearm is a

circumstance relative to determining whether discharge of the firearm was an intentional act). Consequently, the jury could have concluded that Rokus' firing the revolver in its double-action mode required a conscious and appreciable effort by Rokus. Thus, Rokus' intent to cause Kashuba's death may be inferred from circumstantial evidence, such as the type of weapon used, namely, a .44 Magnum which Rokus knew was loaded with hollow-point bullets; Rokus' manner of using the revolver, that is, his close-range pointing of the lethal weapon at the base of Kashuba's skull; and the nature of the wound inflicted on Kashuba, a contact wound, from Rokus' deliberate discharge of the revolver.

Therefore, the evidence at Rokus' trial, construed most favorably to the State, supports the jury's finding that Rokus intentionally caused Kashuba's death without premeditation. For that reason, Rokus' assignment of error is without merit; hence, we affirm Rokus' conviction and sentence.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ANTHONY T. REYNOLDS, APPELLANT.

483 N.W.2d 155

Filed May 1, 1992. No. S-91-087.

1. **Rules of 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.
2. **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.
3. **Trial: Rules of Evidence.** Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.
4. **Rules of Evidence: Words and Phrases.** In the context of Neb. Evid. R. 403, "unfair prejudice" means an undue tendency to suggest a decision on an improper basis.
5. **Criminal Law: Evidence: Proof: Appeal and Error.** Error in admitting or excluding evidence in a criminal trial is prejudicial unless it can be proved that the error was harmless beyond a reasonable doubt.

Appeal from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Reversed and remanded for a new trial.

Thomas J. Garvey, Sarpy County Public Defender, and Robert C. Wester for appellant.

Don Stenberg, Attorney General, and Donald A. Kohtz for appellee.

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

PER CURIAM.

Following a jury trial, the defendant, Anthony T. Reynolds, was convicted of first degree assault and sentenced to imprisonment for 2 to 4 years. The defendant has appealed and contends that the trial court erred in admitting, over objections as to relevancy, certain testimony.

The assault involved the defendant's 4-month-old son. As a result of the assault, the child developed shaken baby syndrome, and his development has been seriously impaired.

The record shows that on February 26, 1990, at about 4 p.m., Carrie Reynolds, wife of the defendant, left for work and left their 4-month-old son, Justin Reynolds, with the defendant. That afternoon Justin was fussy, cranky, and whiny and wanted a lot of attention; however, before she left for work, Justin had calmed down and was doing fine. At about 7 p.m., when Carrie called home to check on the defendant and Justin, the defendant told her that Justin had been fine since she left.

At about 9:58 p.m., the defendant called Carrie at work, told her that there was something wrong with Justin, and said that she should come to the hospital. When Carrie arrived at the hospital, Justin was lying unconscious in the emergency room, with oxygen being pumped into his mouth.

Carrie was not informed of what was wrong with Justin until a few days after the incident. At that time, she was told that Justin had suffered a brain hemorrhage and that the injury and hemorrhage had caused Justin's brain to swell to the point that the brain's oxygen supply had been cut off and Justin had stopped breathing. It was explained to her that Justin was a victim of shaken baby syndrome.

At trial, Dr. Mark Horton, a pediatrician, testified as a medical expert on shaken baby syndrome. He testified that an infant suffering from a violent shaking exhibits a breathing or respiratory problem and convulsions or seizures. The infant may appear lethargic or unarousable and/or may incur a subdural or subarachnoid hemorrhage.

Dr. Karlyle Christian-Ritter, pediatric chief resident at St. Joseph Hospital, testified that on February 26, 1990, Justin Reynolds was brought to the hospital. When Justin arrived at the emergency room, he was not breathing on his own, appeared lethargic, and was unresponsive. She also observed that he had a bulging fontanel (soft spot on the head) and a retinal hemorrhage in the left eye.

Following a CAT scan, Christian-Ritter determined that Justin had a left subdural hematoma. After further tests were run, infection was ruled out, and Justin was diagnosed as being a shaken infant because his symptoms indicated brain trauma and there were no outward signs of bruising or physical abuse.

Three other physicians testified at the trial regarding their examination and findings concerning Justin's medical condition. All were of the opinion that his injury was life threatening. Two of the physicians opined that Justin's injury was most likely due to a violent shaking.

Charles Clark, an investigator for the Bellevue Police Department, interviewed the defendant as part of his investigation and was told by the defendant that earlier in the afternoon of February 26, 1990, he had been bouncing Justin on his hip in an attempt to get Justin to stop crying. The defendant said that he was not paying much attention to how he was holding Justin because he just wanted Justin to stop crying.

The defendant also told Clark that later that evening after defendant took a shower, he went to get Justin up, and Justin appeared lethargic and was having difficulty breathing. The defendant attempted to arouse Justin by shaking him. When Justin did not respond, the defendant shook Justin harder a second time.

The defendant testified that after Carrie left for work that day, Justin was fine and that there were no problems. The defendant fed Justin and put him down to sleep. When he tried

to wake Justin up later that evening, the defendant noticed that Justin would not respond and was having difficulty breathing. The defendant testified that he panicked and began to shake Justin because he thought Justin was suffering from sudden infant death syndrome. There is a history of that syndrome in defendant's family.

The defendant contends that certain testimony by his wife which was admitted into evidence over his objections was irrelevant and prejudicial.

Carrie was allowed to testify, over the defendant's objections as to relevancy, regarding the defendant's attitude toward Justin after he regained consciousness. When it appeared that Justin would be retarded for the rest of his life, the defendant told Carrie that she would have to choose between him and Justin.

The State argues that this evidence is relevant to the issue of the defendant's intent in this case.

> "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. Evid. R. 401, Neb. Rev. Stat. § 27-401 (Reissue 1989). Neb. Evid. R. 402 permits the admission of relevant evidence only. *State v. Robertson*, 219 Neb. 782, 366 N.W.2d 429 (1985). 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. *State v. Baltimore*, 236 Neb. 736, 463 N.W.2d 808 (1990); *State v. Robertson, supra*.
>
> "Although relevant, evidence may be excluded 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." Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1989). . . . In the context of Neb. Evid. R. 403, "unfair prejudice" means an undue tendency to suggest a decision on an improper basis.

State v. Lonnecker, 237 Neb. 207, 210-11, 465 N.W.2d 737, 740-41 (1991).

Whatever probative value this part of Carrie's testimony might have to the issue of the defendant's intent, the value is minimal when compared to the unfair prejudice the testimony caused the defendant. Given the facts and the issue involved in this case, evidence of the defendant's attitude following Justin's regaining consciousness would have an undue tendency to influence the jury's decision on an improper basis, and the trial court erred in admitting the testimony into evidence over the defendant's objections.

Carrie was also allowed to testify, over the defendant's objection, about an incident that occurred at the hospital while she and her family were waiting for Justin to go into surgery. The defendant wanted Carrie to go with him to get something to eat; however, she did not want to leave Justin's room until he went into surgery. Carrie's mother suggested that the defendant get something to eat without Carrie, and the defendant became angry.

Carrie further testified:

> A. . . . And I told him to get out, I said, "Just get out," and he said, "No, you tell them to leave, because this is our child and they have nothing to do with this." And I said, "I want you to leave." So Jim stood up, my stepfather, and was asking Tony, he said, "Come on, let's go outside," you know. Tony got very upset and he raised his fist to Jim.
>
> Q. Who did?
>
> A. Tony.
>
> Q. Did he say anything at that time?
>
> A. He said, "Come on, old man, I'll lay you out right here," or something like that.

The State suggests that the evidence was properly admitted because it was evidence of the defendant's intent and quick temper. There is no merit to that argument.

The evidence as to the defendant's angry outburst at the hospital was irrelevant and prejudicial, and it was error to receive it in evidence.

Error in admitting or excluding evidence in a criminal trial is prejudicial unless it can be proved that the error was harmless beyond a reasonable doubt. *State v. Baltimore*, 236 Neb. 736, 463 N.W.2d 808 (1990); *State v. Lenz*, 227 Neb. 692, 419

N.W.2d 670 (1988). 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. Christian*, 237 Neb. 294, 465 N.W.2d 756 (1991).

In this case, we are unable to say that the admission of the improper evidence was harmless beyond a reasonable doubt.

The judgment is reversed, and the cause is remanded for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

GRANT and FAHRNBRUCH, JJ., concur.

HASTINGS, C.J., concurring.

I concur in the result because I believe that the testimony of the wife regarding the threat made by the defendant to her stepfather was received erroneously, was prejudicial, and does require a new trial. However, in my opinion, evidence of the statement of the defendant that his wife would have to choose between him and the baby was probative of defendant's intent to cause bodily harm intentionally and knowingly.

BOSLAUGH, J., dissenting.

I dissent only from that part of the opinion which holds that it was error for the trial court to admit, over defendant's objections, the testimony of the defendant's wife, Carrie, concerning his statement that she would have to choose between the defendant and their son, Justin, and the conversation at the hospital while they were waiting for Justin to be taken into surgery.

The defendant was charged with assault in the first degree, which required the State to prove beyond a reasonable doubt that the defendant's assault upon Justin, which clearly caused serious bodily injury, was made "intentionally or knowingly." Neb. Rev. Stat. § 28-308 (Reissue 1989).

There is substantial evidence in this case from which the jury could infer that Justin was an unwanted child so far as the defendant was concerned. The defendant made a number of statements which were inculpatory in varying degrees, but he finally admitted that he had shaken Justin vigorously when,

according to the defendant, Justin appeared to be comatose. The evidence established that the injury had to have occurred before that time.

It may be conceded that the testimony in question was prejudicial to the defendant, as most incriminating evidence is. However, I do not agree that it was not relevant or unfairly prejudicial.

The evidence as a whole tended to prove that the defendant deliberately and intentionally shook Justin violently in an effort to stop his crying. Defendant succeeded not only in stopping the crying, but also in so permanently injuring Justin that he will be retarded for the rest of his life.

In my opinion, the testimony in question was relevant to the issue of the intent with which the act was done, and it was within the discretion of the trial court to overrule the defendant's objections to it. I would affirm the judgment.

WHITE, J., joins in this dissent.

JANELL M. CZAPLEWSKI, APPELLANT, V. STEVEN L. CZAPLEWSKI, APPELLEE.

483 N.W.2d 751

Filed May 8, 1992. No. S-89-831.

1. **Modification of Decree: Child Support: Appeal and Error.** The standard of review on matters of child support modifications is de novo on the record, but the trial court's decision will be affirmed absent an abuse of discretion.
2. **Modification of Decree: Child Support.** Modification of an award of child support is not justified unless the applicant proves that a material change in circumstances has occurred since the entry of the decree or a previous modification.
3. **Child Support.** A trial judge does not satisfy his duty to equitably determine child support by blindly following suggested guidelines.

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

John S. Mingus, of Mingus & Mingus, for appellant.

James D. Smith, of Brock, Seiler & Smith, for appellee.

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

PER CURIAM.

In an action for the modification of child support for the parties' two children, the court increased appellee father's child support obligation from $150 to $270 per month. The court further ordered that the amount be reduced to $190 per month when the eldest child became of age or upon further order of the court.

FACTS

Appellant mother, Janell M. Czaplewski, and appellee father, Steven L. Czaplewski, were divorced by a dissolution decree in July 1976, with the mother receiving custody of the couple's two minor children and with the father required to pay $150 per month in child support. In 1982, the obligation was increased to $120 per child, and again reduced to a flat $150 per month in November 1986. In December 1988 the mother again requested a child support modification when the father obtained a new job with the U.S. Postal Service. The fact that the father's child support obligation should be increased was not contested, and on June 16, 1989, the court did modify the obligation, increasing the amount to $270 per month.

The mother nevertheless appeals to this court, contending that the trial judge ought not have considered the fact that Mr. Czaplewski now has another child from a subsequent marriage to support.

DISCUSSION

The standard of review on matters of child support modifications is de novo on the record, but the trial court's decision will be affirmed absent an abuse of discretion. *Empfield v. Empfield*, 229 Neb. 83, 425 N.W.2d 334 (1988).

Modification of an award of child support is not justified unless the applicant proves that a material change in circumstances has occurred since the entry of the decree or a previous modification. *Empfield v. Empfield, supra*; *Dobbins v. Dobbins*, 226 Neb. 465, 411 N.W.2d 644 (1987).

As we noted in *Brandt v. Brandt*, 227 Neb. 325, 417 N.W.2d 339 (1988), a trial judge does not satisfy his duty to equitably determine child support by blindly following suggested guidelines. The Nebraska Child Support Guidelines are, by their very nature, simply guidelines. While we have required since 1987, *Fooks v. Fooks*, 226 Neb. 525, 412 N.W.2d 469 (1987), that the Nebraska Child Support Guidelines be utilized, the reality is that the guidelines are applied as a rebuttable presumption to both temporary and permanent support. See Neb. Rev. Stat. § 42-364.16 (Reissue 1988). The court may deviate from the guidelines where one or both parties have provided sufficient evidence to rebut the presumption that the guidelines should be applied. Thus, the guidelines offer flexibility and guidance, with the understanding that not every child support scenario will fit neatly into the calculation structure.

Line 2(f) of the guideline's worksheet 1, the basic net income and support calculation, provides as a deduction that amount in "[c]hild support previously ordered for children not of this marriage." In keeping with the spirit of the guidelines, the trial court was correct in factoring into the child support calculations the father's offspring of his subsequent marriage. Therefore, the calculations are correct and shall stand.

The order of the trial court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MAURICE T. DAVIS, APPELLANT.

483 N.W.2d 554

Filed May 8, 1992. No. S-90-1023.

1. **Convictions: Appeal and Error.** In reviewing a criminal conviction, an appellate court must view the evidence in the light most favorable to the prevailing party.
2. _____: _____. An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and the verdict will be affirmed, in the absence of prejudicial error, if properly admitted evidence, viewed and construed most favorably to the

State, is sufficient to support the conviction.

3. **Motions to Suppress: Appeal and Error.** When reviewing a motion to suppress, an appellate court will not reweigh or resolve conflicts in the evidence, but will uphold the trial court's findings unless they are clearly erroneous.
4. **Confessions: Evidence: Proof.** To be admissible in evidence, an accused's statement, confession, or admission must have been freely and voluntarily made. The State bears the burden of proving that a defendant's statement was voluntarily made, and not the product of any promise or inducement, before the statement is admissible.
5. **Confessions: Appeal and Error.** Voluntariness is determined by the totality of the circumstances, and a determination by the trial judge that an admission was made voluntarily will not be overturned on appeal absent an abuse of discretion.

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

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

Don Stenberg, Attorney General, and Kimberly A. Klein for appellee.

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

GRANT, J.

After trial to the court, sitting without a jury, defendant-appellant, Maurice T. Davis, was convicted of possession with intent to deliver a controlled substance (crack cocaine), in violation of Neb. Rev. Stat. § 28-416(5)(a) (Reissue 1989). After a presentence investigation, defendant was sentenced to 5 to 6 years in the Department of Correctional Services, with credit of 226 days being given on such sentence.

Defendant timely appealed, and in this court assigns three errors, contending that the trial court erred (1) in overruling defendant's motion to suppress physical evidence seized, (2) in overruling defendant's motion to suppress statements made by the defendant, and (3) in convicting defendant, where the evidence was insufficient to support his conviction. We affirm.

In reviewing a criminal conviction, an appellate court must view the evidence in the light most favorable to the prevailing party. *State v. Red Kettle*, 239 Neb. 317, 476 N.W.2d 220 (1991). The appellate court does not resolve conflicts in the evidence,

pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and the verdict will be affirmed, in the absence of prejudicial error, if properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Timmerman, ante* p. 74, 480 N.W.2d 411 (1992). Viewed in that light, the record shows the following:

In early 1990, Omaha police were investigating defendant's possible involvement in cocaine distribution in the North Omaha area. A confidential informant had supplied information that defendant was a dealer who received his supplies from Kansas City.

On February 19, 1990, police drafted an affidavit in support of an application for a search warrant. That affidavit first detailed specific activities which caused police to suspect defendant's participation in drug activity. The affidavit then set forth specific information which police received from a confidential informant.

Four weeks prior to defendant's arrest, the confidential informant identified defendant and told police officers that defendant was then involved in distributing cocaine. On February 7, 1990, the informant stated the defendant had received 5 ounces of cocaine from Kansas City and that defendant was using workers at a residence at 3305 North 40th Avenue in Omaha to distribute crack cocaine for him. On February 13, the informant told police that defendant had asked the informant to accompany him to Kansas City to pick up another purchase of cocaine and transport it back to Omaha.

The informant had seen "several ounces" of crack in defendant's possession and at 4115 North 42nd Street, where defendant lived with his mother. Less than 48 hours before defendant was arrested the informant had, under police supervision, purchased cocaine from defendant.

On February 19, 1990, the defendant, driving a cream-colored Chevrolet Impala, went to 4115 North 42nd Street while the house was under surveillance. Defendant entered the home and left a few minutes later. The police stopped the car and a drug detection dog brought to the scene

"alerted" to the odor of cocaine during a "perimeter" survey of the car. Defendant consented to a search of the vehicle. The search turned up no evidence of drugs or drug dealing. Defendant was arrested for suspicion of possession of a controlled substance and taken to police headquarters.

At headquarters, defendant waived his *Miranda* protections and agreed to speak with the officers. Sgt. William Agnew then briefly questioned defendant. Defendant specifically stated that there would not be any drugs in his bedroom and that he would be surprised if police found cocaine at his mother's home.

The police finished drafting the affidavit, obtained a search warrant for 4115 North 42nd Street, and returned there to execute the warrant. Pursuant to the order of Sergeant Agnew, the defendant was taken with the police at that time. Agnew testified this was done because "I wanted him to be present at the house."

Police entered the locked residence by using a key on defendant's key chain, after defendant requested that his key be used. On entering the home, defendant indicated that his room was the northeast bedroom on the main floor. The subsequent search of the residence uncovered over 54 grams of cocaine, a portion of which was found in a tennis shoe in defendant's bedroom, and $1,400 in U.S. currency. Defendant was charged with possession with intent to deliver a controlled substance.

At the suppression hearing, defendant, asserting the search warrant was invalid, moved to suppress all physical evidence. Defendant also moved to suppress all statements made to police because they had been coerced and made without the defendant's being advised of his *Miranda* protections. The court overruled both motions.

At trial, both the evidence and the statements were objected to, the objections were overruled, and the evidence was received. Thus, defendant has properly preserved the issues for appeal. See *State v. Hall*, 237 Neb. 169, 465 N.W.2d 150 (1991).

In his first assignment of error, appellant asserts that "[t]he District Court erred in overruling the Defendant's motion to suppress physical evidence seized as a result of the search by Omaha police on February 19, 1990."

When reviewing a motion to suppress, an appellate court will not reweigh or resolve conflicts in the evidence, but will uphold the trial court's findings unless they are clearly erroneous. *State v. Groves*, 239 Neb. 660, 477 N.W.2d 789 (1991). In making this determination, the trial court is the trier of fact, and the reviewing court takes into consideration that the trial court has observed the witnesses testifying regarding the motion to suppress. *Id.*

Defendant's motion to suppress all physical evidence obtained from the search of 4115 North 42nd Street contended that there was no probable cause for the granting of the warrant; that the affidavit upon which the warrant was granted was insufficient; that the warrant was defective on its face; that the warrant was not executed according to its terms; and that the search was made prior to, and not incident to, a lawful arrest, and without probable cause.

In *State v. Groves*, 239 Neb. at 665, 477 N.W.2d at 794-95, this court stated:

> This court has adopted the "totality of the circumstances" test set forth by the U.S. Supreme Court in *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983), to determine the sufficiency of an affidavit used to obtain a search warrant. [Citation omitted.] It is only the probability, and not a prima facie showing, of criminal activity which is the standard of probable cause for issuance of a search warrant. [Citation omitted.]
>
> In evaluating probable cause for the issuance of a search warrant, the magistrate must make a practical, commonsense decision whether, given the totality of the circumstances set forth in the affidavit before him, including the veracity and basis of knowledge of the persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. [Citation omitted.] The duty of the reviewing court is to ensure that the issuing magistrate had a substantial basis for determining that probable cause existed. [Citation omitted.]

Defendant contends that "the information [within the

affidavit] was not 'reasonably trustworthy under the circumstances, because of the almost total lack of accurate, detailed information concerning the informer's reliability.' " Brief for appellant at 12.

The affidavit stated that the confidential informant had given information in the past which had proven "accurate and reliable through independent investigation" and that the informant had on two prior and separate occasions assisted police in controlled purchases of crack cocaine. The affidavit also set out a description, furnished by the informant, of a cream-colored Chevrolet Impala which the informant stated that defendant used to transport cocaine for distribution. The informant later identified that vehicle, parked at 4115 North 42nd Street. It was in this car that the defendant sold to the informant, in another controlled-buy situation, a substance which field tested positive for cocaine. All of this was done within 48 hours of the application for the warrant.

The affidavit, under the "totality of the circumstances," was sufficient to support an independent magistrate's finding that probable cause existed to issue a search warrant for the residence at 4115 North 42nd Street. Thus, all evidence seized pursuant to that search warrant was properly admitted into evidence. This assignment of error is without merit.

In his second assignment, defendant asserts that the trial court erred in failing to suppress a statement made by the defendant, because the statement "was, in fact, the result of improper influence." Brief for appellant at 18.

The statement to which defendant refers was made to Sergeant Agnew, inside the residence at 4115 North 42nd, during the search. After witnessing the police uncover a Crown Royal bag filled with cocaine and cash, defendant asked to speak to Agnew. Agnew testified that he and the defendant went into another room: "I asked Mr. Davis what he wanted, at which time he stated you found everything. Don't tear the house up. Will you put everything back[?]"

In *State v. Melton*, 239 Neb. 506, 510, 476 N.W.2d 842, 845 (1991), this court held: "To be admissible in evidence, an accused's statement, confession, or admission must have been freely and voluntarily made. . . ."

Defendant correctly notes that, as to its burden, the State must also show that the admission made by the accused was not the product of any promise or inducement, direct or implied, no matter how slight, before it will be admitted into evidence. *State v. Haynie*, 239 Neb. 478, 476 N.W.2d 905 (1991).

In *State v. Hall*, 237 Neb. 169, 174, 465 N.W.2d 150, 153 (1991), this court restated that "[v]oluntariness is determined by the totality of the circumstances, and a determination by the trial judge that [an admission] was made voluntarily will not be overturned on appeal absent an abuse of discretion." (Citing *State v. Walker*, 236 Neb. 503, 461 N.W.2d 755 (1990).)

In the present case, defendant was taken to the house and seated in the living room. Defendant then requested to be in the kitchen area in order to observe the inventory of all seized evidence. Upon witnessing the systematic search of his mother's home and the discovery of the cocaine and cash, defendant asked to speak with Agnew. Defendant then volunteered the statements, without any inducement of leniency or even questioning by Agnew.

Defendant seems to suggest that his will was overborne by watching police inventory and "mess up" his mother's home. The nature of the statement does not suggest that any deal was offered or threats made toward defendant. The record shows that defendant was given his *Miranda* warnings prior to execution of the warrant. Nothing suggests that any officer indicated or implied to defendant that the search would be terminated or that any other benefit to him would enure in exchange for such a statement.

Considering the totality of the circumstances, we cannot say that defendant's statement was coerced or the result of improper influence to make an admission. The trial court did not abuse its discretion in finding that defendant's statements were voluntarily made and in overruling defendant's motion to suppress his statements. This assignment is without merit.

Defendant's final assignment of error alleges the evidence was "insufficient as a matter of law to sustain the defendant's conviction" because "it [was] not clearly established that the Defendant in fact resided at the residence of 4115 N. 42nd Street." Brief for appellant at 18-19.

Defendant was detained by police shortly after leaving the residence. Upon execution of the search warrant, police entered the locked home using a house key on defendant's car-key chain. Once inside, defendant indicated that the house's northeast bedroom was his. Inside that room, a traffic citation directed to defendant was found, which was dated February 7, 1990, just 12 days before the warrant was executed. The address listed on the citation was 4115 North 42nd Street. Police also seized from a wastepaper basket a receipt dated February 19, 1990, from Centel Cellular Company, made out to defendant.

In addition, defendant's mother was called by defendant as a witness. After denying that defendant lived with her at 4115 North 42nd Street, the mother testified as follows:

> Q. Did he ever have mail sent to that address?
>
> A. Yes, on my request it was mailed right there.
>
> Q. Did he have access to the residence at 4115 North 42nd Street?
>
> A. Yes, he did.
>
> Q. What type of access did he have?
>
> A. I gave him a key.
>
> Q. Do you recall when you gave Maurice a key?
>
> A. I gave him a key basically when he moved in. I gave all my kids a key.

All this evidence and testimony, if believed, proved that the defendant resided, at least occasionally, at 4115 North 42nd Street. Finally, when the defendant, without threats or coercion, stated, "[Y]ou found everything," evidence clearly established that the cocaine was his. We find this assignment to have no merit.

The trial court's rulings upon defendant's motions to suppress were correct, and evidence was sufficient to sustain a guilty verdict at trial. The judgment of the trial court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. WILLIAM C. GREEN, APPELLANT.

483 N.W.2d 748

Filed May 8, 1992. No. S-90-1216.

1. **Constitutional Law: Prisoners.** While it is true that prisoners do not forfeit all of their Fourth Amendment rights during incarceration, they do not retain the same measure of protection afforded to nonincarcerated individuals.
2. **Prior Convictions: Proof: Right to Counsel: Waiver.** To prove a prior conviction for enhancement purposes, the State need only show that at the time of the prior conviction, the defendant had, or waived, counsel.

Appeal from the District Court for Lancaster County: WILLIAM D. BLUE, Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Richard L. Goos for appellant.

Don Stenberg, Attorney General, and Sharon M. Lindgren for appellee.

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

PER CURIAM.

STATEMENT OF THE CASE

William C. Green appeals his jury conviction of two counts of third degree assault on an officer, a Class IV felony in violation of Neb. Rev. Stat. § 28-931(1) (Reissue 1989), and the resulting enhanced sentence of 10 years' imprisonment on each count (to be served concurrently), with credit given for 138 days served. Third degree assault is punishable by no more than 5 years' imprisonment, a $10,000 fine, or both; however, the court found that appellant was a habitual criminal under Neb. Rev. Stat. § 29-2221 (Reissue 1989).

FACTS

On August 25, 1989, Officer Stahlhut and Investigator Doetker arrived at the county jail to interview appellant Green and to obtain physical evidence on Green, who was being held at the jail on other charges. As Doetker was beginning to read appellant the *Miranda* warnings, appellant rose from his seat and started to leave the interviewing room. Stahlhut grabbed

the appellant by the arm. Green jerked away and hit the officer with his right forearm. The officer attempted to grab Green again, at which time Green poked the officer under his right eye with his fingers. As the investigator approached the pair to assist, Green attempted to punch the investigator in the abdomen.

Two jailers responded to the scuffle and shocked the appellant four times with a stun gun.

ASSIGNMENTS OF ERROR

Green alleges, in summary, that the district court erred in (1) overruling his motion to suppress evidence; (2) finding, based upon insufficient evidence, that he was a habitual criminal; and (3) sustaining the verdicts on insufficient evidence.

DISCUSSION

We address first appellant's contention that his motion to suppress certain evidence at trial should have been sustained. The Supreme Court will uphold the trial court's ruling on a motion to suppress unless such ruling is clearly erroneous. *State v. Victor*, 235 Neb. 770, 457 N.W.2d 431 (1990); *State v. Juhl*, 234 Neb. 33, 449 N.W.2d 202 (1989).

Appellant essentially contends that since he had been arrested and his custody had been transferred to correctional personnel and not the officers, the officers had no right to try to stop him from exiting the jail's interviewing room, which violated his Fourth Amendment rights and constituted an illegal seizure of his person. Appellant then hypothesized, in accordance with the "fruit of the poisonous tree" doctrine (see *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963)), that all of the officers' observations after that point ought to be suppressed.

We have iterated several times that while it is true that prisoners do not forfeit all of their Fourth Amendment rights during incarceration, they do not retain the same measure of protection afforded to nonincarcerated individuals. See, *State v. Starks*, 229 Neb. 482, 427 N.W.2d 297 (1988); *State v. Kerns*, 201 Neb. 617, 271 N.W.2d 48 (1978). No new arrest occurred upon the officers' commencement of the interview. Appellant Green thus had no constitutional basis to contest the identity of

the party assigned to hold him by the arresting authority. See, also, *State v. McCarthy*, 197 Conn. 247, 496 A.2d 513 (1985), as quoted by this court in *Starks*. The assignment is without merit.

We next address the sufficiency of the evidence in finding that appellant is a habitual criminal. In support of his assertion, appellant cites, generally, *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969), and *Gonzales v. Grammer*, 848 F.2d 894 (8th Cir. 1988).

However, in evaluating previous habitual criminal convictions, we have held that to prove a prior conviction for enhancement purposes, the State need only show that at the time of the prior conviction the defendant had, or waived, counsel. *State v. Oliver*, 230 Neb. 864, 434 N.W.2d 293 (1989). The record reflects that Green was indeed represented by appointed counsel at the time of his prior convictions. The assignment is without merit, and the habitual criminal conviction is affirmed.

A jury's verdict must be sustained if the evidence, viewed in the light most favorable to the State, is sufficient to support the verdict. *State v. Ryan*, 233 Neb. 74, 444 N.W.2d 610 (1989). Appellant asserts that neither the officer nor the detective had bruises or visible injuries and that the record reflects that appellant only "attempted" to punch the investigator in the abdomen. Thus, he argues, the evidence is insufficient to sustain the convictions.

Appellant's assertion, while somewhat creative, has no basis in reality. We have never required that an assault culminate in visible markings in order to be labeled as such. In fact, for third degree assault on a police officer, § 28-931(1) requires knowing, intentional, or reckless causation of bodily injury to a peace officer while the officer is engaged in the performance of official duties. The record supports the appellant's convictions. We accordingly affirm.

AFFIRMED.

WHITE, J., concurring in part, and in part dissenting.

While I agree that the evidence amply supports the conviction of the substantive offense, I dissent from the portion of the opinion which sustains the enhancement proceeding, for

the reason I last stated in *State v. Crane, ante* p. 32, 480 N.W.2d 401 (1992) (White, J., dissenting).

STATE OF NEBRASKA, APPELLEE, V. CHARLES G. LEWIS, JR., APPELLANT.

483 N.W.2d 742

Filed May 8, 1992. No. S-90-1236.

Ordinances: Presumptions: Judicial Notice: Appeal and Error. When an ordinance charging an offense is not properly made a part of the record, an appellate court presumes the existence of a valid ordinance creating the offense charged, and an appellate court will not otherwise take judicial notice of the ordinance.

Appeal from the District Court for Lancaster County, WILLIAM D. BLUE, Judge, on appeal thereto from the County Court for Lancaster County, JAMES L. FOSTER, Judge. Judgment of District Court affirmed.

John C. Vanderslice for appellant.

Norman Langemach, Jr., Lincoln City Prosecutor, for appellee.

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

PER CURIAM.

Defendant, Charles G. Lewis, Jr., was charged with driving while under the influence of intoxicating liquor, in violation of Lincoln Mun. Code § 10.52.020, and with operating a snowmobile on a public street, in violation of Lincoln Mun. Code § 10.65.010. The county court for Lancaster County, following trial on stipulated facts, found the defendant guilty on each charge and sentenced him to 1 year's probation, a $200 fine, and a 60-day driver's license suspension. Defendant appealed the driving while under the influence charge to the district court for Lancaster County, which affirmed. This appeal followed. In this court, defendant contends that a snowmobile is not a motor vehicle under the Lincoln Municipal

Code provision which prohibits driving a motor vehicle while under the influence. We affirm.

The provisions of the Lincoln Municipal Code under which the defendant was convicted and sentenced are not in the record. This court will not take judicial notice of a city ordinance which does not appear in the record.

> When an ordinance charging an offense is not properly made a part of the record, an appellate court presumes the existence of a valid ordinance creating the offense charged, and an appellate court will not otherwise take judicial notice of the ordinance. . . . In the absence from the record of the applicable municipal ordinance, an appellate court presumes that the evidence sustains the findings of the trial court and that a sentence is within the limits set out in the applicable ordinance.

State v. King, 239 Neb. 853, 854, 479 N.W.2d 125, 126 (1992). See, also, *State v. Topping*, 237 Neb. 130, 464 N.W.2d 799 (1991); *State v. Cottingham*, 226 Neb. 270, 410 N.W.2d 498 (1987); *State v. Lynch*, 223 Neb. 849, 394 N.W.2d 651 (1986); *State v. Bruce*, 213 Neb. 661, 330 N.W.2d 752 (1983).

When the applicable ordinance is not in the record, the district court, on the initial appeal to that court, and the appellate court, on appeal from the district court, will presume that the evidence before the trial court supports the findings of the trial court. *State v. Topping, supra*; *State v. Cottingham, supra*. The order of the district court, affirming the order of the county court, is affirmed.

AFFIRMED.

SHANAHAN, J., concurring.

This court continues to use a strange standard for disposition of a case involving an omitted ordinance, namely:

> When an ordinance charging an offense is not properly made a part of the record, an appellate court presumes the existence of a valid ordinance creating the offense charged . . . . In the absence from the record of the applicable municipal ordinance, an appellate court presumes that the evidence sustains the findings of the trial court and that a sentence is within the limits set out in the applicable ordinance.

The preceding incantation is used to pull no fewer than two "presumptions" out of a judicial hat to affirm Lewis' conviction. As the result of those unwarranted and untenable presumptions, the majority relieves the State from the fundamental requirement of establishing a valid basis for taking away a defendant's liberty or property. Rather than indulge in such dispensation, other courts in several jurisdictions have concluded that the State's failure to establish the ordinance on which a prosecution is based requires reversal of the conviction and dismissal of the proceeding; for instance, see *State v. Pallet*, 283 N.C. 705, 198 S.E.2d 433 (1973) (State's failure to establish the municipal ordinance on which the prosecution is based required dismissal of the prosecution); *Sisk v. Town of Shenandoah*, 200 Va. 277, 280, 105 S.E.2d 169, 171 (1958) (conviction based on a municipal ordinance prohibiting drunk driving is, in the absence of the municipal ordinance in the record, reversed because "[f]air trial practice required that the defendant be afforded the opportunity to know the provisions of the ordinance she is charged with violating"); *Hishaw v. City of Oklahoma City*, 822 P.2d 1139 (Okla. Crim. App. 1991) (conviction reversed because municipal ordinance was absent from record presented to appellate court); *Peters v. City of Phenix City*, 589 So. 2d 800 (Ala. Crim. App. 1991) (failure to introduce into evidence the ordinance on which the charge was brought rendered the evidence insufficient to sustain a conviction); *Gonon v. State*, 579 N.E.2d 614 (Ind. App. 1991) (ordinance's absence from the record renders the evidence insufficient to sustain a defendant's conviction). Thus, prosecution of a defendant for violation of an ordinance without including the ordinance in the case against the defendant implicates due process and the right to a fair trial.

Although one might contend that a defendant can offer a certified copy of the ordinance at some stage of the proceeding before judgment in the trial court, the fact remains that the prosecution should be required to prove a prima facie case against a defendant, including existence of the very ordinance under which the prosecution is maintained. Otherwise, this court condones and even assists in the deprivation of a

defendant's liberty or property, as the result of prosecution under an ordinance which may, or may not, exist. Moreover, any litigant whose success in an action depends on existence of an ordinance should have the burden to establish existence of the ordinance. Also, in *Zybach v. State*, 226 Neb. 396, 401, 411 N.W.2d 627, 631 (1987) (quoting *Nevels v. State*, 205 Neb. 642, 289 N.W.2d 511 (1980)), this court stated that " 'a party seeking the benefit of such provisions [of an ordinance or regulation must] plead and prove the existence of the ordinance or rule.' " Thus, in cases involving an alleged violation of an ordinance, this court "presumes the existence of a valid ordinance creating the offense," while simultaneously requiring that a party who seeks to benefit from the provisions of an ordinance must " 'plead and prove the existence of the ordinance.' " Judicial doublethink!

Furthermore, the standard employed in Lewis' case may effectively eliminate appellate review of a conviction, since the prosecution, by omitting the crucial ordinance from the record in the trial court, can obviate a defendant's successful appeal from a conviction based on the ordinance. The standard in Lewis' case may also lead to certain undesirable and peculiar results, such as this court's upholding a conviction obtained under an unconstitutional ordinance. For example, suppose that a defendant is prosecuted for violating a municipal ordinance which prohibits an individual's criticism of city government or a public official, or suppose that a defendant is charged with violating an ordinance which forbids the presence of a particular racial minority within a city, a racial minority which includes the defendant. In the foregoing examples, notwithstanding that the defendant has properly challenged the constitutionality of the ordinance that is omitted from the trial, the defendant's conviction under a constitutionally suspect ordinance must be upheld, even if the unconstitutional ordinance is missing from the prosecution's case through oversight or deliberate deletion. Could not happen? Take a look at *State v. Sator*, 194 Neb. 120, 230 N.W.2d 224 (1975); *State v. Radcliff*, 188 Neb. 236, 196 N.W.2d 119 (1972); and *State v. Novak*, 153 Neb. 596, 45 N.W.2d 625 (1951).

The only explanation for the strange standard used by the

majority regarding the missing ordinance in Lewis' case is the rationalization: "Even though wrong, we've always done it this way." Under that approach to jurisprudence, trial by ordeal and dousing suspected witches would still be acceptable methods to ascertain truth of allegations.

As an alternative to the standard employed by this court regarding an omitted ordinance, Lewis has supplied us with certified copies of applicable Lincoln ordinances pertinent to the prosecution and requests that this court take judicial notice of those ordinances as adjudicative facts. The State does not question the authenticity of the ordinances presented for judicial notice by this court; hence, the applicable Lincoln ordinances are beyond question in Lewis' appeal.

The Nebraska Evidence Rules allow the judicial notice requested by Lewis, for Neb. Evid. R. 201(2) provides: "A judicially noticed fact must be one not subject to reasonable dispute in that it is . . . (b) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Neb. Evid. R. 201(6) states that "[j]udicial notice may be taken at any stage of the proceeding." Therefore, an appellate court can take judicial notice of an adjudicative fact.

Various commentators have emphasized the propriety and practicality concerning judicial notice of a municipal ordinance.

> In the case of local ordinances, judicial notice was originally withheld by courts other than those of the local adoptive government. The reason is that only the judge of the local court was likely to have knowledge about or access to the ordinance. Therefore the rule of availability would naturally be limited to that court. The facts do not support the rule. Regardless of the court, if the ordinance is available, is reliable and is known to the court, it should be judicially noticed. Today a growing number of cities are publishing their ordinances. Where ordinances are available or are actually known to the court, the formal rule limiting judicial notice to municipal courts should be abandoned.

2 Norman J. Singer, Statutes and Statutory Construction

§ 39.01 at 163-64 (4th ed. 1986). As pointed out in 2 McCormick on Evidence § 335 at 415 (John William Strong 4th ed. 1992),

> municipal ordinances . . . are not commonly included within the doctrine of judicial notice and these must be pleaded and proved. To the extent that these items become readily available in compilations, it may be expected that they will become subject to judicial notice; whereas, in the meantime, it would appear appropriate for judges to take judicial notice of both private laws and municipal ordinances if counsel furnish a certified copy thereof.

Consequently, court after court has recognized that a municipal ordinance may be judicially noticed in a trial court and at the appellate level. See, *Barberton v. O'Connor*, 17 Ohio St. 3d 218, 478 N.E.2d 803 (1985); *Concrete Contractors, Inc. v. City of Arvada*, 621 P.2d 320 (Colo. 1981); *Wessel v. Erickson Landscaping Co.*, 711 P.2d 250 (Utah 1985); *State v. Duranleau*, 99 N.H. 30, 104 A.2d 519 (1954); *Martinez v. City of San Antonio*, 768 S.W.2d 911 (Tex. App. 1989); *Lowery v. Bd. of Cty. Com'rs for Ada Cty.*, 115 Idaho 64, 764 P.2d 431 (Idaho App. 1988); *Forks v. Fletcher*, 33 Wash. App. 104, 652 P.2d 16 (1982); *Powers v. State*, 370 So. 2d 854 (Fla. App. 1979); *People v Miller*, 77 Mich. App. 381, 258 N.W.2d 235 (1977).

However, as requested by Lewis, judicial notice of Lincoln ordinances affords no solace to Lewis, for Lincoln Mun. Code § 10.04.216 (1982) states: "Snowmobile shall mean a self-propelled *motor vehicle* designed to travel on snow or ice on a natural terrain steered by wheels, skis, or runners and propelled by a belt-driven track with or without steel cleats." (Emphasis supplied.) Other Lincoln ordinances pertaining to snowmobiles prohibit operation of this type of motor vehicle on a public street, Lincoln Mun. Code § 10.65.010 (1986), and on private property, Lincoln Mun. Code § 10.65.040 (1986), within the city of Lincoln, but permit snowmobiling in Lincoln parks, Lincoln Mun. Code § 12.08.021 (1986). Nevertheless, the fact remains that, under Lincoln ordinances pertinent to Lewis' case, a snowmobile is a type of motor vehicle that is subject to the Lincoln ordinances governing operation of a

motor vehicle within the city limits of Lincoln. Stipulated evidence established that on January 20, 1990, two Lincoln police officers, apparently on cruiser patrol, saw Lewis driving his snowmobile at a high rate of speed on public streets within Lincoln; that the officers later stopped Lewis on his snowmobile and administered field sobriety tests and a "preliminary breath test" to Lewis, who failed those tests; that, subsequently, an Intoxilyzer test, properly administered to Lewis, disclosed that he had a breath alcohol level prohibited by Lincoln ordinance concerning operation of a motor vehicle; and that the officers had formed the opinion that Lewis "was under the influence of an alcoholic beverage at the time they saw him operating the snowmobile on the public street." Therefore, in light of judicial notice concerning the Lincoln ordinances, the State charged and proved that Lewis operated his snowmobile, which is a motor vehicle, in violation of the Lincoln ordinance that prohibits a person's operation or physical control of a motor vehicle while that person is under the influence of alcoholic liquor. For that reason, Lewis' conviction must be affirmed.

Were it not for appellate judicial notice of the Lincoln ordinances as requested, Lewis' conviction would have to be set aside, with this cause remanded for dismissal of the prosecution as the result of the State's omitting proof of the ordinances.

GRANT, J., concurring.

I concur fully in the majority opinion. Since at least 1893, defendants in this state appealing convictions under a municipal ordinance have known, or should have known, that if a defendant is to effectively appeal such a conviction, it is necessary to include a copy of the ordinance allegedly violated in the record presented to a reviewing court. Defendants generally know whether there is to be an appeal, and they bear the duty to present a record that may be reviewed properly in the area defendant wants reviewed.

In *Perry v. State*, 37 Neb. 623, 625, 56 N.W. 315, 316 (1893), we said:

> It is true that before the plaintiffs in error could have been lawfully convicted there must have been introduced in

> evidence facts proving that they were inmates of a house of ill-fame, and there must have also been introduced a valid ordinance of the city of Columbus forbidding persons from being inmates of such houses. As a matter of fact none of these things may have been done, but every reasonable presumption will be indulged by this court in favor of the correctness of the judgment of the court below.

Ninety-nine years later, defendants still profess to be astonished and nonplussed by the application of the rule.

To change the rule now and require prosecutors in the numerous ordinance violation cases in this state to introduce in evidence the ordinance allegedly violated would probably give us 99 years of dismissal on appeal of practically all ordinance violation cases. Prosecutors would probably be concerned with encumbering the record in every noncontested ordinance violation case by introducing the pertinent ordinance on the chance that a conviction might possibly be appealed or the prosecutors would forget to do so.

If the procedure is now judicially changed, I assume that would even the score for 198 years—from one allegedly outrageous application of the law to one diametrically opposed.

It does not appear to me to be too much to require lawyers to follow a 99-year-old established procedural rule and to treat this appellate problem as having been settled under the doctrine of stare decisis et non quieta movere.

BOSLAUGH, J., joins in this concurrence.

CAPORALE, J., dissenting.

I am not prepared to adopt a rule which would ultimately require that an appellate court determine which of various competing versions of an ordinance should be judicially noticed. The place to make a proper trial record is in the trial court; if the record does not contain the ordinance in question, an appellate court should not judicially notice it.

Nonetheless, notwithstanding our recent reaffirmations, I agree with Judge Shanahan's suggestion that the time has come to reexamine the continuing validity of our present rule. That is, an appellate court will not take judicial notice of an ordinance

not in the record but presumes, or perhaps more correctly assumes, that a valid ordinance creating the offense charged exists, that the evidence sustains the findings of the trial court, and that the sentence is within the limits set by the ordinance. *State v. King*, 239 Neb. 853, 479 N.W.2d 125 (1992).

The language from *Perry v. State*, 37 Neb. 623, 56 N.W. 315 (1893), which Judge Grant quotes in his concurrence was expanded upon in *Foley v. State*, 42 Neb. 233, 60 N.W. 574 (1894). That expansion makes clear that the assumptions we presently make are outgrowths of the requirements that a municipal court take judicial notice of its own municipality's ordinances and that upon subsequent de novo review by the district court, the district court take judicial notice of whatever the municipal court could have judicially noticed. The *Foley* court explained:

> Courts will not, as a rule, take notice of municipal ordinances, unless required to do so by special charter or general law; but to that rule there are recognized exceptions, among which is that courts of a municipal corporation will take notice, without allegations or proof, of its own ordinances. The ground of the exception noted is that such courts stand in the same relation toward the municipal laws of the city, or other corporation, as do courts of general jurisdiction toward the public laws of the state; and on appeal from a judgment of conviction before a police magistrate of a city for the violation of an ordinance thereof the court will, upon a trial *de novo*, take notice of such ordinance. In short, the district court, or court of like general jurisdiction, will, on appeal from a municipal court, take notice of whatever facts the latter could have noticed judicially before the removal of the cause therefrom. The court exercising appellate jurisdiction in such cases is . . . for the time being regarded as a substitute for the police magistrate. [Citations omitted.] Cases are not wanting which sustain a different rule and holding in effect that in every prosecution under a city ordinance it is essential to set out, or in unmistakable terms refer to, the section or provision thereof relied upon for a conviction. In fact, the weight of authority, judged

> by the number of cases, may be said to sustain that view; but the question being an open one in this state, notwithstanding the dictum in *Perry v. State*, 37 Neb. [623, 56 N.W. 315 (1893),] we feel at liberty to adopt the rule most in harmony with the spirit of our liberal practice, and most promotive of a prompt and efficient enforcement of municipal laws. The reason for the strict rule of the common law which required every by-law, ordinance, or private statute to be specially pleaded cannot be said to exist under our system. At common law, prosecutions under statutes imposing a penalty against the offender, as distinguished from the body of the criminal law, were upon information and generally by a common informer, who claimed a part of the fine or penalty. [Citation omitted.] Such prosecutions were by leave of court and differed from indictments in one respect only, viz., that whereas the latter were upon the oath of twelve men, the former was upon the oath of the prosecutor alone. In such cases the same certainty was required as in prosecutions by indictment. [Citation omitted.] It seems neither necessary nor advisable to require in complaints for the violation of mere municipal regulations the same strictness as in prosecutions under the provisions of the Criminal Code. According to the better doctrine such offenses, although frequently prosecuted in the name of the state, are criminal in form merely, while in substance and effect they are civil proceedings, and, therefore, not within the provision of the constitution which declares that the right of trial by jury shall remain inviolate.

42 Neb. at 235-36, 60 N.W. at 574.

However, in *Steiner v. State*, 78 Neb. 147, 150, 110 N.W. 723, 724 (1907), this court made clear that it would not take judicial notice of municipal ordinances not in the record, declaring:

> But a different rule will prevail with respect to this court, where such matters are not triable *de novo*. This court cannot undertake to notice the ordinances of all the municipalities within its jurisdiction, nor to search the records for evidence of their passage, amendment or repeal. A party relying upon such matters must make

them a part of the bill of exceptions, or in some manner present them as a part of the record.

Having encouraged the creation of inadequate trial records, this court decided in *Wells v. State*, 152 Neb. 668, 42 N.W.2d 363 (1950), to fill in one of the inevitably resulting gaps by declaring that, as a judgment of the district court had come to the Supreme Court with the usual presumptions of regularity, it would be presumed in the absence of a showing to the contrary that the facts before the district court, including those of which it was required to take judicial notice, established that the facts charged in the complaint were a violation of the ordinance described or referred to therein. The *Wells* court did not undertake to explain how in the absence of the ordinance from the record one could show to the contrary.

In *State v. Cottingham*, 226 Neb. 270, 410 N.W.2d 498 (1987), we decided to plug yet another hole by presuming that sentences imposed under an ordinance not in the record were within the limits set in the ordinance.

Even if I leave aside the questionable wisdom of the rule as first announced, much has changed since 1894. Not the least significant of these changes is that we no longer have municipal courts. They have been merged into the county courts, Neb. Rev. Stat. § 24-515 (Reissue 1989), which have broader territorial jurisdiction than a single municipality, Neb. Rev. Stat. § 24-503 (Reissue 1989). Neither do district courts review county court decisions involving municipal ordinances de novo; the review of such cases is for error appearing on the record made in the county court. Neb. Rev. Stat. § 25-2733 (Reissue 1989). In such instances, the district courts serve as intermediate courts of appeal, *State v. Douglass*, 239 Neb. 891, 479 N.W.2d 457 (1992), and are not free to go beyond the record made in the county court. Indeed, we ruled in *State v. Lynch*, 223 Neb. 849, 394 N.W.2d 651 (1986), that a municipal ordinance not offered in evidence in the county court could not on appeal be received in evidence in the district court. Nor can it any longer be said, if it ever could, that all actions arising under municipal ordinances are civil in nature. See, for example, *State v. Metzger*, 211 Neb. 593, 319 N.W.2d 459 (1982) (city ordinance making it unlawful to commit indecent, immodest,

or filthy act said to be criminal in nature).

These changes compel me, on more mature reflection, to conclude that the party prosecuting under an ordinance ought to be required to properly make it a part of the trial record. As Judge Shanahan's concurrence demonstrates, other states so require. The failure to fulfill that obligation should result in a dismissal of the prosecution.

I recognize that given the number of ordinance cases prosecuted in the county courts, our present rule is the more convenient one for prosecutors and court personnel. However, governmental convenience is not a legitimate basis for requiring an aggrieved defendant to establish the municipal law under which he was prosecuted and convicted.

Since the record in this case fails to contain the ordinance under which the subject proceedings were held, I would reverse the judgment of the district court and remand the cause with the direction that the district court reverse the county court's judgment and direct that the complaint be dismissed.

IN RE INTEREST OF D.A.B. AND J.B., CHILDREN UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V. D.B., APPELLANT.

483 N.W.2d 550

Filed May 8, 1992. No. S-91-735.

1. **Parental Rights.** When a parent is unable to discharge his or her parental responsibilities because of a mental deficiency, and there are reasonable grounds to believe that such condition will continue for a prolonged and indeterminate period, the parental rights may be terminated when such action is shown to be in the best interests of the children.
2. _____. When a natural parent suffers from a mental deficiency and cannot be rehabilitated within a reasonable period of time, the best interests of the children require that a final disposition be made without delay.
3. _____. Children cannot, and should not, be suspended in foster care, nor be made to await uncertain parental maturity.

Appeal from the County Court for Madison County: STEPHEN P. FINN, Judge. Affirmed.

Kathleen Koenig Rockey, of Domina & Copple, P.C., and Jane R. Mapes, guardian ad litem for D.B., for appellant.

Joseph M. Smith, Madison County Attorney, for appellee.

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

BOSLAUGH, J.

The appellant is the mother of two sons, D.A.B., born July 18, 1982, and J.B., born November 28, 1984. She has appealed from the order of the county court terminating her parental rights to the two children. The father of the children has relinquished his parental rights to the children and is not a party to this appeal.

> Our review is de novo on the record, and we are required to reach a conclusion independent of the trial court's findings; however, where the evidence is in conflict, we will consider and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another.

In re Interest of A.M.Y., F.E.Y., and K.C.Y, 237 Neb. 414, 415, 466 N.W.2d 93, 94 (1991).

On September 13, 1989, a petition was filed in the county court alleging that the two children were in a situation dangerous to their health or morals because of physical abuse by their father. The abuse was apparent when D.A.B. came to school with a bloody nose, a bump on his head, and various bruises. A guardian ad litem was appointed for the children, they were placed in the temporary custody of the Department of Social Services (DSS), and a temporary restraining order against the father was entered.

D.A.B. had been in the custody of DSS from July 7, 1983, to June 1, 1987, because he had been diagnosed as a failure to thrive infant. He was returned to the custody of his parents in 1987, after extensive efforts had been made to rehabilitate the family. D.A.B. had grown older and was able to better communicate his needs. The father was in the home, and it was hoped he would be able to assist in or take over the parenting of the children.

On October 5, 1989, and again on November 30, 1989, the children were found to be juveniles within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1988) and were placed in the custody of DSS. At the hearing on November 30, 1989, the appellant admitted that the allegations in the petition were true. The parents were ordered to participate in individual family counseling.

On June 29, 1990, the children were removed from the custody of the appellant and placed in foster care. The record shows that at that time it was alleged the appellant and her boyfriend had been engaging in sexual contact in front of the children, the home was in an unsanitary condition, and there was chronic neglect of the children.

Prior to the removal, J.B., who was then 5 years old and still wearing diapers, would come to preschool on a daily basis in a filthy condition and had to be cleaned by the teachers. He suffered from severe diaper rash, as well as open sores on other areas of his body. He also came to school with severe ear infections.

D.A.B. was sent home with chickenpox in March 1990, but was sent back to school the next day by the appellant and was again returned home.

Both children had to be treated for head lice.

On March 22, 1990, a day when it was 27 degrees outside with a windchill of -3 degrees, Monica Matteo, a Head Start worker, visited the home and found J.B. playing outside without a coat. When Matteo and J.B. entered the house, the appellant and her boyfriend appeared to be unclothed in the living room and went into the bedroom. Later, the appellant came out of the bedroom wrapped in a blanket.

On several occasions Matteo observed the house to be unclean. She also saw J.B. eat bologna off a dirty floor without without any objection from the appellant.

Attempts were made to explain the importance of proper hygiene to the appellant and to show her how to properly bathe the children and treat them for their various illnesses. The appellant was also instructed on how to clean her home.

At the request of DSS, Dr. A. James Fix performed a psychological evaluation of the appellant in July 1990. He

determined that the appellant is mildly mentally retarded and due to that mental deficiency, she would not be able to acquire the proper parenting skills to care for her children.

In April 1991, Dr. Richard Sanders performed a psychological evaluation of the appellant at the request of her attorney. He determined that the appellant is mildly mentally retarded; however, his opinion was that with the appropriate instruction, the appellant might be able to learn to properly care for her children.

On November 8, 1990, a motion for termination of the parental rights of the appellant, pursuant to Neb. Rev. Stat. § 43-292(5) (Reissue 1988), was filed. The motion alleged that the appellant is unable to care for her dependent children due to her mental retardation, which is a lifelong condition. After the hearing on the motion, the county court terminated the appellant's parental rights on July 17, 1991.

The appellant has assigned as error that the county court erred in terminating her parental rights and in failing to make a complete recording of the proceedings so that an accurate bill of exceptions could be prepared.

After a bill of exceptions had been prepared in this case, the parties discovered that at the hearing on July 1, 1991, not all of the testimony of the appellant could be transcribed because there had been a malfunction in the recording equipment. Most of the questions had been recorded, but the appellant's responses were inaudible.

From a review of the questions, the appellant's attorney was able to reconstruct most of her omitted responses. That reconstruction was reduced to writing and stipulated as a part of the record by all of the parties.

The appellant was available and could have been examined again to ascertain her answers to those questions to which her answers had not been recorded. Counsel, however, did not request a further hearing but was content to rely upon the record as reconstructed and complains as to that part which had not been reconstructed. Based upon our review of the record which the parties have submitted and the circumstances in this case, we conclude that the appellant has not been prejudiced or deprived of any substantial right, and the assignment of error is

without merit.

In this case, the record establishes by clear and convincing evidence that the appellant is unable to discharge her parental responsibilities because of her mental deficiency. The evidence also shows that her mental deficiency will continue for a prolonged and indefinite period.

It was the opinion of both experts who testified that the appellant is mildly mentally retarded and that intellectually she is in the bottom 1 percent of the population as a whole. Neither expert expects the mental deficiency to go away.

From 1983 to 1987, extensive resources were employed by DSS in an effort to help the appellant develop adequate parenting skills. There were classes, counseling, supervision, and in-home visits.

There was but little improvement, and when the children were taken from the custody of the appellant and placed in foster care, it was apparent that the appellant was unable to fulfill her parental obligations.

The testimony of Matteo demonstrates that the children were not adequately cared for and constantly suffered from unsanitary conditions and neglect. Despite Matteo's efforts to demonstrate appropriate parenting skills to the appellant, the children continued to be neglected.

Although the appellant was provided with extensive services to assist her in properly raising her children, she was unable to profit from the instruction provided because of her mental deficiency.

When a parent is unable to discharge his or her parental responsibilities because of a mental deficiency, and there are reasonable grounds to believe that such condition will continue for a prolonged and indeterminate period, the parental rights may be terminated when such action is shown to be in the best interests of the children. *In re Interest of M.M., C.M., and D.M.*, 234 Neb. 839, 452 N.W.2d 753 (1990).

It is also clear that termination of the appellant's parental rights is in the best interests of the children. When a natural parent suffers from a mental deficiency and cannot be rehabilitated within a reasonable period of time, the best interests of the children require that a final disposition be made

without delay. *In re Interest of M.M., C.M., and D.M., supra.*

At best, it is uncertain that the appellant will ever be able to learn to discharge her parental obligations in an appropriate manner. " 'A child cannot, and should not, be suspended in foster care, nor be made to await uncertain parental maturity.' " *Id.* at 843, 452 N.W.2d at 756.

The order terminating the parental rights of the appellant is affirmed.

AFFIRMED.

LAVERNE R. SCHALL, APPELLANT, V. ANDERSON'S IMPLEMENT, INC., A NEBRASKA CORPORATION, ET AL., APPELLEES.

484 N.W.2d 86

Filed May 15, 1992. No. S-89-358.

1. **Equity: Appeal and Error.** On appeal from the district court to an appellate court, an equity case is tried de novo on the record, requiring the appellate court to reach a conclusion independent of the findings of the trial court.
2. **Equity: Motions to Dismiss.** When a defendant in an equity action moves to dismiss plaintiff's action at the close of plaintiff's evidence, the defendant, for the purposes of considering his motion, admits the truth of plaintiff's evidence and testimony, together with every inference which may fairly and reasonably be drawn therefrom. The court must then determine, as a question of law, whether plaintiff's evidence has made a prima facie case, and if so, the motion is to be overruled.
3. **Conveyances: Statutes: Time.** Statutes covering substantive matters in effect at the time of the transaction govern, not later enacted statutes.
4. **Conveyances: Fraud: Intent: Words and Phrases.** "Good faith," as used in Neb. Rev. Stat. § 36-603(b) (Reissue 1988), encompassed an absence or freedom from intent to defraud.
5. **Conveyances: Fraud: Intent: Proof.** While Neb. Rev. Stat. § 36-605 (Reissue 1988) specifically negated the need to prove fraudulent intent, courts will scrutinize a transaction for elements of circumstantial proof of fraud to determine if it was completed in good faith.
6. **Conveyances: Fraud: Proof.** Neb. Rev. Stat. § 36-603 (Reissue 1988) of the Uniform Fraudulent Conveyance Act required adequate consideration and good faith dealings to prove a conveyance was not fraudulent.
7. **Fraud: Proof: Words and Phrases.** "Badges of fraud" are said to be facts which throw suspicion on a transaction, and which call for an explanation. More

simply stated, they are signs or marks of fraud. They do not of themselves or per se constitute fraud, but they are facts having a tendency to show the existence of fraud, although their value as evidence is relative not absolute.

Appeal from the District Court for Brown County: EDWARD E. HANNON, Judge. Reversed and remanded for further proceedings.

John S. Mingus, of Mingus & Mingus, for appellant.

W. Gerald O'Kief for appellees.

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

GRANT, J.

Plaintiff-appellant, LaVerne R. Schall, filed a petition seeking to set aside a deed of trust executed by the defendant Anderson's Implement, Inc. (Anderson's Inc.), to defendant Richard C. Anderl, trustee, on the basis that the transaction by the corporation was done to defraud Schall in his efforts as a judgment creditor to collect a judgment obtained in a earlier lawsuit against Anderson's Inc. Defendants Kenneth G. Anderson and Donald G. Anderson were beneficiaries in the trust deed. Other defendants were named in the original petition, but have been dismissed for various reasons, and no appeal is taken from those court dismissals.

The matter was tried as a case in equity to the court. At the close of plaintiff's evidence, the defendants moved to dismiss because "evidence [adduced at the trial failed] to state a cause of action against the defendants . . . ." The trial court granted the motion and dismissed the case. Schall appeals that judgment to this court. We reverse and remand for further proceedings.

Schall assigns numerous errors in his appellate brief. They may be distilled into one. Schall contends that the district court erred in granting defendants' motion to dismiss because plaintiff presented sufficient evidence to prove that dividends to shareholders were paid at a time when the corporation was insolvent and that the execution of the deed of trust was a fraudulent conveyance.

On appeal from the district court to an appellate court, an equity case is tried de novo on the record, requiring the

appellate court to reach a conclusion independent of the findings of the trial court. *Dowd v. Board of Equal., ante* p. 437, 482 N.W.2d 583 (1992). When a defendant in an equity action, however, moves to dismiss plaintiff's action at the close of plaintiff's evidence, the defendant, for the purposes of considering his motion, admits the truth of plaintiff's evidence and testimony, together with every inference which may fairly and reasonably be drawn therefrom. The court must then determine, as a question of law, whether plaintiff's evidence has made a prima facie case, and if so, the motion is to be overruled. *Hulse v. Schelkopf*, 220 Neb. 617, 371 N.W.2d 673 (1985); *Marco v. Marco*, 196 Neb. 313, 242 N.W.2d 867 (1976).

Viewed in that light, the record before the court shows the following facts: Anderson's Inc. was incorporated in 1975 as a closely held subchapter S corporation, with its fiscal year running from February 1 through January 31. The corporation's only stockholders were Kenneth D. Anderson; his wife, Mildred; and their two sons, Kenneth G. and Donald. The stockholders were also the corporation's entire board of directors. Each was a 25-percent owner of the corporation, which had a stated capital in 1975 of $82,400.

On January 29, 1980, the four-person board of directors was advised that earned surplus profits were $300,000 and that the board should declare a cash dividend. The suggestion was brought before the board and approved. A cash dividend of $75,000 was paid to each stockholder. After the payment of the dividend, each stockholder loaned $50,000 to the corporation. In exchange, the corporation issued notes of indebtedness to each creditor stockholder.

On February 1, 1980, Kenneth D. and Mildred resigned from the board, and each of them entered into an "Agreement for Sale and Purchase of Stock" with Anderson's Inc. The agreement called for a total purchase price of $95,000 plus interest to each of the parents for the company to buy out the parents' stock. The agreement provided for issuing to the parents promissory notes signed by the remaining board members. No security for the notes was to be given.

At this time, February 1980, corporate records indicated the corporation had a total of $290,000 of unsecured debt to the

parents, consisting of the $190,000 described above plus the total of the loans made by the parents in the amount of $100,000 on January 29, 1980. The board of directors for Anderson's Inc. after February 1, 1980, consisted of only the two sons, Kenneth G. and Donald.

Plaintiff worked for Anderson's Inc., beginning in May 1978, at a monthly salary plus a 5-percent commission on the profit of the parts department. Payments made under this agreement were satisfactory to plaintiff and Anderson's Inc. This contract between Schall and Anderson's Inc. was renewed in February 1979. Upon the renewal of Schall's contract, both parties agreed to increase Schall's compensation to include a 30-percent commission on the "net profit" of the parts department. The contract was unclear as to the calculation of "net profit," and in early 1980 a dispute arose between Schall and Anderson's Inc. over the actual commission due to Schall under the February 1979 contract.

While this dispute was going on, the corporation made another declaration of dividends. In January 1981, the two-member board voted to declare another dividend of $166,302 to each of the two shareholders. Upon receipt of the dividend, the two shareholders loaned back to the company $156,302 each, and received in exchange promissory notes from Anderson's Inc. With this transaction, the corporation owed the two remaining shareholders a total of over $400,000 in unsecured debt, consisting of the loans just described plus the $100,000 loaned to the corporation in January 1980.

After reaching an impasse in negotiations to recover his commission, plaintiff filed a suit against Anderson's Inc. The case was tried on April 2 and 3, 1985. Upon conclusion of the trial, the trial court entered an order continuing the case "pending briefing by the parties."

On May 1, 1985, less than 1 month after completion of the trial, but before a final order was rendered by the trial court, Anderson's Inc. executed a deed of trust for the purpose of securing "[p]ayment of the indebtedness described on Exhibit 'A'." Exhibit A listed the "indebtedness secured" as promissory notes of $206,302.88 to both Kenneth G. and Donald, notes of $95,000 to both Kenneth D. and Mildred, and notes of $50,000

to both Kenneth D. and Mildred. The corporation executed a deed of trust to Anderl, the trustee, on all the real estate owned by the corporation.

On September 3, 1985, the district court for Brown County filed its memorandum decision and order in the Schall-Anderson's Inc. case. The order found that Anderson's Inc. did withhold payment of money owed to Schall in the amount of $38,157.61, and the court rendered its judgment in that amount against Anderson's Inc. On October 3, 1986, the Brown County sheriff served a writ of execution upon Anderson's Inc., but found no unencumbered personal or real property in the corporation's name, and the writ was returned unsatisfied.

Without notifying the trustee, Anderson's Inc. undertook to sell the land described in the trust deed. They advertised that the land was to be sold on December 12, 1986, and on that same day Schall filed this action. In Schall's second amended petition, he sought to enjoin conveyance of the deeded property, to have the instrument found invalid, and to receive a priority lien on the land in question.

On January 9, 1989, trial in the present action began. Plaintiff introduced his evidence, and cross-examination was conducted by defendants. When plaintiff rested, defendants moved for dismissal of plaintiff's petition for failure to introduce evidence entitling the plaintiff to relief. The motion was sustained. Plaintiff timely appealed.

Schall's first cause of action in his second amended petition asserted that the "Deed of Trust was executed to hinder, delay or defraud [Schall]." This contention is based on an alleged fraudulent conveyance.

We recognize that in 1989 the Nebraska Legislature enacted the Uniform Fraudulent Transfer Act (UFTA), Neb. Rev. Stat. §§ 36-701 to 36-712 (Cum. Supp. 1990). The UFTA replaced the 1980 Uniform Fraudulent Conveyance Act (UFCA), Neb. Rev. Stat. §§ 36-601 to 36-613 (Reissue 1988), repealed in 1989. Any rights, however, which plaintiff Schall might have against defendants in the lawsuit before us accrued on May 1, 1985, when the deed of trust was executed. Statutes covering substantive matters in effect at the time of the transaction

govern, not later enacted statutes. *Holthaus v. Parsons*, 238 Neb. 223, 469 N.W.2d 536 (1991); Neb. Rev. Stat. § 49-301 (Reissue 1988). The UFCA, in effect at the time of the transaction, controls the disposition of this case.

Section 36-605 provided:

> Every conveyance made without fair consideration when the person making it is engaged or is about to engage in a business or transaction for *which the property remaining* in his or her hands after the conveyance is an *unreasonably small capital*, is fraudulent as to creditors and as to other persons who become creditors during the continuance of such business or transaction without regard to his or her actual intent.

(Emphasis supplied.)

Thus, under the UFCA, each conveyance by someone in business had to satisfy two requirements: (1) It must have been for fair consideration, and (2) it must have left intact a sufficient amount of property to reasonably capitalize the business. The statute specifically negated any need for a court to find actual intent to defraud.

As to fair consideration, § 36-603 provided: "Fair consideration is given for property, or obligation . . . (b) When such property, or obligation is received in good faith to secure a present advance or antecedent debt in amount not disproportionately small as compared with the value of the property, or obligation obtained."

Section 36-603 allowed for conveyance of an interest in property to secure an antecedent debt, but was qualified in two respects. In order to pass the first half of the fraudulent conveyances test, § 36-603 required that the antecedent debt must not have been disproportionately small as compared with the value of the property and that the transaction must have been completed in "good faith."

Evidence and testimony at trial indicated that the total amount due on all notes at the time of execution of the deed was $504,704.30. Evidence further indicated that Anderson's Inc., at the time of the conveyance, owned a total of $188,938 worth of real property, appurtenances, buildings, and improvements which could have secured the debt. Since the debt exceeded the

value of the property, this debt was obviously not "disproportionately small as compared with the value of the property."

With respect to "good faith," as used in § 36-603(b), this court has stated: " 'Good faith,' among other characteristics, encompasses an absence or freedom from intent to defraud. (Citations omitted.) Consequently, good faith and fraud are mutually exclusive terms; the presence of one excludes the existence of the other in the same subject." *Gifford-Hill & Co. v. Stoller*, 221 Neb. 757, 764-65, 380 N.W.2d 625, 630 (1986).

While § 36-605 specifically negated the need to prove fraudulent intent, courts will scrutinize a transaction for elements of circumstantial proof of fraud to determine if it was completed in good faith. *Southern Lumber & Coal v. M. P. Olson Real Est.*, 229 Neb. 249, 426 N.W.2d 504 (1988).

In *Brown v. Borland*, 230 Neb. 391, 394-95, 432 N.W.2d 13, 16 (1988), this court recognized:

> Under the old conveyances to defraud creditors act, every conveyance made with intent to defraud creditors was void. Case law interpretation provided that a conveyance made in good faith and for adequate consideration was not made with intent to defraud. Section 36-603 of the [UFCA] also requires adequate consideration and good faith dealings to prove a conveyance was not fraudulent. Therefore, we see no reason why past case law rules on good faith and adequate consideration should not remain in effect.
>
> . . . It is through case law that the badges of fraud and presumptions were developed. The current uniform act, in § 36-307, preserves distinction of "intent presumed at law" from "intent to defraud." Therefore, we find that existing rules on badges of fraud and their presumptions are still in effect under the uniform act.

The badges of fraud with which a court concerns itself were discussed in *Gifford-Hill & Co. v. Stoller*, 221 Neb. at 763, 380 N.W.2d at 630:

> " ' "Badges of fraud" . . . are said to be facts which throw suspicion on a transaction, and which call for an explanation. . . . More simply stated, they are signs or

marks of fraud. They do not of themselves or per se constitute fraud, but they are facts having a tendency to show the existence of fraud, although their value as evidence is relative not absolute. They are not usually conclusive proof; they are open to explanation. They may be almost conclusive or they may furnish merely a reasonable inference of fraud, according to the weight to which they may be entitled from their intrinsic character and the special circumstances attending the case. Often a single one of them may establish and stamp a transaction as fraudulent. When, however, several are found in the same transaction, strong, clear evidence will be required to repel the conclusion of fraudulent intent . . . .' "

Courts have noted that certain circumstances which accompany a transaction may deserve some explanation. Circumstances which may not, on their face, be illegal, may in a certain transaction be contrary to public policy. See Unif. Fraudulent Conveyance Act § 7 notes 15 to 25, 7A U.L.A. 520-24 (1918).

We have said:

> "The generally recognized badges of fraud are the lack of consideration for the conveyance, the transfer of the debtor's entire estate, relationship between transferor and the transferee, the pendency or threat of litigation, secrecy or hurried transaction, insolvency or indebtedness of the transferor, departure from the usual method of business, the retention by the debtor of possession of the property, and the reservation of benefit to the transferor. 37 Am.Jur.2d *Fraudulent Conveyances*, § 10 at 701."

Gifford-Hill & Co. v. Stoller, 221 Neb. at 764, 380 N.W.2d at 630.

The evidence before the court suggests that Schall, at the very least, raised a question as to the good faith of the board of directors in the transfer, when the board authorized the execution of the deed of trust. The circumstantial evidence of those badges of fraud discussed above has placed upon the defendants the burden of presenting clear evidence to repel the conclusion of fraudulent intent.

Evidence shows that even after voluntary liquidation of all of

its assets in 1986, Anderson's Inc. owed money to a business creditor in an approximate amount of $40,000, to professionals retained by the corporation, and to shareholders on various promissory notes. All of this was in addition to the judgment obtained by Schall 1 year earlier, in the amount of $38,157.61.

We find that plaintiff introduced sufficient evidence for the trial court to find that the directors were aware of the unsecured status of the shareholders' (i.e., their own) debt and the impending ruling of the district court as to Schall's lawsuit and that such knowledge played at least some part in the board's decision to secure the shareholders' debt.

We do not hold that the act of securing the shareholders' notes, in itself, was fraudulent. Section 36-603 provided that an antecedent debt is fair consideration for property received to secure that debt. This has been upheld even when done by a debtor in failing times. *Saline State Bank v. Stipek*, 131 Neb. 100, 267 N.W. 234 (1936); *Nebraska Wheat Growers Ass'n v. Johnson*, 130 Neb. 99, 264 N.W. 165 (1936). In general, repayment of antecedent debt constitutes fair consideration, but such a transaction will require closer scrutiny if the transferee is an officer, director, or major stockholder of the transferor. *Atlanta Shipping Corp., Inc. v. Chemical Bank*, 818 F.2d 240 (2d Cir. 1987); *Tillson v. Downing*, 45 Neb. 549, 63 N.W. 836 (1895).

When the deed of trust in this case is put into context, substantial questions are raised as to the good faith of the directors. The deed of trust was executed by directors who, by their actions, gave themselves and their parents as creditors a secured interest valued at over $500,000 in corporation property, to the immediate detriment of Schall, as well as other creditors.

Yet another badge of fraud considered by a court analyzing a conveyance is the insolvency or indebtedness of the transferor. In the context of the UFCA, one is insolvent "when the present fair salable value of his or her assets is less than the amount that will be required to pay his or her probable liability on his or her existing debts as they become absolute and matured." § 36-602(1).

Evidence of the corporation's insolvency is found in the

payment schedules of the debt owed by Anderson's Inc. to Kenneth D. and Mildred Anderson for redemption of their stock. The "Agreement for Sale and Purchase of Stock" provides:

> 3. . . . The purchase price [$95,000] shall be paid as follows:
>
> . . . 240 monthly payments of 395.83, commencing on the 1st day of February, 1980, and a like sum due and payable on the 1st day of each month thereafter until . . . paid in full.
>
> . . . .
>
> 5. . . . It is further agreed by and between the parties hereto that Seller shall, from the date of this Agreement, retain no security interest, mortgage, or lien with respect to the stocks sold.

For nearly 2 years Anderson's Inc. paid upon this debt the required amount within the required time. Then, beginning in March 1983, the company made payments only every 2 to 3 months. In 1984, a total of only five payments were made. The record shows only one payment made in 1985 and only four more payments made before the liquidation of the company assets.

At the time of the execution of the deed of trust, the corporate debt was far outrunning its equity. It seems clear that the corporation could not pay its debts as they came due.

The facts presented raise some question as to the good faith of the corporation in securing the antecedent debts, and thus "fair consideration" in this transaction is questionable.

Section 36-605 required the corporation to have a reasonable amount of capital after the conveyance. This is a fact question.

Evidence suggests that the corporation may not have even had adequate capital before the trust deed was executed, but almost certainly it did not afterward. As shown by the corporation's income tax returns, at fiscal yearend 1984, Anderson's Inc. had $1.5 million in total debt and $577,236 in equity. The following year, however, the company showed only $273,273 in equity and $1.3 million in debt, and in 1986 that gap increased to $88,828 in equity and $682,976 in debt.

Thus, we find facts have been alleged and adduced which

indicate both the presence of some of the badges of fraud recognized in this state and the possible absence of adequate capital. This raises a question as to the fraudulent intent of the directors in executing this deed of trust, which might lead to the conclusion that the intent surrounding the conveyance of the deed of trust was to hinder, delay, or defraud Schall from executing upon his validly obtained judgment. Likewise, some facts alleged have raised inferences which might be adverse to Anderson's Inc.

Schall has presented sufficient evidence to raise a question regarding whether the deed of trust was executed to hinder, delay, or defraud him. The judgment of dismissal is reversed, and the cause is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

GEORGE W. WARNER III AND VIRGINIA C. WARNER, APPELLEES AND CROSS-APPELLEES, V. REAGAN BUICK, INC., DEFENDANT AND THIRD-PARTY PLAINTIFF, APPELLEE AND CROSS-APPELLANT, AND SUPERIOR BUICK PONTIAC GMC, INC., NOW KNOWN AS RHODEN MOTOR CENTER, THIRD-PARTY DEFENDANT, APPELLANT AND CROSS-APPELLEE.

483 N.W.2d 764

Filed May 15, 1992. No. S-89-1189.

1. **Judgments: Appeal and Error.** On appeal from a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict and will not be set aside unless clearly erroneous, but as to questions of law, we arrive at an independent conclusion.
2. **Uniform Commercial Code: Breach of Warranty: Value of Goods: Damages.** The measure of damages for breach of an express warranty is the difference between the value of the goods at the time of acceptance and their value as warranted.
3. **Uniform Commercial Code: Sales: Revocation: Breach of Warranty: Actions.** The right to revoke acceptance, cancel the contract, and recover any amounts paid is a separate, independent, and alternative cause of action from one for breach of warranty with regard to accepted goods.

4. **Revocation: Breach of Warranty: Actions.** Revocation of acceptance is not a prerequisite to a suit for breach of warranty.
5. **Actions: Pleadings.** It is the essential character of a cause of action as shown by the allegations of the complaint, and not the pleader's denomination, which determines the nature of an action.
6. **Equity: Damages.** The right to indemnity is generally regarded as equitable in nature.
7. **Uniform Commercial Code: Damages.** The general law of indemnity supplements the provisions of the Uniform Commercial Code.
8. **Contracts: Notice: Tender: Damages.** Notice of suit or tender of defense is not ordinarily a condition precedent to recovery on an indemnity contract, even as to a liability incurred or determined in a prior action against the indemnitee.
9. **Negligence: Liability: Damages.** Indemnification is available when one party is compelled to pay money which in justice another ought to pay, or has agreed to pay, unless the party making the payment is barred by the wrongful nature of his conduct.
10. **Liability: Contribution: Damages.** Indemnification is distinguishable from contribution in that the latter involves a sharing of the loss between parties jointly liable.
11. _____: _____: _____. Generally, the party seeking indemnification must have been free of any wrongdoing, and its liability is vicariously imposed.
12. **Negligence: Damages.** Indemnity is available to one who engaged in merely passive neglect, but unavailable to one who engaged in direct and active negligence.
13. **Liability: Contribution: Damages.** If a party seeking indemnification is independently liable to the plaintiff, that party is limited to a claim for contribution.
14. **Judgments: Records.** When there is a conflict between the record of a judgment and a verbatim record of the proceedings in open court, the latter prevails.

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

Victor J. Lich, Jr., of Lich, Herold, & Mackiewicz, for appellant.

Joseph F. Daly and P. Shawn McCann, of Sodoro, Daly & Sodoro, for appellee Reagan Buick.

Michael F. Pistillo, of Steier & Kreikemeier, P.C., for appellees Warner.

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

WHITE, J.

This is an action by the purchasers of a used automobile,

George W. Warner III and Virginia C. Warner (the Warners), to recover damages from the dealer-seller, Reagan Buick, Inc. (Reagan), for breach of contract, breach of express and implied warranties, and violation of the Nebraska Uniform Deceptive Trade Practices Act. Reagan filed a third-party action against the seller from which it had purchased the automobile, Superior Buick Pontiac GMC, Inc. (Superior), in which Reagan alleged that any damages which the Warners might recover against Reagan should be imposed against Superior in favor of Reagan.

The trial court rendered judgment in favor of the Warners, against Reagan, in the amount of $7,734 and in favor of Reagan on its third-party complaint against Superior in the amount of $3,867, or one-half the amount awarded the Warners. In addition, Reagan and Superior were each assessed an attorney fee of $1,000 in favor of the Warners. Superior appeals and Reagan cross-appeals.

Superior's assignments of error are summarized as follows: The trial court erred in (1) finding that Superior breached its contract with Reagan; (2) finding that Superior breached any express or implied warranties in its sale of the automobile to Reagan; (3) failing to find that Reagan waived its right to sue by not reasonably notifying Superior of the breach or revoking its acceptance within a reasonable time, as required by Neb. U.C.C. §§ 2-607 and 2-608 (Reissue 1980); (4) failing to sustain Superior's motion for summary judgment; and (5) failing to sustain Superior's motions to dismiss Reagan's third-party petition at the close of the Warners' case and at the conclusion of all the evidence.

Reagan, which is considered an appellee and a cross-appellant by virtue of Neb. Ct. R. of Prac. 1C (rev. 1989), directs its appeal against both the Warners and Superior. Against the Warners, Reagan asserts that the trial court erred in (1) finding that Reagan breached its contract with the Warners and that Reagan breached any express or implied warranties and (2) failing to sustain its motions to dismiss the Warners' petition at the close of the Warners' case and at the close of all the evidence. Against Superior, Reagan assigns as error the trial court's entry of judgment for only one-half of the damages assessed against Reagan in favor of the Warners.

We shall first discuss the errors assigned by Reagan in its cross-appeal against the Warners. When viewed most favorably to the prevailing party, the Warners, the facts material to the resolution of the case are as follows:

In early February 1986, the Warners began negotiating with a representative of Reagan to purchase the vehicle in question. Reagan's salesman represented that the automobile was a "one-owner" vehicle acquired through a trade-in. On February 5, the Warners executed a sales contract describing the vehicle as a 1983 Buick Riviera. The negotiated price was $12,647.17 and, including interest, credit life insurance, and a maintenance agreement, the total acquisition cost was $17,120.97. A paper prominently displayed in the window announced that the car was sold "as is," without any express or implied warranties.

Shortly after the Warners took possession of the car, several problems developed. The windows did not operate properly, and when they did operate, they caused the interior lights to go on. Also, the transmission did not function properly, and the vehicle leaked when left in the rain. Sometime in late March or early April 1986, the Warners requested that Reagan take the car back, but Reagan refused to do so. The Warners thereafter remained in possession of the vehicle, driving it daily up through the time of trial and, in the process, adding approximately 15,000 miles to the 26,761 miles already on the odometer at the time the Warners purchased the vehicle.

The Warners were not initially furnished with a title because it was held by General Motors Acceptance Corporation, the company which had financed the purchase. Upon investigating the vehicle's history, the Warners discovered that the car was originally sold by a dealer to a Michael Stevens of Illinois. The car was stolen from Stevens and subsequently stripped and burned. Stevens' insurer sold the burned-out frame to an auto parts store in Illinois, which rebuilt the automobile and sold it to Mitchell Used Cars of Greentop, Missouri. Mitchell in turn sold it to Martz Auto in Ottumwa, Iowa. Martz Auto apparently sold the car at auction to Superior. Superior then sold it to Reagan, who finally sold it to the Warners.

Several automobile appraisers, testifying as experts, stated that the car contained Buick Riviera parts from various model

years between 1978 and 1983 and possibly parts from other makes of cars as well. There was also testimony that the paint was thick in spots, indicating that the vehicle had been repainted. All the experts agreed that it would be evident to anyone experienced in the automobile business that the car was a 1983 Buick in name only. Each expert also testified that the value of the car was substantially lessened because of the amalgamation of parts used and the lack of skill evident in the attempted restoration. In this regard, they specifically noted that bundles of wires were not attached to anything and that the 1979 instrument panel installed lacked a turbo indicator, even though the 1983 model contained a turbo engine.

For its first assignment of error, Reagan argues that the evidence is insufficient as a matter of law to support a finding that Reagan breached its contract or any express or implied warranties. In our review of Reagan's cross-appeal against the Warners, we are governed by the rule that in a bench trial of a law action, a trial court's factual findings have the effect of a jury verdict and will not be set aside unless clearly erroneous, but as to questions of law, we arrive at an independent conclusion. *Nebraska Builders Prod. Co. v. Industrial Erectors*, 239 Neb. 744, 478 N.W.2d 257 (1992).

Neb. U.C.C. § 2-313 (Reissue 1980) provides:

> (1) Express warranties by the seller are created as follows:
>
> (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
>
> (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.
>
> (c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.
>
> (2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific

> intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

In all the documents of sale, financing, and repair, the automobile is described as a 1983 Buick Riviera. The overwhelming evidence that the car was in fact only the skeleton of a 1983 Buick Riviera and a mishmash of assorted parts is sufficient evidence of a breach of an express warranty. See *Crane v Wood Motors, Inc.*, 53 Mich. App. 17, 218 N.W.2d 420 (1974) (description of an aircraft as a 1969 model would create an express warranty that the plane was manufactured in 1969 and not 1968). The outright misrepresentations made by Reagan's salesmen regarding the history of the car strengthens our conclusion that Reagan breached an express warranty.

The measure of damages for breach of an express warranty is the difference between the value of the goods at acceptance and their value as warranted. Neb. U.C.C. § 2-714 (Reissue 1980); *Wendt v. Beardmore Suburban Chevrolet*, 219 Neb. 775, 366 N.W.2d 424 (1985). The automobile appraisers who testified at trial generally agreed that the value of the car at the time of acceptance was between $3,000 and $5,000. Assuming the actual purchase price represents the market value of the vehicle as warranted, we cannot say the trial court's award is clearly erroneous.

We note that no complaint is made of the award of attorney fees, pursuant to Neb. Rev. Stat. § 87-303 (Reissue 1987) of the Nebraska Uniform Deceptive Trade Practices Act. Because there is evidence tending to establish that the true nature of the car was known to Reagan, we will not disturb this award. As the judgment in favor of the Warners is sustainable on the theory of breach of an express warranty, a discussion of whether the contract itself or an implied warranty of merchantability was breached is not necessary. Because Reagan's second assignment of error is subsumed in its first argument, the judgment in favor of the Warners and against Reagan is affirmed.

We now turn to Superior's appeal from the trial court's entry of judgment in favor of Reagan on Reagan's third-party petition. Viewed in the light most favorable to Reagan, the facts

surrounding the sale of the vehicle by Superior to Reagan are as follows:

Superior purchased the vehicle on July 30, 1985, at a Des Moines, Iowa, auto auction. There is evidence that when an automobile is sold at such an auction, a red light is turned on over any car that has been salvaged and rebuilt.

Gary Runyan, a Reagan employee, purchased the car for Reagan on December 15, 1985. He testified that Superior's general manager told him the car was a single-owner vehicle taken in trade for a new car. Runyan purchased the car for $10,200, and the sale contract included a conspicuous provision stating that the car was sold "as is," with no warranties of merchantability or fitness for a particular purpose.

Runyan purchased four other vehicles for Reagan on the same day and admitted that he had not closely inspected the car ultimately sold to the Warners. He testified that it was common among Omaha automobile merchants to purchase vehicles for resale based upon the word of another dealer that the car was of the one-owner, trade-in variety. Several Reagan employees testified that it was Reagan's policy not to resell salvaged automobiles and that Reagan would not have purchased the car from Superior had it known the car's true history.

Though not assigned as error, Superior advances an argument in its brief, which Reagan "adopts" as part of its cross-appeal, regarding the validity of the Warners' claim against Reagan. Superior does so on the premise that "any failure of the Warners' case must cause Reagan's Third-Party Petition to fail . . . ." While this issue is not presented in conformity with the rules of this court, we will nevertheless address it.

Superior argues that the Warners' failure to effectively revoke acceptance of the vehicle and continued use thereof after Reagan rejected the tendered return of the car precludes their suit under the provisions of §§ 2-607 and 2-608. Superior is correct that the continued use of an automobile after discovery of defects substantially impairing its value may result in a waiver of the right to revoke acceptance. See *Wendt, supra.* However, it is well established in Nebraska that the right to revoke acceptance, cancel the contract, and recover any

amounts paid is a separate, independent, and alternative cause of action from one for breach of warranty with regard to accepted goods. *Wendt, supra*, citing *Ford Motor Credit Co. v. Harper*, 671 F.2d 1117 (8th Cir. 1982). The Warners brought this case under theories of breach of contract and express and implied warranties. Revocation of acceptance is not a prerequisite to such a suit, and thus Superior's argument is without merit.

Proceeding to matters assigned as error, Superior asserts that Reagan's failure to provide reasonable notice of the alleged breach or to revoke its acceptance within a reasonable period of time bars its third-party suit. Superior also argues that the evidence does not support a finding that it breached the contract or any express or implied warranties because the car was sold to Reagan "as is." Because these arguments turn on the assumption that Reagan's third-party suit is governed by the provisions of the Uniform Commercial Code, it is first necessary to address the nature of Reagan's third-party petition.

City of Wood River v. Geer-Melkus Constr. Co., 233 Neb. 179, 444 N.W.2d 305 (1989), involved a third-party petition very similar to the one in this case. There, the city of Wood River filed an action for breach of contract against Geer-Melkus after a waste water treatment facility constructed by Geer-Melkus broke down. Geer-Melkus filed a third-party complaint against the supplier of certain components used in constructing the facility. The third-party petition alleged that if Geer-Melkus was found liable to Wood River, then the supplier was liable to Geer-Melkus in the same amount, based upon the supplier's breach of warranty.

On appeal from the trial court's dismissal of the third-party petition, pursuant to the statute of limitations contained in Neb. U.C.C. § 2-725 (Reissue 1980), this court addressed the nature of Geer-Melkus' suit. Though the petition did not include the word "indemnity," the court noted that it is the essential character of a cause of action as shown by the allegations of the complaint, and not the pleader's denomination, which determines the nature of an action. The court characterized the third-party complaint as one for

indemnification because Geer-Melkus' position was that if it suffered damages due to the supplier's failure to fulfill its contractual obligation, it would look to the supplier for payment of its loss. Because the third-party action was in essence one for indemnification, the court concluded that the provisions of § 2-725 did not bar the suit.

Here, Reagan's third-party petition likewise does not include the word "indemnity." Instead, after alleging that Superior breached the contract and express and implied warranties, the petition states that "if judgment is entered herein for [the Warners] and against [Reagan] that [Reagan] have and recover said judgment from [Superior] plus its costs herein expended." It is clear that if Reagan is found liable to the Warners, Reagan is looking to Superior for satisfaction of any amounts paid on the basis of Reagan's breach of the contract and warranties. The gravamen of the third-party petition is indemnification, and we shall treat it as such.

Though at one time founded upon an implied contract, today the right to indemnity is generally regarded as equitable in nature. *City of Wood River, supra* (view that implied indemnity finds its roots in principles of equity is consistent with Nebraska law). See, also, *Shore v. Minneapolis Auto Auction, Inc.*, 410 N.W.2d 862 (Minn. App. 1987); *Howell v. River Products Co.*, 379 N.W.2d 919 (Iowa 1986). The Uniform Commercial Code provides that "[u]nless displaced by the particular provisions of this act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principle [sic] and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions." Neb. U.C.C. § 1-103 (Reissue 1980). Thus, the general law of indemnity supplements the provisions of the Uniform Commercial Code. *Wilson v. Dodge Trucks, Inc.*, 238 Ga. 636, 235 S.E.2d 142 (1977). Notice of suit or tender of defense is not ordinarily a condition precedent to recovery on an indemnity contract, even as to a liability incurred or determined in a prior action against the indemnitee. *Insurance Co. of North America v. Hawkins*, 197 Neb. 126, 246 N.W.2d 878 (1976). Here, Reagan brought Superior into the suit more than a year before

the Warners' case went to trial. Superior's argument that Reagan's third-party suit is barred under the provisions of §§ 2-607 and 2-608 is without merit.

Disposal of Superior's arguments regarding the judgment on the third-party petition does not end the matter, however, for Reagan contends that the trial court erred in failing to award Reagan the full amount of damages awarded the Warners. Reagan argues that the trial court erroneously applied a theory of contribution, rather than indemnification.

Under Nebraska law, indemnification is available when one party is compelled to pay money which in justice another ought to pay, or has agreed to pay, unless the party making the payment is barred by the wrongful nature of his conduct. *Hiway 20 Terminal, Inc. v. Tri-County Agri-Supply, Inc.*, 232 Neb. 763, 443 N.W.2d 872 (1989). Indemnification is distinguishable from the closely related remedy of contribution in that the latter involves a sharing of the loss between parties jointly liable. *Strong v. Nebraska Natural Gas Co.*, 476 F. Supp. 1170 (D. Neb. 1979).

Though most often applied in the context of tort claims, courts in other jurisdictions have awarded indemnification in favor of the retail seller of a good and against a manufacturer or supplier liable to the retailer on purely contractual grounds. See, e.g., *Pawelec v. Digitcom, Inc.*, 192 N.J. Super. 474, 471 A.2d 60 (1984); *Volvo of America Corp. v. Wells*, 551 S.W.2d 826 (Ky. App. 1977). However, "[i]t is generally recognized that the party seeking indemnification must have been free of any wrongdoing, and its liability is vicariously imposed." *City of Wood River*, 233 Neb. at 190, 444 N.W.2d at 311. In the tort context, we have held that indemnity is available to one who engaged in merely passive neglect, but unavailable to one who engaged in direct and active negligence. *Hiway 20 Terminal, Inc., supra*. If a party seeking indemnification is independently liable to the plaintiff, that party is limited to a claim for contribution. *Pawelec, supra*.

Here, the trial court entered judgment against Superior, on Reagan's third-party petition, in the amount of $3,867, or one-half of the amount Reagan was ordered to pay the Warners. The trial court obviously concluded that Reagan and

Superior are equally to blame for the Warners' mistreatment. With this conclusion, we agree. There is evidence that Superior knew the car was a salvaged wreck, yet affirmatively misrepresented the car's history to Reagan's representative. There is also evidence that Reagan should have known the true nature of the vehicle by the time it was sold to the Warners. While we agree with Reagan that the trial court essentially applied a contribution theory in awarding judgment on the third-party petition, we disagree with Reagan's conclusion that this constitutes error. See *Howell v. River Products Co., supra* (indemnitee entitled to two-thirds of amount awarded original plaintiff where indemnitor was responsible for two-thirds of the damage). The judgment entered on Reagan's third-party petition is within the equitable powers of the court and is therefore affirmed.

Finally, Superior argues that the trial court erred in awarding Reagan a $1,000 attorney fee as part of the judgment against Superior. However, while the trial court's written order of judgment appears to award the $1,000 attorney fee imposed against Superior to Reagan's attorney, oral comments from the bench indicate an intention that the award go to the Warners' attorney. When there is a conflict between the record of a judgment and a verbatim record of the proceedings in open court, the latter prevails. *State v. Salyers*, 239 Neb. 1002, 480 N.W.2d 173 (1992). As the award of attorney fees to the Warners was based on violation of the Uniform Deceptive Trade Practices Act and Superior was neither accused of nor found to be in violation of that act, the trial court's judgment is hereby modified to eliminate the $1,000 fee for the Warners' attorney, to be paid by Superior. As the remainder of Superior's assignments of error are subsumed in the matters discussed above, the trial court's judgment is in all other respects affirmed.

AFFIRMED AS MODIFIED.

STEVE J. PURBAUGH AND RHONDA L. PURBAUGH, APPELLANTS, V. GEAROLD H. JURGENSMEIER, APPELLEE.

483 N.W.2d 757

Filed May 15, 1992. No. S-89-1236.

1. **Summary Judgment: Appeal and Error.** Summary judgment is properly granted only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue concerning any material fact or as to the ultimate inferences deducible from such facts and that the moving party is entitled to judgment as a matter of law. On appeal, it is this court's duty to review the evidence in a light most favorable to the party against whom the judgment was granted and give such party the benefit of all reasonable inferences deducible from the evidence.
2. **Decedents' Estates: Executors and Administrators: Contracts: Liability.** Unless otherwise provided in the contract, a personal representative is not individually liable on a contract properly entered into in his fiduciary capacity in the course of administration of the estate unless he fails to reveal his representative capacity and identify the estate in the contract. Neb. Rev. Stat. § 30-2490(a) (Reissue 1989).
3. **Contracts: Deeds: Merger: Title.** "Merger" does not serve to make the contract and the deed one document; it is merely a rule for the resolution of title disputes.
4. **Contracts: Deeds: Merger.** Upon the execution, delivery, and acceptance of an unambiguous deed, such being the final acts of the parties expressing the terms of their agreement with reference to the subject matter, all prior negotiations and agreements are deemed merged therein.
5. _____: _____: _____. The doctrine of merger does not apply to those provisions of the antecedent contract which the parties do not intend to be incorporated in the deed, or which are not necessarily performed or satisfied by the execution and delivery of the stipulated conveyance.
6. **Contracts: Stipulations: Sales: Real Estate: Deeds: Time: Merger.** A stipulation in a preliminary contract for the sale of real estate, to deliver a deed at a specified time upon a contingency fully performed, does not necessarily merge in a subsequently delivered and accepted deed.
7. **Contracts: Sales: Deeds: Merger.** Terms such as purchase price, interest, payments, and date of closing included within the contract of sale are normally not repeated in the deed and therefore are not merged with the deed instrument.
8. **Decedents' Estates: Executors and Administrators: Principal and Agent: Contracts: Liability.** In determining what disclosures as to identity of a principal are sufficient to satisfy Neb. Rev. Stat. § 30-2490(a) (Reissue 1989) so as to relieve a personal representative of personal liability, the law of agency may be controlling.
9. **Decedents' Estates: Executors and Administrators: Principal and Agent: Contracts: Liability: Proof.** It is the agent's and, accordingly, the personal representative's duty to disclose his or her capacity as agent of a corporation or of a decedent's estate if he or she is to escape personal liability for contracts made by him or her, and the agent bears the burden of proof of showing that he or she

was acting in a representative capacity and not an individual capacity.

10. **Decedents' Estates: Executors and Administrators: Contracts: Liability.** The disclosure of a representative capacity is not complete for the purpose of relieving the personal representative from personal liability unless it embraces the name of the estate; without that, the party dealing with the personal representative may understand that the personal representative intended to pledge his or her personal liability and responsibility in support of the contract and for its performance.
11. **Decedents' Estates: Executors and Administrators: Notice.** Express notice of the personal representative's status and the estate's identity is unnecessary if the circumstances surrounding the transaction demonstrate that the third person should be charged with notice of the relationship.
12. **Decedents' Estates: Executors and Administrators: Contracts: Liability: Notice.** If a party contracting with a personal representative has, at the time of contracting, notice of representative capacity and of the identity of the estate, that notice may absolve the personal representative of individual liability.

Appeal from the District Court for Lancaster County: EARL J. WITTHOFF, Judge. Reversed and remanded with directions.

Robert R. Gibson, of Professional Legal Associates of Nebraska, P.C., for appellants.

Kenneth Dudek for appellee.

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

HASTINGS, C.J.

Steve J. and Rhonda L. Purbaugh, plaintiffs, appeal the order of the district court granting summary judgment to the defendant, Gearold H. Jurgensmeier, and dismissing the plaintiffs' petition. We reverse and remand with directions for further proceedings.

Jurgensmeier was personal representative of the estate of Mary Ann Bentzinger, deceased. On February 12, 1987, the Purbaughs and Jurgensmeier entered into a contract for the sale of land at 9500 South 56th Street, Lincoln, Nebraska. Jurgensmeier signed this contract and five subsequent addenda as "Gearold H. Jurgensmeier P.R." The contract nowhere indicates that the property involved was property of the Bentzinger estate.

The contract originally provided that the sale would be closed, and possession of the property delivered, "on or before

the 31st day of March, 1987." Later addenda postponed closing and transfer until July 12, 1987 (addendum of May 18, 1987), and February 12, 1988 (addendum of December 8, 1987). Apparently, the transaction was closed on May 16, 1988.

The deed offered by Jurgensmeier's agent and accepted by the Purbaughs at closing was headed "PERSONAL REPRESENTATIVE'S JOINT TENANCY DEED." It identified the grantor as "GEAROLD H. JURGENSMEIER, Personal Representative of the Estate of MARY ANN BENTZINGER[,] Deceased" and was signed "ESTATE OF Mary Ann Bentzinger DECEASED By Gearold H. Jurgensmeier [signature] Personal Representative."

As represented by exhibit "E," attached to defendant's answer, prior to closing Rhonda Purbaugh wrote a letter dated February 18, 1988, addressed to "Mr. Gerald Jergensmier [sic], Bentzinger Estate," stating that the condition of the well on the property "we are in [the] process of purchasing" was misrepresented by the defendant's agent, that a new well had to be dug, and that "[a]s owner, you are responsible for the debt incurred in drilling this new well."

The Purbaughs sued Jurgensmeier only in his personal capacity; the Bentzinger estate was not joined as a defendant by suing Jurgensmeier in his representative capacity. See Neb. Rev. Stat. § 30-2490 (Reissue 1989) ("[c]laims based on contracts entered into by a personal representative in his fiduciary capacity . . . may be asserted against the estate by proceeding against the personal representative in his fiduciary capacity").

The claims of Purbaughs' petition were that Jurgensmeier breached the land sale contract by failing to close the transaction on July 12, 1987, resulting in increased finance costs to the Purbaughs, and because on February 16, 1988, the pump and well stopped functioning. It was also alleged that the plaintiffs had taken possession of the property on or about April 10, 1987, pursuant to a memorandum agreement of that date, signed again by "Gearold H. Jurgensmeier P.R."

Neither party addressed, either in the trial court or on this appeal, the issue of whether the addendum signed by the parties extending the time of performance to February 12, 1988,

waived Purbaughs' cause of action as it related to Jurgensmeier's failure to perform on July 12, 1987.

The district court granted summary judgment in favor of Jurgensmeier, finding that "there are no genuine issues of material facts," that "Plaintiffs had notice that the defendant was acting in his capacity as Personal Representative," and that "[t]he contract to sell merged into the deed which contained the representative capacity of the defendant and the name of the estate of the seller," and *apparently* concluded that the defendant in his personal capacity was not the proper party in interest.

On appeal, the Purbaughs assign as error the court's finding that the plaintiffs had notice that Jurgensmeier was acting only in his representative capacity, its holding that the contract merged into the deed for the purpose of determining Jurgensmeier's personal liability, and its holding that the personal representative in his representative capacity was the proper party defendant.

In reviewing this case we are guided by the following principles:

> [S]ummary judgment is properly granted only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue concerning any material fact or as to the ultimate inferences deducible from such facts and that the moving party is entitled to judgment as a matter of law. . . . On appeal, it is this court's duty to review the evidence in a light most favorable to the party against whom the judgment was granted and give such party the benefit of all reasonable inferences deducible from the evidence.

(Citations omitted.) *Barelmann v. Fox*, 239 Neb. 771, 780-81, 478 N.W.2d 548, 555 (1992).

The Purbaughs' assignments of error, of course, combine to raise the single issue of whether the district court erred in its findings and order dismissing their petition. The trial court concluded that Jurgensmeier the individual could not be liable on the contract and that therefore he was an improper party to the litigation. This holding was based on findings that the Purbaughs had actual notice of Jurgensmeier's representative

capacity and of the identity of the estate, and that the deed—which Jurgensmeier signed as personal representative of the Bentzinger estate—merged with the contract. The materiality of these findings to the district court's holding is made clear by reference to § 30-2490(a), which defines the individual liability in contract of a personal representative. That section provides: "Unless otherwise provided in the contract, a personal representative is not individually liable on a contract properly entered into in his fiduciary capacity in the course of administration of the estate unless he fails to reveal his representative capacity and identify the estate in the contract."

However, if the district court was correct in its finding that the contract and the deed "merged" in such a way that Jurgensmeier's disclosures on the deed became part of the contract so as to satisfy § 30-2490(a), then the Purbaughs' earlier notice, if any, of Jurgensmeier's capacity and the identity of the estate is irrelevant. We examine that finding.

"Merger" does not serve to make the contract and the deed one document; it is merely a rule for the resolution of title disputes. " ' " '[U]pon the execution, delivery, and acceptance of an unambiguous deed, such being the final acts of the parties expressing the terms of their agreement with reference to the subject matter, all prior negotiations and agreements are deemed merged therein . . . .' " ' " *Newton v. Brown*, 222 Neb. 605, 616, 386 N.W.2d 424, 432 (1986). "[T]hereafter the deed regulates the rights and liabilities of the parties, and evidence of contemporaneous or antecedent agreements between the parties is inadmissible *to vary or contradict the terms of the deed*." (Emphasis supplied.) 77 Am. Jur. 2d *Vendor and Purchaser* § 290 at 448-49 (1975). The doctrine of merger "does not apply to those provisions of the antecedent contract which the parties do not intend to be incorporated in the deed, or which are not necessarily performed or satisfied by the execution and delivery of the stipulated conveyance." *Id.* § 291 at 450. For example, "[a] stipulation in a preliminary contract for the sale of real estate, to deliver a deed at a specified time upon a contingency fully performed, does not necessarily merge in a subsequently delivered and accepted deed." *Id.* at 451.

The doctrine of merger does not serve to make the contract and the deed one. Absent fraud or mistake, the deed controls as to the identity of the estate. *Newton v. Brown, supra.* Terms such as purchase price, interest, payments, and date of closing included within the contract of sale are normally not repeated in the deed and therefore are not merged with the deed instrument. The district court erred in holding that the merger of the contract into the deed in this case discharged Jurgensmeier's disclosure responsibilities under § 30-2490(a).

The parties have not furnished citations to cases, nor have we been able to find any cases, which address the issue of what disclosures suffice to satisfy § 30-2490(a) or the virtually identical provision of Unif. Probate Code § 3-808, 8 U.L.A. 373 (1983). However, the official comment to § 3-808 of the Uniform Probate Code directs courts in search of interpretive direction to the law governing the individual liability of corporate agents.

Corporate law, in turn, refers to the law of agency on this question. See *McGowan Grain v. Sanburg*, 225 Neb. 129, 403 N.W.2d 340 (1987). In *McGowan*, the court addressed the personal jurisdiction of the district court over an officer of an out-of-state corporation doing business in this state. In determining whether the officer was acting on behalf of the corporation in transactions within Nebraska, "[t]his court . . . recognized the general rule that an agent, acting for a disclosed principal, is not ordinarily liable for the principal's contract." *Id.* at 134, 403 N.W.2d at 345. This proposition is consonant with § 30-2490(a) as that statute regards a personal representative's individual liability, and is reflected in other Nebraska cases. *Cargill Leasing Corp. v. Mueller*, 214 Neb. 569, 572, 335 N.W.2d 277, 279 (1983) (" '[i]t is a fundamental rule that an agent who contracts on behalf of a disclosed principal, in the absence of some other agreement to the contrary or other circumstances showing that the agent has expressly or impliedly incurred or intended to incur personal responsibility, is not liable to the other contracting party' "); *Koperski v. Husker Dodge, Inc.*, 208 Neb. 29, 48, 302 N.W.2d 655, 665 (1981) (stating same proposition). See, also, 19 C.J.S. *Corporations* § 540 at 169 (1990) ("it is the agent's duty to

disclose his capacity as agent of a corporation if he is to escape personal liability for contracts made by him, and the agent bears the burden of proof of showing that he was purchasing in his corporate, not individual, capacity").

In corporate law,

> " 'The disclosure of an agency is not complete for the purpose of relieving the agent from personal liability unless it embraces the name of the principal; without that, the party dealing with the agent may understand that he [the agent] intended to pledge his personal liability and responsibility in support of the contract and for its performance.' "

West v. Federal Deposit Ins. Corp., 149 Ga. App. 342, 347-48, 254 S.E.2d 392, 397 (1979). This court addressed the sufficiency of disclosure of an agency relationship in *Department of Banking v. Davis*, 227 Neb. 172, 416 N.W.2d 566 (1987). In that case the Department of Banking, as receiver for Commonwealth Savings Company, sued the defendants to foreclose a real estate mortgage. The mortgage had originally been executed between the defendants and Nebraska Modular Homes, Inc., which had assigned the mortgage to Commonwealth. The defendants had fully paid Modular in satisfaction of the mortgage. This court held that the rubber-stamped statement "Assignment with Recourse" on the back of the original of the mortgage was insufficient notice to the defendants that Modular was contracting as an agent of Commonwealth. The situation in that case was the reverse of the situation we have here, but the principle is the same.

> "As a general rule, one who contracts with the agent of an undisclosed principal, supposing that the agent is the real party in interest, and not being chargeable with notice of the existence of the principal, is entitled, if sued by the principal on the contract, to set up any defenses and equities which he could have set up against the agent had the latter been in reality the principal suing on his own behalf."

Id. at 177, 416 N.W.2d at 569.

The initials "P.R." which Jurgensmeier added to his signature may have been sufficient to inform a layperson that

he or she was dealing with a personal representative, but there was nothing in the documents or dealings set forth in the record which would indicate what or whom Jurgensmeier represented. The initials are analogous to the rubber stamp in *Davis*. Jurgensmeier, as he concedes, did not fully disclose his capacity and the identity of the estate, as required by § 30-2490(a).

However, in corporate law, "express notice of the agent's status and the principal's identity is unnecessary if the circumstances surrounding the transaction demonstrate that the third person should be charged with notice of the relationship." *G.T.M. Carpet Co. v. Richards*, 534 So. 2d 539, 541 (La. App. 1988). Accord, Restatement (Second) of Agency § 4(1) at 17 (1958) ("[i]f, at the time of a transaction conducted by an agent, the other party thereto has notice that the agent is acting for a principal and of the principal's identity, the principal is a disclosed principal"); *id.* § 320 at 67 ("[u]nless otherwise agreed, a person making or purporting to make a contract with another as agent for a disclosed principal does not become a party to the contract"). Thus, if a party contracting with a personal representative has, at the time of contracting, notice of representative capacity and of the identity of the estate, the analogy to the law of corporations suggested by the official comment to § 30-2490 would absolve the personal representative of individual liability.

This case does not present such a situation. The district court's finding that the Purbaughs "had notice that the defendant was acting in his capacity as Personal Representative of the Estate of Mary Ann Bentzinger," upon which the court's order of dismissal was founded, is vague as to when such notice existed. The only evidence of the Purbaughs' notice is the deed and Rhonda Purbaugh's February 18, 1988, letter. This indicates that, at the earliest, the Purbaughs had notice of Jurgensmeier's status and the identity of the estate over 1 year after they signed the original contract. If the district court meant by its finding that the Purbaughs had notice after the signing of the contract, then that finding would not predicate the order dismissing the petition. If, on the other hand, the district court meant by its finding that the Purbaughs had notice at the time the contract was signed, then that finding is

unsupported by the record. The mere addition of the initials "P.R." to Jurgensmeier's signature would be, as a matter of law, insufficient to place the Purbaughs on notice. See *West v. Federal Deposit Ins. Corp.*, 149 Ga. App. at 347, 254 S.E.2d at 397 (" ' "[t]he disclosure of an agency is not complete for the purpose of relieving the agent from personal liability unless it embraces the name of the principal. . . ." ' ").

Therefore, there is a question of fact relating to the knowledge of the Purbaughs as to Jurgensmeier's capacity and the identity of the estate. This would be critical in ascertaining Jurgensmeier's liability, if any.

There is another issue which appears to lurk in the background as to the sufficiency of the petition to state a cause of action, which issue was not raised by the parties either in the trial court or in this court. However, it is an issue which the parties would be well advised to consider on trial of this matter.

The judgment of the district court is reversed, and the cause is remanded with directions for further proceedings in accordance with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLANT, V. RICHARD L. CRIBBS, APPELLEE.

484 N.W.2d 84

Filed May 15, 1992. No. S-91-177.

Constitutional Law: Double Jeopardy: Proof. The Double Jeopardy Clause bars any subsequent prosecution in which the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted.

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

James S. Jansen, Douglas County Attorney, Robert C. Sigler, and Kristina B. Murphree for appellant.

Thomas M. Kenney, Douglas County Public Defender, and Kelly S. Breen for appellee.

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

PER CURIAM.

Defendant, Richard L. Cribbs, was arrested November 5, 1990, in Douglas County. On November 6, 1990, he was charged, by complaint, in the county court for Douglas County with operating a motor vehicle while intoxicated, a misdemeanor. On November 7, 1990, he was also charged, by information, in the district court for Douglas County with operating a motor vehicle while his operator's license was revoked, a felony offense. Both charges arose out of the November 5, 1990, arrest.

The defendant pled no contest to the misdemeanor offense on December 18, 1990, and was sentenced to 6 months' incarceration, a $500 fine, and 15 years' driver's license revocation. Defendant filed a plea in bar alleging that he had "already been convicted of the offense charged herein . . . ."

The district court sustained the defendant's plea in bar on February 13, 1991. The State timely appealed, contending the district court erred in "sustaining the defendant's motion to dismiss based on a violation of the double jeopardy clause . . . ." We reverse.

The subsequent prosecution of Cribbs in the district court does not violate double jeopardy under the holding of *Grady v. Corbin*, 495 U.S. 508, 110 S. Ct. 2084, 109 L. Ed. 2d 548 (1990), the definitive case from the U.S. Supreme Court. The Supreme Court in *Grady* refused to allow the State to "*prove the entirety of the conduct for which [the defendant] was convicted* . . . to establish essential elements of [a different felony offense]." (Emphasis supplied.) *Grady*, 110 S. Ct. at 2094. It is not necessary for the State to prove the entirety of the conduct for which Cribbs was convicted in county court (driving while intoxicated) in order to prove the elements of the driving with a revoked license charge in district court. The State seeks to show only one element (operation of a motor vehicle) of the convicted offense, not the entirety of that offense.

Grady held: "[T]he Double Jeopardy Clause bars any subsequent prosecution in which the government, to establish

an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted." *Grady*, 495 U.S. at 521. In the case before us, the only fact proved in defendant's misdemeanor conviction in county court that the State will again prove in this felony case is that defendant was driving an automobile on November 5, 1990. That fact does not constitute an offense.

We recently adopted this interpretation of *Grady* in *State v. Woodfork*, 239 Neb. 720, 478 N.W.2d 248 (1991). The facts in *Woodfork* are virtually identical to those before us. Woodfork pled no contest in the county court to misdemeanor offenses of willful reckless driving and driving while intoxicated, and then filed a plea in bar in response to an information in the district court charging him with the felony offense of driving while his operator's license was revoked.

In *Woodfork*, 239 Neb. at 728, 478 N.W.2d at 253, we stated:

> The subsequent prosecution on the driving while the operator's license was revoked charge passes the *Grady* test, since the State is not required to prove the *entire* conduct for which the defendant was convicted of willful reckless driving and DWI. There was no need for the State to prove conduct which constituted reckless behavior or a state of intoxication because neither conduct is an essential element of a driving while the operator's license was revoked charge under § 39-669.07. The only conduct which needs to be proven again in a subsequent proceeding, and which is mentioned in the State's complaint, is driving upon the streets and highways. Since driving in and of itself is not unlawful and does not constitute the entire conduct for which the defendant was previously convicted, a conviction of driving while the operator's license was revoked would not violate the double jeopardy clause.

The order of the trial court dismissing the charge against defendant in the district court was in error and is reversed. The cause is remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

CAPORALE, J., dissenting.

I agree that under the principle announced in *State v. Woodfork*, 239 Neb. 720, 478 N.W.2d 248 (1991), the trial court erroneously sustained the defendant's plea in bar. However, I adhere to the view that the *Woodfork* majority incorrectly interpreted *Grady v. Corbin*, 495 U.S. 508, 110 S. Ct. 2084, 109 L. Ed. 2d 548 (1990).

Moreover, even if that interpretation were correct, I would hold that the trial court correctly sustained the defendant's plea in bar under the stricture of Neb. Const. art. I, § 12, that no "person shall . . . be twice put in jeopardy for the same offense." No citizen of this state ought to have to defend subsequent prosecutions for the same conduct simply because the left hand of the prosecutorial bureaucracy refuses to take the trouble to learn and coordinate with what the right hand is planning.

BOSLAUGH, J., joins in this dissent.

IN RE INTEREST OF N.M. AND J.M., CHILDREN UNDER 18 YEARS OF AGE.

STATE OF NEBRASKA, APPELLEE AND CROSS-APPELLEE, V. R.M., APPELLANT, AND J.M., APPELLEE AND CROSS-APPELLANT.

484 N.W.2d 77

Filed May 15, 1992. No. S-91-217.

1. **Juvenile Courts: Jurisdiction: Parental Rights: Proof.** If the pleadings and evidence at the adjudication hearing do not justify a juvenile court acquiring jurisdiction of a child, then the juvenile court has no jurisdiction, i.e., no power, to order a parent to comply with a rehabilitation plan, nor does the juvenile court have any power over the parent or child at the disposition hearing unless jurisdiction is alleged and proven by new facts at a new adjudication-disposition hearing.
2. **Juvenile Courts: Parental Rights: Notice.** Adequate notice of the possibility of the termination of parental rights must be given in adjudication hearings before the juvenile court may accept an in-court admission, an answer of no contest, or a denial from a parent as to all or any part of the allegations of the petition before the juvenile court.

3. **Parental Rights: Right to Counsel.** A parent in a juvenile court case has the right to appointed counsel if unable to hire a lawyer.
4. **Judicial Notice.** A trial court cannot take judicial notice of disputed allegations.

Appeal from the Separate Juvenile Court of Douglas County: JOSEPH W. MOYLAN, Judge. Reversed and remanded for further proceedings.

Ann E. Ebsen for appellant.

Milo Alexander for appellee J.M.

James S. Jansen, Douglas County Attorney, Elizabeth G. Crnkovich, and Donald C. Hosford, Jr., guardian ad litem, for appellee State.

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

PER CURIAM.

The natural parents of Nicole, born March 3, 1982, and James, born October 1, 1984, appeal from an order of the separate juvenile court of Douglas County terminating their rights to their two minor children. The mother and father each timely appealed. The father filed his notice of appeal after the mother's filing and is therefore designated an appellee. The father has no dispute with the mother's appeal, but only with the juvenile court's termination of his parental rights.

The mother, R.M., contends that the juvenile court erred (1) "in finding that clear and convincing evidence established that [the mother] had failed to comply with reasonable efforts . . . to correct conditions leading to the determination" that the children were minors within Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1988); (2) "in finding that the rehabilitative plan . . . was fundamentally fair and reasonable and designed as a reasonable effort to correct the conditions" leading to the determination; and (3) "in failing to determine the best interests of the children." The father, J.M., assigns the same errors in regard to the termination of his rights, and additionally contends that the court erred (1) "in finding that the repeated admission of evidence of sexual abuse and the imposition of a plan requiring therapy for sexual abuse, despite the dismissal of

all allegations of sexual abuse at the adjudication stage, did not constitute a denial of fundamental fairness and due process," and (2) in overruling the father's objection to the request for judicial notice of the court's own records.

For the reasons hereinafter stated, we reverse the judgment and remand the cause for further proceedings as to James, and reverse and dismiss the cause as to Nicole.

I.

The issue of jurisdiction is not raised by the parents, but, following the holding in *In re Interest of D.M.B., ante* p. 349, 481 N.W.2d 905 (1992), we determine the juvenile court did not obtain jurisdiction over Nicole.

The record before us shows, in that regard, as follows: The children were removed from their parents' home on December 15, 1986, when the mother brought James to the hospital with severe cuts and bruises to his head and face. The children were apparently placed in foster care at this point.

On January 14, 1987, an amended petition was filed in the juvenile court. That petition alleged, in part:

> COUNT I
>
> [Nicole] was born March 3, 1982; [James] was born October 1, 1984; and said children are now living or to be found in Douglas County, Nebraska.
>
> COUNT II
>
> [Nicole] and [James] come within the meaning of Nebraska Revised Statutes, 1943, Section 43-247 (3a), being under the age of eighteen years, and lacking proper parental care by reason of the faults or habits of [J.M., their father] and [R.M., their mother], natural parents of said children, in that:
>
> A. On or about December 15, 1986, [James] sustained numerous lacerations and bruises to the head and face while in the care and custody of [J.M.].
>
> B. [J.M.] and [R.M.] have given conflicting explanations as to the cause of these injuries; medical personnel indicate the injuries are not consistent with those explanations.
>
> C. [Nicole] has been subjected to fondling of the

> genitals and oral sex by [J.M.] on at least three occasions in the past year.

An adjudication hearing was held on March 16, 1987. The father and the mother, each with separate counsel; an appointed guardian ad litem for the children; and a deputy county attorney were present. The county attorney told the court that the parents were "willing to admit to certain portions of the petition that I filed." The parents each then admitted count I and paragraphs A and B of count II, as set out above. Leave was granted to the county attorney to strike paragraph C of count II.

The juvenile court found that Nicole and James were children within the meaning of § 43-247(3)(a) insofar as their parents, J.M. and R.M., are concerned. A written order filed the next day found that "Paragraph A and B of Count II are true" and that "the minor children are children within the meaning of Section 43-247 (3a) . . . ." It should be noted that the parents admitted only count I and paragraphs A and B of count II. The court found only that count I and paragraphs A and B of count II were true and that the children were within § 43-247(3)(a), without stating how the children were within that section. Thus, the only admissions made by the parents were not specifically addressed to the general provisions of the statutes concerning children who lack "parental care by reason of the fault or habits of [their parents]." The parents actually admitted very little.

The adjudication order contained no specific factual findings, although Neb. Rev. Stat. § 43-279.01(2) (Reissue 1988) provides:

> After giving the parties the information prescribed in subsection (1) of this section, the court may accept an in-court admission . . . from any parent or custodian as to all or any part of the allegations in the petition. The court shall ascertain a factual basis for an admission or an answer of no contest.

Insofar as Nicole is concerned, in the state of the pleadings, it would have been difficult to "ascertain a factual basis" for the parents' admissions.

In any event, we are faced with an adjudication order finding

jurisdiction over Nicole, when there are no factual allegations, no evidence at the adjudication hearing, and no findings concerning the actions of either the father or the mother as to the child Nicole. Insofar as Nicole is concerned, we are acting in a void. In *In re Interest of D.M.B., ante* at 352, 481 N.W.2d at 909, we held:

> If the pleadings and evidence at the adjudication hearing do not justify a juvenile court acquiring jurisdiction of a child, then the juvenile court has no jurisdiction, i.e., no power, to order a parent to comply with a rehabilitation plan, nor does the juvenile court have any power over the parent or child at the disposition hearing unless jurisdiction is alleged and proven by new facts at a new adjudication-disposition hearing.

We hold the juvenile court had no jurisdiction over Nicole and that therefore this court has no jurisdiction either.

The cause as to Nicole is remanded to the juvenile court with directions to dismiss. It can be hoped the matter concerning Nicole may be refiled to obtain a determination whether the specific allegations concerning Nicole, as set out in the amended petition before dismissal of paragraph C, are correct. It should be noted that the amended petition, as filed, contains no factual allegations concerning the mother as to Nicole.

II.

As to the order concerning James, we determine that the cause, in that respect, must be remanded for further proceedings.

As to the jurisdiction issue, the allegations concerning James, when most broadly construed, set out a basis for juvenile court jurisdiction. As in the case of Nicole, no "factual basis" for the parents' admission was ascertained. The facts admitted at adjudication were that on December 15, 1986, James "sustained numerous lacerations and bruises to the head and face while in the care and custody of [J.M.]" and that J.M. and R.M. gave explanations of those injuries which were not consistent with the injuries. We note that at the disposition hearing, on April 28, 1987, a report was submitted, without objection, setting out that J.M. had " 'bucked' foreheads with

James as he had been mad and frustrated with the child playing with the television wires." J.M. was sentenced to county jail for 6 months for assault and battery in connection with this incident and was serving that sentence at the time of the disposition hearing. As stated in the father's reply brief at 3, "The adjudication was based on Mr. [M.'s] admitted physical abuse of James." The juvenile court had jurisdiction over James inasmuch as his father had physically abused him.

Similarly, when broadly construed, the allegations of the petition can be determined to set out facts contending that the mother was not properly parenting James because she is not protecting James against his father.

We determine, however, that both the mother and the father have been deprived of due process in the course of the proceedings concerning James, and we remand the cause as to that child for further proceedings.

First of all, we note that at the adjudication hearing of March 16, 1987, before accepting the parents' admissions, the court advised the parents that they had the right to a trial, at which trial the State would have to prove the charges made against them by a preponderance of the evidence; the right to cross-examine witnesses; the right to testify or not testify; and the right to call witnesses. The parents were advised of these rights in compliance with § 43-279.01(1), which statute requires that the court inform the parties of various rights before the court "may accept an in-court admission . . . as to all or any part of the allegations in the petition."

We note that the record before us makes no mention, as required by § 43-279.01(1)(a) and (b), of certain other rights as to which the parents must be advised, to wit:

> (a) Nature of the proceedings and the possible consequences or dispositions pursuant to sections 43-284 [provisions for care and custody of juveniles under § 43-247(3)], 43-285 [placement reports], and 43-288 to 43-295 [orders as to juveniles, including care and treatment, and possible termination of parental rights];
>
> (b) Right to engage counsel of their choice at their own expense or to have counsel appointed if unable to afford to hire a lawyer.

We do not base our decision in this case on the grounds that the record does not show full compliance with § 43-279.01, because the point is not raised by the parents in this case, and possibly, appropriate information was furnished to the parties at the detention hearing, which is not in the record before us. The question of counsel must have been addressed earlier because, at the adjudication hearing, each parent was represented by counsel, apparently appointed at an earlier time.

It is clear, however, that adequate notice of the possibility of the termination of parental rights must be given in adjudication hearings before the juvenile court may accept an in-court admission, an answer of no contest, or a denial from a parent as to all or any part of the allegations of the petition before the juvenile court.

The crux of the lack of due process to the father is the fact that he has been deprived of his right to counsel for an appreciable part of the proceedings concerning James. It is true that the father precipitated the withdrawal of his first appointed counsel, as shown by the motion to withdraw and affidavit of J.M.'s first attorney, filed July 8, 1987, and by J.M.'s letter to the court dated June 23, 1987. In his letter J.M. requests "a new Public Defender." The lawyer who withdrew requested that substitute counsel be appointed. J.M.'s complaints about that lawyer were to the effect that J.M. and that lawyer did not get along generally. We note that such a reason does not, of itself, require the appointment of different counsel. *State v. Reddick*, 230 Neb. 218, 430 N.W.2d 542 (1988). A hearing was held on July 16, 1987, on the motion to withdraw. Both parents were present, as well as their attorneys, the guardian ad litem for the children, an employee of the Department of Social Services, and a probation officer. On July 17, 1987, the court entered an order permitting the attorney to withdraw. Nothing in the order stated the father was to proceed pro se, nor was a different attorney appointed for the father.

On July 5, 1988, an "Entry of Appearance" was filed. This document stated, in its entirety, "COMES NOW Joseph Lopez Wilson and, pursuant to the Order of Appointment dated January 23, 1987 by this Court, hereby enters his appearance

on behalf of [J.M.], the natural father of the minor children herein." The facts set out in the entry of appearance cannot be correct. In March 1987, the original attorney was representing the father, and that representation continued until that attorney was permitted to withdraw on July 17, 1987. In any event, the record shows that the father did not have counsel between July 17, 1987, and July 5, 1988. During that time, three review hearings were held. We hold that a parent in a juvenile court case has the right to appointed counsel if unable to hire a lawyer. § 43-279.01(1)(b).

The review hearing held on October 28, 1987, presented particularly damaging evidence as to the father. Both parents were present at this review hearing. The mother's lawyer was present, but the father appeared without counsel. A report submitted at this review hearing, without objection from J.M. or R.M.'s attorney, stated in part, "[Nicole] has stated to me that her father . . . had seriously sexually abused [Nicole] several times. [Nicole] has also stated to me that her mother . . . had molested her brother [James]. However, Nicole's main worry appears to be [J.M.'s] violence to Nicole and to [James]."

This same report contained a three-page addendum, described as "[Nicole] in session with [family therapist] Martha Skrocky 8-26-87." This addendum consisted of questions by the therapist and answers of Nicole. Specific sexual abuse by the father on Nicole was described by Nicole. Nicole also described specific sexual abuse of James by the mother. The record does not show if the author of the report was available for cross-examination, but the record does show that no cross-examination was conducted, and no testimony as to the report was offered. On January 5, 1987, the same information had been given by Nicole to a police officer, Nicole's foster parents, and a Child Protective Services worker, and was set out in a report of another Child Protective Services worker received in evidence at the disposition hearing. The case, from a pleading point of view, however, proceeded as a case involving physical abuse as to James only. It cannot be said that the absence of counsel for J.M. did not affect J.M.'s due process right.

J.M. also assigns as error the actions of the trial court "in overruling Cross-Appellant [J.M.'s] Amended Objection to

Request for Judicial Notice." This issue stems from the motion for termination of parental rights, where paragraph III states: "That movant requests the Court to take judicial notice of its own records, exhibits and orders in this case under consideration."

First of all, the concept of judicial notice has no place in the request made by the State. Rule 201(2) of the Nebraska Evidence Rules, Neb. Rev. Stat. § 27-201(2) (Reissue 1989), states: "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (a) generally known within the territorial jurisdiction of the trial court or (b) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."

The evidence which the State requests the trial court to judicially notice is not in any way within the definitions set out above. The reports as to sexual abuse contain alleged facts and conclusions to which neither of the parents has ever agreed. Both have denied any sexual abuse of the children in question. There has not been a judicial finding involving these disputed allegations. The parents' denial, of course, does not mean the allegations are false, but that those allegations must be proved. A trial court cannot take judicial notice of disputed allegations. It appears that what the State means is that it wants the court to consider reports earlier adduced and treat them as established fact. That is not judicial notice and is not right.

State v. Norwood, 203 Neb. 201, 277 N.W.2d 709 (1979), should not be read to hold to the contrary. In *Norwood* we stated at 204-05, 277 N.W.2d at 711:

> The court properly took into consideration all of its earlier proceedings. The matter before the juvenile court was a continuation of the same proceeding. A court must take judicial notice of its own records in the case under consideration. Solomon v. A. W. Farney, Inc., 136 Neb. 338, 286 N.W. 254. It also has a right to examine its own records and take judicial notice of its own proceedings and judgment in an interwoven and dependent controversy where the same matters have already been considered and determined.

Norwood determined that the hearing on the motion to

terminate parental rights "was a continuation of the same proceeding." *Id.* at 204, 277 N.W.2d at 711. Obviously a court in a 10-day trial in a case other than a juvenile case must consider the evidence adduced on the first day. That is not "judicial notice," but a consideration of evidence before a court.

Similarly, *Norwood* held that a court should judicially notice "its own proceedings and judgment . . . where the same matters have already been considered *and determined*." (Emphasis supplied.) 203 Neb. at 204-05, 277 N.W.2d at 711. Such judicial notice by a court is far different from being asked to judicially notice controverted facts, as in this case.

The trial court stated it took "judicial notice of the previous proceedings, including the Exhibits and the testimony and the orders, et cetera." The authors of the various reports were not shown to be available for cross-examination at the time of the hearing on the motion to terminate, and as to the exhibits introduced while J.M. was without counsel or not present or both, the authors of those exhibits should have been available for cross-examination by J.M., if they were to be received in evidence. *In re Interest of P.D.*, 231 Neb. 608, 437 N.W.2d 156 (1989); *In re Interest of J.S., A.C., and C.S.*, 227 Neb. 251, 417 N.W.2d 147 (1987).

As an additional reason that the court should not have considered all of the prior reports as fact through the guise of "judicial notice," it is not possible to determine what "facts" the court judicially noticed and relied on in reaching the decision it did. See *In re Interest of C.K., L.K., and G.K., post* p. 700, 484 N.W.2d 68 (1992).

With regard to the due process afforded to the mother, the same analysis applies. There were many reports which may have been "judicially noticed" by the court and considered as fact by the court, when the authors of those reports were not shown to be available for cross-examination. Many of those "facts" could be damaging to the mother's case.

Considering the state of the record before us, we hold that the order terminating the parental rights of both the mother and the father as to James must be set aside. The judgment is reversed and the cause remanded for further proceedings in

accord with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

GRANT, J., concurring in part, and in part dissenting.

I agree fully with everything the majority sets out in part II, that is, the issue concerning James.

I dissent from the determination that the juvenile court had no jurisdiction over Nicole, as set out in part I. An injured child, James, was before the court. His parents had no rational explanation for his injuries. James' sister was also before the court with the same parents. Both children are entitled to be safe. I think the juvenile court had jurisdiction, which is the power to decide the case, even if that decision is incorrect. I believe, however, the court deprived the parents of their rights to due process in an even greater degree than with regard to James, because no factual determinations were ever made as to Nicole.

I agree that the order of the juvenile court terminating the rights of the parents as to James should be reversed, and the cause remanded for further proceedings. I would also reverse the order of the juvenile court terminating the rights of the parents as to Nicole, and remand the cause for further proceedings as to Nicole also.

HASTINGS, C.J., and BOSLAUGH, J., join in this concurrence and dissent.

IN RE INTEREST OF C.K., L.K., AND G.K., CHILDREN UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V. P.S., APPELLANT.

484 N.W.2d 68

Filed May 15, 1992. Nos. S-91-307, S-91-308.

1. **Parental Rights: Evidence: Proof: Appeal and Error.** A 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 an appellate court de novo on the record, impermissible or improper evidence is not considered by the appellate court. In an appeal from a judgment or order terminating parental rights, the appellate 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.

2. **Parental Rights: Abandonment: Words and Phrases.** "Abandonment," for the purpose of Neb. Rev. Stat. § 43-292(1) (Reissue 1988), is a parent's intentionally withholding from a child, without just cause or excuse, the parent's presence, care, love, protection, maintenance, and the opportunity for the display of parental affection for the child.

Appeal from the County Court for Dodge County: DANIEL J. BECKWITH, Judge. Affirmed.

Richard B. Register for appellant.

Dean Skokan, Dodge County Attorney, and Joe Stecher for appellee.

Larry C. Johnson, guardian ad litem.

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

SHANAHAN, J.

The biological mother of three children, Lloyd, born January 9, 1984; Gena, born May 12, 1985; and Christy, born October 28, 1986, appeals from the judgments of the county court for Dodge County, sitting as a juvenile court pursuant to Neb. Rev. Stat. § 43-245 (Cum. Supp. 1990), which terminated the mother's parental rights concerning her children. Termination was based on Neb. Rev. Stat. § 43-292(1) (Reissue 1988) (abandonment of a child for at least 6 months immediately before the filing of a petition to terminate parental rights), § 43-292(2) (substantial and continuous or repeated neglect of a juvenile and refusal to provide parental care and protection for the juvenile), and the court's conclusion that termination of parental rights was in the children's best interests. The children's biological father is not involved in these appeals. We affirm.

STANDARD OF REVIEW

In an appeal from a judgment terminating parental

> rights, an appellate court tries factual questions de novo on the record, which requires an appellate court to reach a conclusion independent of the findings of the trial court, but, when evidence is in conflict, an appellate 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 M.P., 238 Neb. 857, 858, 472 N.W.2d 432, 434 (1991). Accord, *In re Interest of A.H.*, 237 Neb. 797, 467 N.W.2d 682 (1991); *In re Interest of J.S., A.C., and C.S.*, 227 Neb. 251, 417 N.W.2d 147 (1987); *In re Interest of T.C.*, 226 Neb. 116, 409 N.W.2d 607 (1987).

> "The unequivocal language of § 43-292 imposes two requirements before parental rights may be terminated. First, requisite evidence must establish existence of one or more of the circumstances described in subsections (1) to (6) of § 43-292. Second, if a circumstance designated in subsections (1) to (6) is evidentially established, there must be the additional showing that termination of parental rights is in the best interests of the child, the primary consideration in any question concerning termination of parental rights. The standard of proof for each of the two preceding requirements prescribed by § 43-292 is evidence which is 'clear and convincing.' "

In re Interest of M.P., 238 Neb. at 859, 472 N.W.2d at 434 (quoting *In re Interest of J.S., A.C., and C.S., supra*). See, also, *In re Interest of T.C., supra*.

> "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." *In re Interest of T.C., supra* at 117, 409 N.W.2d at 609. Accord, *In re Interest of A.H., supra*; *In re Interest of J.S., A.C., and C.S., supra*. " '[C]lear and convincing evidence means and is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved.' " *In re Interest of J.S., A.C., and C.S., supra* at 266, 417 N.W.2d at 157 (quoting from *Castellano*

v. Bitkower, 216 Neb. 806, 346 N.W.2d 249 (1984)). *In re Interest of M.P.*, 238 Neb. at 859-60, 472 N.W.2d at 434.

BACKGROUND FOR PARENTAL RIGHTS TERMINATION

The hearing to terminate the mother's parental rights occurred on February 13, 1991.

Anonymous reports regarding abuse of Lloyd and Gena brought the children to the attention of the Department of Social Services (DSS) and resulted in the mother's voluntarily working with DSS concerning her children's well-being. Within a few weeks after Christy's birth, the child was hospitalized because "she was failing to gain weight and was, in fact, losing weight." An attending physician suspected that Christy was not getting enough food and conveyed his suspicions to authorities, who placed Christy in a foster home on December 29, 1986. Although the juvenile court, on January 7, 1987, adjudged that Christy was a child within the court's jurisdiction, based on Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1988) (lack of proper child care as the result of parental fault or habit; parental neglect or refusal to provide necessary subsistence or care necessary for a child's health, morals, and well-being), Christy was returned to her mother on January 14. However, on January 22, DSS personnel learned about the three children in their mother's home, where Christy was suffering from "pinkeye" and Lloyd, then 3 years old, and Gena, nearly 2, were locked in a bedroom. Police removed the hungry and dirty children from the home. On February 18, the court adjudicated that Lloyd and Gena were children within the purview of Nebraska's Juvenile Code, pursuant to § 43-247(3)(a).

On March 4, the court ordered a rehabilitation plan to facilitate reunion of the children with their mother. The plan required that the mother abstain from consumption of alcohol and use of drugs, participate in counseling and therapy sessions, and attend classes in parenting. However, soon after issuance of the plan, the mother broke her arm by hitting a car window during a drunken brawl, was absent from numerous counseling sessions, and skipped four of six scheduled parenting classes. On August 28, the court ordered a second

plan substantially similar to the previous plan, but the mother failed to comply with the second plan. The mother moved from place to place without telling DSS about her location. In fact, between February 1987 and August 1990, the mother lived at more than 30 different addresses while in 13 different cities in 6 different states, with Cloquet, Minnesota, as her most recent address just before the termination hearing. The mother missed several of the periodic 6-month review hearings to assess the mother's rehabilitation under the court-ordered plan. Although ordered to pay $25 per child each month as child support, the mother paid no child support until the termination petitions were filed in January 1991. At the time of the hearing, the mother was working full time as a nurse's aide and had recently commenced attendance at parenting classes and counseling sessions, after apparently terminating her common-law marriage, which began in 1989. On the mother's return to Nebraska, and even shortly before the termination hearing, Gena and Christy did not recognize their mother. When Lloyd finally recognized his mother, he experienced great confusion and her return coincided with a resurgence of a severe behavioral problem in Lloyd.

The mother testified that her absence from review hearings was occasioned by her difficulties with finances and transportation. The longest period of the mother's employment was "[m]aybe . . . a week." Her successive and widespread residences and her noncompliance with the rehabilitation plan were the result of the mother's protracted unemployment and her searching with her former common-law husband to find that man's children. When those children were eventually found, she served as a "main caretaker" for the children until her return to Nebraska in December 1990. The mother acknowledged that on her return to Nebraska, she had intended to stay in the state for just a few weeks and then return to Minnesota. However, when the petitions to terminate her parental rights were filed in January 1991, she decided to remain in Nebraska.

At the termination hearing, the mother introduced into evidence two reports from her psychotherapist in Minnesota. The first report, dated April 3, 1990, states:

> [The mother] has been living with her current boyfriend for approximately 1 year and, though they're not legally married, she has adopted his last name as her own. She revealed that this relationship is near termination and that her boyfriend is going to get back with his former spouse and his 2 children who are frequent visitors in their household. Client also admitted that she frequently uses manipulation as a ploy to make her boyfriend commit to a relationship with her and when she feels that he is abandoning her, resorts to extreme anger.
>
> . . . .
>
> [The mother's personality profile] suggests an individual who often presents themselves [sic] in an unrealistically favorable way. This person may have difficulty with anger control and at times display exaggerated anger responses without any apparent provocation. Individuals with similar profiles typically resent authority and often have a history of conflict with society. In addition, individuals with similar profiles are often referred by social agencies for evaluation, but they have difficulty in seeing any problems in themselves. They are not likely to attend regularly or participate in therapy. In addition, this profile suggests an individual who may have a tendency towards addictive behaviors.
>
> Client was also administered the Substance Use Disorders Diagnostic Schedule (SUDDS) and an Alcohol Use Profile. Although client was cooperative throughout assessement [sic], it was noted that her response style was predominately one directional to deny her use of alcohol and/or drugs. This suggested that she was presenting herself in the best possible light. Although there were some contradictions noted in the information she presented, the assessment was not indicative of dependence nor abuse.

In the second report, dated December 3, 1990, the psychotherapist stated that

> [the mother's] attendance in therapy continues to be somewhat sporadic since the initial progress report and she has failed to show for several scheduled appointments. [The mother] remains somewhat resistant in her

> participation and has stated that she has difficulty understanding why she should be involved. She continues to exhibit problems with her anger control which has been exhibited in ongoing physical altercations with her boyfriend.

When the mother's lawyer tried to inquire about the number of rehabilitation plans ordered for the children's father, the court, responding to a relevancy objection, excluded testimony about rehabilitation plans for the children's father.

JUDICIAL NOTICE AT TERMINATION HEARING

In the termination hearing, the State requested that the court "take judicial notice of the testimony [and] exhibits, received as evidence in all adjudication, dispositional and evaluation hearings in Cases Number 2456 and Cases Number 2476" pertaining to the three children involved in the present appeals. A transcript of the prior proceedings, including testimony and exhibits offered or received, apparently had not been prepared and, therefore, was not presented in conjunction with the State's request for judicial notice. The mother's lawyer objected "strongly to the taking of straight judicial notice in this particular proceeding" and argued that the mother

> would like the opportunity to specifically object to any evidence and statements made, and I believe it's the State's burden to show in this formal hearing that she has failed in her parental obligations, and the hearsay statements and relaxed rules [of evidence] that apply to prior hearings should not be applied to such an important hearing as today.
>
> . . . .
>
> . . . [T]o preserve a right for appeal, we are required to specifically note each and every objection. Without a transcript of those particular statements and testimony presented at prior hearings, we will not be able to preserve that for appeal.

The State responded: "[I]t is appropriate for the Court to receive under judicial notice all those past proceedings. This Court has heard those before. It is redundant, I think, to

anticipate this Court hasn't heard them because it has. It knows those facts. It knows those hearings." The judge who presided at the termination hearing also presided at the previous proceedings involving the mother's children.

In ruling on the request for judicial notice, the court did not identify any adjudicative fact judicially noticed, but stated, "The Court will take judicial notice of Cases 2456 and 2476 of all pleadings, adjudications and records that are admissible."

The subject of the juvenile court's judicial notice, when eventually reflected by a transcript containing the testimony and exhibits now contained in the bill of exceptions, but which was unavailable and, therefore, not presented when the court took its judicial notice, includes hearings which occurred throughout a span exceeding 4 years, starting with the detention hearing for Christy on December 29, 1986, and including Christy's adjudication hearing on January 7, 1987, the adjudication hearing for Gena and Lloyd on February 18, 1987, and 13 subsequent hearings before the termination hearing on February 13, 1991. At those hearings before the trial for termination of parental rights, 33 witnesses testified and 36 exhibits were presented to the court. Transcription of testimony in the proceedings before the termination hearing covers 490 pages in 4 volumes of transcription. The material judicially noticed is 70 percent of what is now contained in the bill of exceptions presented for review in this court.

JUDGMENT IN THE JUVENILE COURT

At the conclusion of the termination hearing, the court determined that the evidence clearly and convincingly established that the mother "has abandoned the children for a period of time in excess of six (6) months immediately prior to the filing of the Petition to Terminate Parental Rights. The mother has substantially, continually and repeatedly neglected the children, refusing to give the children necessary parental care and protection" and that the children's best interests require termination of their mother's parental rights.

ASSIGNMENTS OF ERROR

The mother claims that error has occurred by the trial court's (1) taking judicial notice of all prior proceedings involving the

mother's children, (2) excluding evidence regarding the number of rehabilitation plans ordered for the children's father, (3) allowing the guardian ad litem to control visitation of the children, (4) determining that evidence clearly and convincingly established the mother's abandonment and neglect of her children, and (5) deciding that termination of the mother's parental rights was in the children's best interests.

JUDICIAL NOTICE IN THE JUVENILE COURT

Recently, in *In re Interest of C. W. et al.*, 239 Neb. 817, 823, 479 N.W.2d 105, 111 (1992), this court stated:

> While we recognize the Nebraska Evidence Rules 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.

Although the Nebraska Evidence Rules may be inapplicable to the termination hearing we are reviewing, nonetheless, Neb. Evid. R. 201(2), Neb. Rev. Stat. § 27-201(2) (Reissue 1989), supplies some insight into the nature of "judicial notice," namely: "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (a) generally known within the territorial jurisdiction of the trial court or (b) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."

As noted in *Gottsch v. Bank of Stapleton*, 235 Neb. 816, 835, 458 N.W.2d 443, 455 (1990): "[A]s a subject for judicial notice, existence of court records and certain judicial action reflected in a court's record are, in accordance with Neb. Evid. R. 201(2)(b), facts which are capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned." In the same vein as *Gottsch*, but expressed in this court's review of a juvenile court's termination of parental rights, the court stated in *State v. Norwood*, 203 Neb. 201, 204-05, 277 N.W.2d 709, 711 (1979): "[A juvenile court] has a right to examine its own records and take judicial

notice of its own proceedings and judgment in an interwoven and dependent controversy where the same matters have already been considered and determined."

We point out that the court in the present juvenile case did not identify what fact or facts were judicially noticed in page after page of the voluminous record eventually compiled as a part of the bill of exceptions for these appeals. Perhaps one explanation for the trial court's failure to specify the precise subject of its judicial notice is the fact which we notice: A transcription of testimony and exhibits in the prior proceedings had not been prepared and submitted for the court's consideration when the court indicated that it was judicially noticing "all pleadings, adjudications and records that are admissible" and contained in the prior proceedings involving the children. As we observed in *State v. Vejvoda*, 231 Neb. 668, 677, 438 N.W.2d 461, 468 (1989):

> Judicial notice, however, is not the same as extrajudicial or personal knowledge of a judge. "What a judge knows and what facts a judge may judicially notice are not identical data banks. . . . [A]ctual private knowledge by the judge is no sufficient ground for taking judicial notice of a fact as a basis for a finding or a final judgment . . . ." McCormick on Evidence § 329 at 922-23 (E. Cleary 3d ed. 1984).

"Care should be taken by the court to identify the fact it is noticing, and its justification for doing so." *Colonial Leasing etc. v. Logistics Control G.I.*, 762 F.2d 454, 459 (5th Cir. 1985). See, also, *Gottsch v. Bank of Stapleton, supra.* In *In Interest of Adkins*, 298 N.W.2d 273 (Iowa 1980), the Iowa Supreme Court expressed some safeguards pertaining to judicial notice in a proceeding to terminate parental rights:

> Papers requested to be noticed must be marked, identified, and made a part of the record. Testimony must be transcribed, properly certified, marked and made a part of the record. Trial court's ruling in the termination proceeding should state and describe what it is the court is judicially noticing. Otherwise, a meaningful review is impossible.

298 N.W.2d at 278. See, also, *In re Interest of R.A.*, 226 Neb.

160, 410 N.W.2d 110 (1987).

However, for our review in the present appeals, there is no identification or indication of the adjudicative fact or facts judicially noticed by the trial court, which, basically, noticed something somewhere in the expanse of the proceedings involving the children. Without cryptesthesia or telepathy, we are unable to ascertain just what fact or facts were judicially noticed by the trial court. Moreover, the trial court remarked that it would judicially notice everything "admissible" in the prior proceedings. By using "admissible," when the Nebraska Evidence Rules are inapplicable, the trial court referred to some undisclosed standard for determination of admissibility of evidence in a hearing to terminate parental rights. Therefore, the trial court's enigmatic expression that all "admissible" parts of the prior proceedings would be judicially noticed only compounds the confusion engulfing the court's ruling on judicial notice.

On the other hand, the children's mother does not point to any deprivation of due process as a consequence of the court's judicial notice at the termination hearing, although we concede that demonstrating a deprivation of procedural due process becomes difficult, if not impossible, as a result of the uncertainty and conjecture surrounding the judicial notice taken by the trial court.

Moreover, a 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 an appellate court de novo on the record, impermissible or improper evidence is not considered by the appellate court. In an appeal from a judgment or order terminating parental rights, the appellate 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 A.H.*, 237 Neb. 797, 467 N.W.2d 682 (1991); *In re Interest of J.S., A.C., and C.S.*, 227 Neb. 251, 417 N.W.2d 147 (1987).

Consequently, in our de novo review of the record in the

present appeals, we disregard those items or material indicated by the trial court as the subject of its judicial notice. Thus, in light of our standard of review, we do not address the mother's first assignment of error regarding the question of judicial notice inasmuch as we conduct our review based on the record made at the termination hearing, exclusive of the material which may have been the subject of the trial court's "judicial notice."

FATHER'S REHABILITATION PLANS

The mother was not allowed to inquire into the number of rehabilitation plans ordered for the children's father. We find no probative value in evidence regarding the number of rehabilitation plans for the children's father; hence, the mother's second assignment is without merit.

CONTROL OF VISITATION RIGHTS

In her third assignment of error, the mother contends that the juvenile court authorized the guardian ad litem and DSS to establish and thereafter control the visitation of her children. However, in our review of the record, we find no such authorization as alleged by the mother. To the contrary, in December 1990, the court actually instructed DSS to comply with a court-ordered increase in the frequency of visitation for the mother. We find that the mother's third assignment of error has no merit.

SUFFICIENCY OF EVIDENCE: ABANDONMENT AND NEGLECT

In part, § 43-292 authorizes termination of parental rights when "(1) The parents have abandoned the juvenile for six months or more immediately prior to the filing of the petition; [and] (2) The parents have substantially and continuously or repeatedly neglected the juvenile and refused to give the juvenile necessary parental care and protection."

In *In re Interest of J.L.M. et al.*, 234 Neb. 381, 398, 451 N.W.2d 377, 388 (1990), we stated:

> "Abandonment," for the purpose of § 43-292(1), is a parent's intentionally withholding from a child, without just cause or excuse, the parent's presence, care, love,

> protection, maintenance, and the opportunity for the display of parental affection for the child. See *In re Interest of A.G.G.*, 230 Neb. 707, 433 N.W.2d 185 (1988). Further, we have stated that if a parent voluntarily, but unreasonably or unjustifiably, departs from the state of residence of the parent's child or children, such departure may constitute parental abandonment of the child or children . . . . See, *In re Interest of A.G.G., supra*; *In re Interest of R.A.*, 226 Neb. 160, 410 N.W.2d 110 (1987).

Accord *In re Interest of C.A.*, 235 Neb. 893, 457 N.W.2d 822 (1990).

From our de novo review, we find that the evidence clearly and convincingly establishes that the mother in the present case abandoned her children for a period of at least 6 months immediately before the State filed its termination petitions. See § 43-292(1). Also, we find that the evidence clearly and convincingly establishes that the mother has substantially and continuously or repeatedly neglected her children and refused to give her children necessary parental care and protection. See § 43-292(2).

The mother persistently ignored the vital interests of her young children and voluntarily, but unfortunately, left Nebraska and the lives of her children; for example, she elected to remain separated from her children in Nebraska while searching in Minnesota for her common-law husband's children. Contemporaneous with the filing of the termination petitions, the mother attempted to ameliorate a regrettable situation by staying in Nebraska, although intending to return to Minnesota; by obtaining employment; and by resuming some visitation with her children. As this court observed in *In re Interest of J.M.D.*, 233 Neb. 540, 542-43, 446 N.W.2d 233, 235 (1989):

> "The parental obligation is a positive duty which encompasses more than a financial obligation. It requires continuing interest in the child and a genuine effort to maintain communication and association with that child." *In re Adoption of Simonton*, 211 Neb. 777, 784, 320 N.W.2d 449, 454 (1982). "Abandonment is not an ambulatory thing the legal effects of which a parent may

> dissipate at will by token efforts at reclaiming a discarded child." *In re Interest of Z.D.D. and N.J.D.*, 230 Neb. 236, 241, 430 N.W.2d 552, 555 (1988).

The mother's somewhat nomadic existence left little hope for parentally produced stability in the lives of her children, and her prolonged absence from Nebraska, coupled with her unwillingness to attend to the needs of her children, as demonstrated by her rejection of parenting classes and counseling sessions, demonstrates the mother's disregard for the basic needs of her young children. At a time in the lives of the children when they most needed their mother, there was only maternal itinerancy, not interest. Consequently, we conclude that the mother's fourth assignment of error lacks merit.

BEST INTERESTS OF THE CHILDREN

We find, by clear and convincing evidence, that the best interests of the children require termination of their mother's parental rights. By the time of the termination hearing, Lloyd had spent almost 60 percent of his life in foster care, Gena over 70 percent of her life in foster care, and Christy over 90 percent. Quite understandably, Gena and Christy did not recognize their mother. Lloyd, who is older than his sisters, did recognize his mother, but that recognition caused an adverse reaction in Lloyd and recurrence of a behavioral problem. While the mother insists that the State's action has prevented her from being an integral part of the children's lives, it is an obvious fact that it is the mother's own actions and behavior which have prevented her from being a healthy influence and factor in the lives of her children. Although the mother suggests that she has finally begun to change her life,

> prospects for the children must take into account the past conduct of a parent, not just a parental promise about the future.
>
> "When parents cannot rehabilitate themselves within a reasonable time, the best interests of a child require that a final disposition be made without delay." *In re Interest of W.*, 217 Neb. 325, 330, 348 N.W.2d 861, 865 (1984).

In re Interest of L.O. and B.O., 229 Neb. 889, 896, 429 N.W.2d 388, 393 (1988).

CONCLUSION

After our de novo review of the record, we have concluded that there is clear and convincing evidence that the mother abandoned her children for a period of at least 6 months preceding the State's filing of the termination petitions, see § 43-292(1), and that there is clear and convincing evidence that the mother has substantially and continuously or repeatedly neglected her children and refused to give them necessary parental care and protection, see § 43-292(2). Also, we conclude that there is clear and convincing evidence that termination of the mother's parental rights is in the best interests of her children.

Therefore, the judgments of the juvenile court terminating the mother's parental rights are affirmed.

AFFIRMED.

BOSLAUGH, J., dissenting in part.

While I concur in the judgment of the court in these cases, I do not agree that a juvenile court at a hearing on the motion or petition for termination of parental rights can consider evidence previously adduced in the same proceeding only if it has been "transcribed" and is presented as a document.

In *State v. Norwood*, 203 Neb. 201, 204, 277 N.W.2d 709, 711 (1979), we noted that the termination matter before the juvenile court "was a continuation of the same proceeding." And in *In re Interest of N.M. and J.M., ante* p. 690, 484 N.W.2d 77 (1992), we noted that in a case other than a juvenile case, a trial court must consider the evidence adduced from the first day of the proceeding. This same principle is applicable in juvenile cases.

The statement quoted from *In Interest of Adkins*, 298 N.W.2d 273 (Iowa 1980), which is taken out of context, does not support a contrary view. Unlike the Nebraska Juvenile Code, the Iowa statute prescribes more than one procedure for termination of parental rights. In the *Adkins* case, Chief Justice Reynoldson reviewed and discussed parts of the record in the earlier child in need of assistance (CHINA) proceeding, which had been commenced in 1977.

After discussing various provisions of the Iowa Code, including the provisions in chapters 232 and 600A, the *Adkins*

opinion states:

> These related statutes reveal a legislative scheme to provide for termination in the same court in which the CHINA adjudication has taken place, as a logical resolution of a child's "limbo" CHINA status where clear and convincing evidence discloses the existence of those prerequisites itemized in subsection *232.114(5). In these circumstances must the evidence and proceedings in the underlying CHINA case be replayed in the same court in the termination proceeding?*
>
> It is true, of course, that ordinarily judicial notice may not be taken of court proceedings in related but wholly different cases. [Citations omitted.]
>
> However, in special circumstances exceptions to this rule have been formulated and applied. . . . In every case we have found, courts adjudicating a termination action have taken judicial notice of the underlying prior proceeding involving the subject child or children. *In re Welfare of Clausen*, 289 N.W.2d 153, 156-57 (Minn.1980); *In re Interest of Norwood*, 203 Neb. 201, 204-05, 277 N.W.2d 709, 711 (1979); *see In re Adoption of K.*, 417 S.W.2d 702, 704-05 (Mo.Ct.App.1967) (appellate court reviewing adoption proceeding judicially noticed the record filed in a prior neglect case appeal). *Although [the appellant] attempts to distinguish Clausen and Norwood because of statutory and rule differences, we are persuaded the rationale of those cases should be adopted here.* Under subsection 232.114(5), CHINA and termination proceedings are not separate and distinct actions, but are interdependent and interwoven. The CHINA action may be a prelude or first step to termination of the parent-child relationship. [Citations omitted.] Many of our decisions disclose that a termination action often follows directly from a prior CHINA adjudication. [Citations omitted.]
>
> *We hold it is permissible for a trial court in a subsection 232.114(5) termination proceeding to judicially notice the prior CHINA case, including the evidence, providing certain safeguards are followed.* Papers requested to be

> noticed must be marked, identified, and made a part of the record. Testimony must be transcribed, properly certified, marked and made a part of the record. Trial court's ruling in the termination proceeding should state and describe what it is the court is judicially noticing. Otherwise, a meaningful review is impossible.

(Emphasis supplied.) *Adkins*, 298 N.W.2d at 277-78.

It is not clear from the opinion in the *Adkins* case whether the judge who heard the termination proceeding was the same judge who had heard the evidence in the earlier CHINA proceeding. If the termination hearing is before a judge who has not heard the evidence presented at an earlier hearing, it would be impossible for the court to consider evidence that has been presented to a different court unless it has been transcribed and presented as a document. Ordinarily, such a problem is not presented in proceedings under the Nebraska Juvenile Code.

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

DANIEL FOREMAN, APPELLANT, V. STATE OF NEBRASKA, UNIVERSITY OF NEBRASKA-LINCOLN, AND THE NEBRASKA SECOND INJURY FUND, APPELLEES.

483 N.W.2d 752

Filed May 15, 1992. No. S-91-608.

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: Evidence: Appeal and Error.** 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.
3. **Workers' Compensation: Appeal and Error.** Factual determinations by the Workers' Compensation Court will not be set aside on appeal unless such determinations are clearly erroneous.
4. **Workers' Compensation.** A claimant who has achieved maximum medical healing is no longer entitled to compensation for temporary total disability.

5. _____. Generally, whether a worker has reached maximum medical improvement is a question of fact.
6. **Workers' Compensation: Second Injury Fund.** For a condition to constitute a preexisting permanent partial disability for which compensation can be recovered from the Second Injury Fund, the worker must have sustained at least a 25-percent loss of earning capacity.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Rod Rehm, P.C., for appellant.

Don Stenberg, Attorney General, and Lisa D. Martin-Price for appellee State.

Jill Gradwohl Schroeder, of Baylor, Evnen, Curtiss, Grimit & Witt, for appellee Second Injury Fund.

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

BOSLAUGH, J.

The plaintiff, Daniel Foreman, sustained a low back injury on December 16, 1985, while he was employed as a sheet metal worker for the defendant University of Nebraska-Lincoln. The injury occurred when the plaintiff was lifting some large fittings for an exhaust system.

The record shows that on January 29, 1986, Dr. Louis Gogela performed a laminectomy at the L4 level of the plaintiff's spine. On August 1, 1986, Dr. Gogela released the plaintiff to return to full-time employment without restriction.

On August 16, 1986, during the course of his employment by the university, the plaintiff bent over to replace a screen in a window, and as he twisted, he felt something pop in his back. The plaintiff returned to Dr. Gogela for treatment of this injury.

On March 23, 1987, Dr. Gogela performed additional surgery to remove disk material at the L4 level of the plaintiff's spine. Dr. Gogela released the plaintiff to work in the summer of 1987, restricting him to light duties initially and eventually allowing the plaintiff to return to full-time duties without restrictions.

In a report dated July 21, 1987, Dr. Gogela stated that the

plaintiff had sustained a 10-percent permanent partial impairment of the body as a whole. Thereafter, the university made a voluntary award of permanent partial disability at a rate of 10 percent and paid the plaintiff $30.58 per week.

On October 24, 1988, the plaintiff again injured his lower back while working for the university. Following this injury, the plaintiff sought medical treatment from Dr. Ronald Schwab.

On March 1, 1989, Dr. Schwab performed a "lumbar spinal decompression with posterolateral spinal fusion L4 to sacrum, Steffe plate internal fixation L4-5 level."

After the accident of October 24, 1988, the plaintiff did not return to employment at the university. He received temporary total disability payments from November 1, 1988, to November 15, 1990, and he continued to receive permanent partial disability payments of $30.58 a week through January 26, 1989.

On October 30, 1989, Dr. Schwab completed a functional capacity form on which he indicated that the plaintiff could participate in certain restricted work activities. On November 14, 1989, Dr. Schwab wrote to Jim Weiss, a vocational rehabilitation counselor employed by the university, which stated that he believed the plaintiff could return to his former work activities if he did not lift in excess of 50 pounds. Additionally, Dr. Schwab completed an estimated functional capacity form which set forth the plaintiff's work restrictions. On December 29, 1989, Dr. Schwab estimated that the plaintiff could return to work on approximately March 1, 1990.

In a report dated March 15, 1990, Dr. Frederick Hathaway stated that the plaintiff's spinal fusion was solid and that the plaintiff could work with certain restrictions. In a supplemental report dated October 18, 1990, Dr. Hathaway expressed the opinion that the plaintiff had reached maximum medical improvement and he could have returned to work as of April 1, 1990. According to Dr. Hathaway, the plaintiff had sustained a 40-percent permanent partial impairment of the body as a whole.

This action was commenced on February 20, 1990. The petition alleged injuries occurring on December 16, 1985, August 18, 1986, and October 24, 1988. At the first hearing in this matter, the plaintiff testified that although he had not

returned to work at the university, he was working approximately 30 hours a week in various farming activities on his farm.

On October 15, 1990, Dr. Schwab reported that he estimated that the plaintiff had sustained a 30-percent disability to the body as a whole and stated that the plaintiff could return to work subject to certain restrictions.

Various vocational rehabilitation professionals interviewed the plaintiff, reviewed his medical and occupational history, and presented opinions concerning the plaintiff's loss of earning capacity.

On rehearing, the compensation court found that the statute of limitations barred the plaintiff from recovering additional compensation for the accident of December 16, 1985, and that the plaintiff was not entitled to further benefits from the accident and injury of August 16, 1986, due to the plaintiff's failure to establish by expert medical evidence that the accident caused the need for surgery in March 1987 or resulted in any permanent impairment. The compensation court concluded that the accident and injury of October 24, 1988, were compensable and that as a result thereof, the plaintiff was temporarily totally disabled from October 25, 1988, through March 31, 1990, and that he thereafter sustained a 30-percent permanent loss of earning capacity. The plaintiff was awarded compensation for $74^5/_7$ weeks for temporary total disability at the rate of $245 per week, compensation for $225^2/_7$ weeks of permanent partial disability for a 30-percent loss of earning power at $95.41 per week, mileage reimbursement for medical care, reimbursement for direct payment of medications, and vocational rehabilitation benefits if applied for in a timely fashion. The Second Injury Fund was found to have no liability and was dismissed as a party.

The plaintiff has appealed from the award on rehearing.

The plaintiff assigns as error the compensation court's findings (1) that he was no longer entitled to temporary total disability benefits from the accident and injury of October 24, 1988, (2) that the plaintiff was no longer entitled to 10 percent permanent partial disability benefits for the accident and injury of August 16, 1986, (3) that the plaintiff failed to establish

causation entitling him to benefits for the accident and injury of August 16, 1986, (4) that the plaintiff sustained a 30-percent loss of earning capacity as a result of the accident and injury of October 24, 1988, and (5) that the Second Injury Fund was not liable for any portion of benefits due the defendant.

> " '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.' "

Roan Eagle v. State, 237 Neb. 961, 962, 468 N.W.2d 382, 384 (1991), quoting *Heiliger v. Walters & Heiliger Electric, Inc.*, 236 Neb. 459, 461 N.W.2d 565 (1990).

Relying on *Briggs v. Consolidated Freightways*, 234 Neb. 410, 451 N.W.2d 278 (1990), and the testimony from his treating physician, the plaintiff argues that he is still entitled to compensation for temporary total disability because he has not reached maximum medical improvement.

A claimant who has achieved maximum medical healing is no longer entitled to compensation for temporary total disability. *Briggs, supra*. In determining whether a claimant has reached maximum medical recovery,

> "[t]he fact that some treatment is still necessary, such as physical therapy or drugs, does not necessarily rule out a

> finding that the condition has become stabilized, if the underlying condition causing the disability has become stable and if nothing further in the way of treatment will improve that condition. . . ."

Briggs, 234 Neb. at 415, 451 N.W.2d at 283, quoting 2 Arthur Larson, The Law of Workmen's Compensation § 57.12(c) (1989).

In a deposition taken on January 10, 1991, after the rehearing, the plaintiff's physician, Dr. Schwab, testified that he did not believe that the plaintiff's condition had stabilized. He also stated he could not "comfortably say that he has reached maximum medical improvement at this time." However, on redirect examination, Dr. Schwab testified that he could not state with any medical certainty that the plaintiff was suffering from any additional problem that was treatable, and he had no diagnostic procedures scheduled as of the date of the deposition.

Generally, whether a worker has reached maximum medical improvement is a question of fact. *Roan Eagle v. State, supra.* Viewing the evidence in the light most favorable to the defendant, as we are required to do, we cannot say that the compensation court was clearly wrong in finding that the plaintiff had achieved maximum medical improvement by April 1, 1990, and was no longer temporarily totally disabled.

The plaintiff also contends that the compensation court erred in finding that he was no longer entitled to permanent partial disability payments of $30.58 per week. Referring to *Hansen v. Paxton & Vierling Iron Works*, 138 Neb. 589, 293 N.W. 415 (1940), the plaintiff argues that permanent partial disability benefits may be received by an injured worker in addition to temporary total disability benefits for a subsequent injury even if the total of those benefits exceeds the maximum amount of compensation benefits payable. The plaintiff's argument is without merit.

In the *Hansen* case, this court stated:

> There is nothing in the workmen's compensation law to prevent an employee from receiving compensation for temporary total disability to perform the duties in which he is engaged at the time of an accident, merely because he

> is then receiving an unrelated allowance for a permanent partial disability from a previous accident.

Hansen, 138 Neb. at 595, 293 N.W. at 418. In that case, the injury for which the worker received compensation for permanent partial disability and the injury for which the worker received compensation for temporary total disability were to different parts of the body and were unrelated. Furthermore, there is no indication that the combined payments for permanent partial disability and temporary total disability exceeded the maximum allowable under the statute.

Neb. Rev. Stat. § 48-121 (Reissue 1988) states in part:

> (1) For total disability, the compensation during such disability shall be sixty-six and two-thirds percent of the wages received at the time of injury, but such compensation shall not be more than the maximum weekly income benefit specified in section 48-121.01 . . . .
>
> (2) For disability partial in character, except the particular cases mentioned in subdivision (3) of this section, the compensation shall be sixty-six and two-thirds percent of the difference between the wages received at the time of the injury and the earning power of the employee thereafter, but such compensation shall not be more than the maximum weekly income benefit specified in section 48-121.01. . . .

The maximum weekly benefit allowable under Neb. Rev. Stat. § 48-121.01 (Reissue 1988) is $245. After the plaintiff's injury of October 24, 1988, the defendant employer paid the plaintiff compensation for temporary total disability at the rate of $245 a week and continued to make payments of $30.58 per week for permanent partial disability until January 26, 1989.

Termination of the payments for permanent partial disability was proper because the plaintiff was not entitled to compensation in excess of the prescribed statutory maximum amount of weekly compensation. The compensation court recognized this by allowing the defendant employer a credit for $318.91 for permanent partial disability inadvertently paid to the plaintiff at the time that he was receiving temporary total disability benefits as a result of his October 24, 1988, injury.

As to the assignment of error regarding the finding that the

plaintiff had not established causation entitling him to compensation for the accident and injury of August 16, 1986, the plaintiff concedes that the issue is moot if this court finds he is not entitled to receive compensation for any permanent partial disability arising from that injury because he was already receiving the maximum compensation allowed under the statute for the injury of October 24, 1988.

The plaintiff has assigned as error the finding that he sustained a 30-percent loss of earning capacity as a result of the accident and injury of October 24, 1988; however, this error was not argued in his brief. This court will not consider errors assigned but not discussed. *In re Interest of B.M.*, 239 Neb. 292, 475 N.W.2d 909 (1991).

The final assignment of error concerns the finding that the Second Injury Fund was not liable for any part of the compensation due the plaintiff.

> "To recover from the Second Injury Fund, § 48-128, a claimant must prove by a preponderance of evidence (1) a prior permanent partial disability, (2) a second or subsequent injury which is compensable, causing permanent disability, and (3) the combination of permanent disabilities existing after such second or subsequent injury is substantially greater in degree or percentage than permanent disability from the second or subsequent injury, considered by itself and not in conjunction with the prior permanent disability."

Sherard v. Bethphage Mission, Inc., 236 Neb. 900, 908, 464 N.W.2d 343, 348 (1991), quoting *Norris v. Iowa Beef Processors*, 224 Neb. 867, 402 N.W.2d 658 (1987).

For a condition to constitute a preexisting permanent partial disability for which compensation can be recovered from the Second Injury Fund, the worker must have sustained at least a 25-percent loss of earning capacity. Neb. Rev. Stat. § 48-128 (Reissue 1988).

In this case, the compensation court found that the plaintiff's loss of earning capacity prior to the October 24, 1988, injury was not at least 25 percent. The record supports this finding.

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ROBERT E.C. TRAMMELL, APPELLANT.

484 N.W.2d 263

Filed May 22, 1992. No. S-90-1040.

1. **Speedy Trial: Indictments and Informations: Time: Pretrial Procedure.** Every person indicted or informed against for any offense shall be brought to trial within 6 months. Such 6-month period shall commence to run from the date the indictment is returned or the information filed. In computing the time for trial, the time from filing until final disposition of pretrial motions of the defendant shall be excluded.
2. **Speedy Trial: Indictments and Informations: Time.** When the State dismisses an information against a defendant and refiles another information charging the defendant with the same offense alleged in the previous information, the periods during which the informations are pending for the same offense must be combined in determining the last day for commencement of trial under Nebraska's speedy trial statutes.
3. _____: _____: _____. The 6-month period in which the trial must commence commences to run from the date the information is filed and not from the time the complaint is filed.
4. **Constitutional Law: Statutes: Speedy Trial.** The constitutional right to a speedy trial and the statutory implementation of that right under Neb. Rev. Stat. § 29-1207 (Reissue 1989) exist independently of each other.
5. **Constitutional Law: Speedy Trial.** Determining whether a defendant's constitutional right to a speedy trial has been violated requires a balancing test in which courts must approach each case on an ad hoc basis. This balancing test involves four factors: (1) length of delay, (2) the reason for the delay, (3) the defendant's assertion of the right, and (4) prejudice to the defendant.
6. **Due Process.** The due process clause requires dismissal if a defendant can show that preindictment delay caused actual prejudice to his or her defense and was a deliberate action by the State designed to gain a tactical advantage.
7. **Confessions: Appeal and Error.** The voluntariness of an admission or confession is determined by the totality of the circumstances, and a determination by the trial court that a confession was made voluntarily will not be overturned on appeal unless clearly wrong.
8. **Due Process: Police Officers and Sheriffs: Evidence.** Unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.
9. **Jury Misconduct: New Trial.** In order for jury misconduct to be the basis of a new trial, the misconduct must be prejudicial to the defendant.

Appeal from the District Court for Lancaster County: WILLIAM D. BLUE, Judge. Reversed and remanded for a new trial.

Dennis R. Keefe, Lancaster County Public Defender, and Richard L. Goos for appellant.

Don Stenberg, Attorney General, and Delores Coe-Barbee for appellee.

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

PER CURIAM.

The defendant, Robert E.C. Trammell, was convicted of aiding the consummation of a felony, in violation of Neb. Rev. Stat. § 28-205 (Reissue 1989). He was also found to be a habitual criminal, as defined in Neb. Rev. Stat. § 29-2221 (Reissue 1989), and was sentenced to imprisonment for 10 years. Trammell has appealed, and his assignments of error, when summarized, allege that (1) he was denied a speedy trial, (2) his motion to suppress should have been sustained, (3) witnesses for the State should not have been allowed to testify concerning evidence that had been destroyed by the police, (4) the State was guilty of prosecutorial vindictiveness, and (5) he should have been granted a new trial because of the misconduct of a juror. We reverse and remand for a new trial.

The record shows that during the early morning hours of November 5, 1986, the Star City Eagles Club in Lincoln, Nebraska, was burglarized, and beer and bottles of liquor were taken from the premises. While Lincoln police investigated the burglary, officers received information which led them to contact Trammell's wife, Veronica Trammell. On November 17, 1986, the wife consented to a search of the residence she shares with Trammell, where beer taken during the burglary was discovered.

The police later learned that additional property stolen during the burglary might be at Trammell's residence. On November 30, 1986, again with the wife's permission, a second search of the Trammell residence was conducted, and 29 bottles of liquor stolen during the burglary were found and seized. At the time of the searches Trammell was being held on sexual assault charges. See *State v. Trammell*, 231 Neb. 137, 435 N.W.2d 197 (1989).

On December 1, 1986, Trammell gave Sgt. Larry Nelson a tape-recorded confession of his involvement in the burglary, portions of which Nelson read at trial.

Prior to trial, Trammell filed a "Motion for Discharge of Defendant," alleging that he had been denied his right to a speedy trial. He also moved to suppress his confession. Both of these motions were overruled.

In his first summarized assignment of error, Trammell alleges that he was denied his right to a speedy trial under Neb. Rev. Stat. § 29-1207 (Reissue 1989) and the Sixth Amendment to the U.S. Constitution.

A complaint against Trammell was initially filed on September 10, 1987, and an information was filed on November 3, 1987. Then, on February 2, 1988, the information was dismissed "because [Trammell] was convicted of First Degree Sexual Assault and Habitual Criminal sufficient for sentencing purposes . . . ." However, on February 10, 1989, the sexual assault judgment was reversed and that cause remanded for further proceedings. See *State v. Trammell, supra*. On June 21, 1989, the information in the sexual assault case was dismissed.

On June 15, 1989, a second complaint was filed in this case. A second preliminary hearing was held, at which no witnesses were called, but the transcript of the initial October 27, 1987, preliminary hearing, along with other documentary evidence, was introduced. On November 20, 1989, an information was filed which again charged Trammell with aiding the consummation of a felony and with being a habitual criminal.

Section 29-1207 states in part:

> (1) Every person indicted or informed against for any offense shall be brought to trial within six months, and such time shall be computed as provided in this section.
>
> (2) Such six-month period shall commence to run from the date the indictment is returned or the information filed. . . .
>
> . . . .
>
> (4) The following periods shall be excluded in computing the time for trial:
>
> (a) . . . the time from filing until final disposition of pretrial motions of the defendant . . . .

In a similar case, this court held recently that while the time chargeable against the State under the speedy trial act

commences with the filing of an initial information against a defendant, the time chargeable to the State ceases, or is tolled, during the interval between the dismissal of the initial information and the refiling of an information charging a defendant with the same crime alleged in the previous, but dismissed, information. *State v. Sumstine*, 239 Neb. 707, 478 N.W.2d 240 (1991). See, also, *State v. Batiste*, 231 Neb. 481, 437 N.W.2d 125 (1989). Consequently, when the State dismisses an information and refiles another information charging the defendant with the same offense alleged in the previous information, the periods during which the informations are pending for the same offense must be combined in determining the last day for commencement of trial under Nebraska's speedy trial statutes, subject to the time excluded pursuant to § 29-1207(4).

Thus, in determining whether Trammell was brought to trial within the 6-month period prescribed by § 29-1207, we must consider both the time elapsed from the filing of the original information on November 3, 1987, until the February 2, 1988, dismissal, and the time from the refiling of the information on November 20, 1989, until commencement of the trial on September 18, 1990. When these two time periods are combined and the time from filing until final disposition of Trammell's pretrial motions is excluded, the record shows that Trammell was brought to trial within the 6-month period required by § 29-1207.

Although Trammell contends that the interval between the filing of the second complaint and the filing of the second information should be included in determining whether he was tried within 6 months, it is well established that the 6-month period commences to run from the date the information is filed and not from the time the complaint is filed. *State v. Gingrich*, 211 Neb. 786, 320 N.W.2d 445 (1982); *State v. Born*, 190 Neb. 767, 212 N.W.2d 581 (1973). See, also, *State v. Sumstine, supra*; *State v. Batiste, supra*.

Trammell also claims that he was denied his right to a speedy trial as guaranteed by the Sixth Amendment to the U.S. Constitution. As we stated in *State v. Andersen*, 232 Neb. 187, 195-96, 440 N.W.2d 203, 211 (1989):

> The constitutional right to a speedy trial and the statutory implementation of that right under § 29-1207 exist independently of each other. Determining whether a defendant's constitutional right to a speedy trial has been violated requires a balancing test in which courts must approach each case on an ad hoc basis. This balancing test involves four factors: (1) length of delay, (2) the reason for the delay, (3) the defendant's assertion of the right, and (4) prejudice to the defendant. None of these four factors standing alone is a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, the factors are related and must be considered together with such other circumstances as may be relevant. . . .

See, also, *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972).

U.S. v. Meyer, 906 F.2d 1247 (8th Cir. 1990), is similar to this case. In *Meyer*, the defendant was convicted of making, and aiding and abetting the making of, false statements in a passport application. In answering Meyer's Sixth Amendment claim, the Eighth Circuit Court stated:

> Meyer's sixth amendment claim is based on the three-year delay between the date of the offense and the date of the trial. Her claim is without merit because it ignores the intervening dismissal of the first indictment. The original indictment was dismissed without prejudice only two months after it was returned. She was not reindicted until nearly three years later. This three-year period between the dismissal of that indictment and Meyer's reindictment for the same offense does not implicate her sixth amendment right to a speedy trial because that guaranty is not operative after charges have been formally dismissed. See *United States v. MacDonald*, 456 U.S. 1, 9-10, 102 S. Ct. 1497, 1502-03, 71 L. Ed. 2d 696 (1982) . . . . Such a delay implicates only the due process clause.

U.S. v. Meyer, 906 F.2d at 1251. See, also, *United States v. Hicks*, 798 F.2d 446 (11th Cir. 1986), *cert. denied* 479 U.S. 1035, 107 S. Ct. 886, 93 L. Ed. 2d 839 (1987) (once the government, acting in good faith, formally drops the charges, the speedy

trial guarantee of the Sixth Amendment is no longer effective, and any delay following dismissal must be scrutinized under due process standards).

Meyer also notes that it is " 'an unusual case' " in which the Sixth Amendment has been violated when the time limits under the Speedy Trial Act, 18 U.S.C. § 3161 et seq. (1988), have been met. *U.S. v. Meyer*, 906 F.2d at 1251.

Thus, *Meyer* holds that the period between dismissal of a defendant's first indictment and reindictment for the same offense does not implicate the right to a speedy trial, but, rather, the delay only implicates the due process clause (i.e., the 5th Amendment to the U.S. Constitution as made applicable to the states by the 14th Amendment). Despite this rule, Trammell claims that the entire period between his December 1, 1986, confession and his September 18, 1990, trial establishes that he was denied his right to a speedy trial. But under the rule discussed in *Meyer*, we need not consider the period during which Trammell was not charged in determining whether he was granted a speedy trial. With that in mind, when all the factors set forth in *State v. Andersen, supra*, and *Barker v. Wingo, supra*, are considered in conjunction with the record before us, it is clear that Trammell was not denied his constitutional right to a speedy trial.

Furthermore, while Trammell does not claim that he was denied due process, we note that such a claim would be meritless. Although statutes of limitations are the primary safeguard against prejudicial preaccusation delay, Trammell could establish a due process violation based upon preaccusation delay by showing that it resulted in actual prejudice and was intentional and improperly motivated. *U.S. v. Meyer, supra*. In other words, the due process clause requires dismissal if a defendant can show that preindictment delay caused actual prejudice to his or her defense and was a deliberate action by the State designed to gain a tactical advantage. *United States v. Robinson*, 767 F.2d 765 (11th Cir. 1985).

The reason for the State's delay in prosecuting this case is apparent from the record. After initially charging Trammell, the State chose to dismiss the charges because he had been

convicted of a sexual assault and sentenced as a habitual criminal; the State thus deemed it unnecessary to prosecute him on additional charges. After the judgment in the sexual assault conviction was reversed, the State found it more prudent to prosecute Trammell in this case rather than retry the sexual assault case. The State neither received nor attempted to attain any advantage by delaying the prosecution of Trammell in this case.

While Trammell contends that he was prejudiced by a lapse of memory on the part of some of the witnesses, the only potentially important memory lapses at the time of trial related to the circumstances surrounding his confession and therefore concerned the admissibility of that confession. However, when viewed within the context of the entire record, those memory lapses were not consequential, and, as discussed below in connection with Trammell's second summarized assignment of error, the confession was admissible at the trial.

Therefore, we conclude that Trammell's conviction in this case did not violate his right to a speedy trial or due process.

Trammell's second summarized assignment of error asserts that the trial court erred in failing to sustain his motion to suppress his statement to the police in which he confessed his involvement in the burglary.

The record shows that at the time Trammell confessed to Nelson, he was being held on sexual assault charges. Prior to trial in this case, the trial court conducted a hearing on Trammell's motion to suppress his confession. At that hearing the trial court received into evidence a transcript of a similar hearing in Trammell's sexual assault case in which the admissibility of Trammell's confession was at issue because the State sought to use the confession to impeach Trammell's testimony in that case. The transcript of the hearing in the sexual assault case includes the following testimony by Nelson:

> Q. . . . Well, is it not true, Officer, that you told the defendant prior to the recording of the incident that you were interested in two things, one, getting the property back, which you had yet to be recovered, and second, that you were interested more in John Richard [sometimes referred to in the record as Richards], one of the

participants in the burglary, and getting charges against him or evidence?

A. And clearing this case, that's correct.

Q. And did you not indicate to Mr. Trammell that no charges would be filed against him as a result of any connection he might have with the Star City Eagles burglary?

A. I wasn't in a position to guarantee that.

Q. You did indicate that to him though, didn't you?

A. No. I can't promise that.

Q. Well, you talked about it though, didn't you?

A. I told him I'd check into it, if we could work that kind of an arrangement.

Both at the suppression hearing and at the trial in this case, Nelson also testified that he made no direct or indirect promises to Trammell that a confession would result in a benefit or advantage to him. Officer Larry Murray, who was also present when Trammell gave his confession, testified that, so far as he was aware, Trammell was not offered any promises in exchange for his confession.

In addition to the transcript of Trammell's statement to the police, the record contains the standard written *Miranda* warning which Trammell signed. The transcript of Trammell's statement to the police begins with Nelson reviewing each portion of the *Miranda* warning with Trammell, including a statement that "[a]nything you may say can be and will be used against you in a court of law . . . ." When Nelson asked if Trammell understood that statement, Trammell answered, "Yes."

Contrarily, the transcript from Trammell's sexual assault case, which was received in evidence in this case, contains Trammell's testimony that he provided a statement to prevent police from "harassing" his wife and that Nelson promised Trammell that he "would not be prosecuted for anything [he] might have got cornered off in" if he would "give" the police Richard. In his brief, Trammell also points out that although Richard and another accomplice in the burglary were charged in December 1986, no complaint was filed against Trammell until September 10, 1987. According to Trammell, this delay

was a result of the promise of nonprosecution.

After overruling Trammell's motion to suppress his statement to the police, the trial court, over Trammell's objection, admitted that evidence at trial.

In *State v. Haynie*, 239 Neb. 478, 476 N.W.2d 905 (1991), this court reviewed the standards which are applicable in determining the admissibility of a defendant's confession. A statement of a suspect, to be admissible, must be shown by the State to have been given freely and voluntarily and not to have been the product of any promise or inducement—direct, indirect, or implied—no matter how slight. However, this rule is not to be applied on a strict per se basis. Rather, determinations of voluntariness are based upon an assessment of all the circumstances and factors surrounding the situation when the statement was made. *Id.*

Whether a defendant's statements resulted from an officer's promise is a question of fact. In determining whether the findings made by the trial court in that regard are clearly wrong, an appellate court takes into consideration that the trial court observed the witnesses who testified at the hearing. *Id.*

The voluntariness of an admission or confession is determined from a consideration of all the circumstances, and a determination by the trial court that a confession was made voluntarily will not be overturned on appeal unless clearly wrong. *Id.*

In this case there is a conflict between Trammell's testimony and that of the officers who took his confession. Based upon the record in this case and the criteria set forth in *State v. Haynie, supra*, we cannot say that the district court was clearly wrong in determining that Trammell voluntarily confessed his involvement in the burglary.

Trammell also argues that his confession is not admissible because it was obtained while he was in custody and represented by counsel in his sexual assault case. However, the fact that a defendant is held in custody on charges for which he has appointed counsel does not by itself automatically bar the admissibility of police-initiated custodial interrogation of the defendant regarding unrelated matters for which the defendant has not yet been charged. See *McNeil v. Wisconsin*, ____ U.S.

____, 111 S. Ct. 2204, 115 L. Ed. 2d 158 (1991) (an accused's assertion of his Sixth Amendment right to counsel cannot imply an assertion of the *Miranda* Fifth Amendment right). See, also, *U.S. v. Cooper*, 949 F.2d 737 (5th Cir. 1991).

Thus, the trial court did not err in refusing to suppress Trammell's confession.

Trammell's third summarized assignment of error avers that the district court erred in overruling his motion regarding physical evidence which was "destroyed" by the police. With respect to this contention, the record shows that prior to the filing of the complaint against Trammell, the police did not preserve the beer and liquor which had been seized at Trammell's residence, but instead returned the property to the Star City Eagles Club. Trammell contends that he was denied due process because this physical evidence was not available for his use in preparing his defense.

The police may very well have acted improperly in returning the beer and liquor to the Star City Eagles Club prior to the trial. See Neb. Rev. Stat. § 29-818 (Reissue 1989). However, Trammell does not even suggest how, given the testimonial evidence presented at the trial, an inspection of the beer and liquor would have aided his defense; he merely complains that the property was not preserved. Furthermore, there is nothing in the record to suggest that the police acted in bad faith when they returned the beer and liquor to the Star City Eagles Club. As the U.S. Supreme Court stated in *Arizona v. Youngblood*, 488 U.S. 51, 58, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988):

> We think that requiring a defendant to show bad faith on the part of the police both limits the extent of the police's obligation to preserve evidence to reasonable bounds and confines it to that class of cases where the interests of justice most clearly require it, *i. e.*, those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant. We therefore hold that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.

In his fourth summarized assignment of error, Trammell

claims that the district court erred in failing to sustain his claims regarding prosecutorial vindictiveness. At the conclusion of the State's case in chief, Trammell renewed his motion for discharge, arguing in part that the prosecution was the product of vindictiveness on the part of the county attorney. Trammell asserts that he was prosecuted in this case only because he was successful in his appeal in the sexual assault case, and, therefore, his conviction is improper and a violation of due process. See, U.S. Const. amend. XIV, § 1; Neb. Const. art. I, § 3.

The cases Trammell cites in support of this contention are inapposite, for they involve fact patterns which involve double jeopardy, the filing of greater charges after unsuccessful plea bargaining, and the filing of greater charges after the filing of a notice of appeal, i.e., subsequent action to a defendant's detriment which is taken by the State in the same case after the defendant's successful assertion of a given right. See, *North Carolina v. Pearce*, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969); *Blackledge v. Perry*, 417 U.S. 21, 94 S. Ct. 2098, 40 L. Ed. 2d 628 (1974); *Bordenkircher v. Hayes*, 434 U.S. 357, 98 S. Ct. 663, 54 L. Ed. 2d 604 (1978); *Thigpen v. Roberts*, 468 U.S. 27, 104 S. Ct. 2916, 82 L. Ed. 2d 23 (1984).

It is true that the State initially dismissed the charges against Trammell in this case after he had been convicted of first degree sexual assault and did refile the charges against Trammell in this case after he had successfully appealed the sexual assault conviction. However, the State was entitled to such discretion. We are aware of no authority which supports the proposition that a defendant's successful appeal in one case renders him immune from prosecution for an unrelated offense, even if prior charges for the unrelated offense had previously been dropped.

Thus, the trial court did not err in failing to sustain Trammell's claims regarding prosecutorial vindictiveness.

In his fifth and final summarized assignment of error, Trammell contends that the trial court erred in overruling his motion for a new trial on grounds of juror misconduct.

As noted previously, at trial the district court allowed Nelson to read a portion of the statement in which Trammell confessed

his involvement in the burglary. In that statement Trammell described being at the top of a hill near the scene of the crime and observing the activities of the perpetrators to whom he had provided transportation. Nelson testified that he did not believe that part of Trammell's confession statement because that area was "not really a hilly part of Lincoln." Apparently in response to this discrepancy, a juror took it upon herself to observe the site of the burglary when she "drove by it . . . on [her] way home." At the hearing on Trammell's motion for a new trial, the juror testified that she reported her findings to the other members of the jury, stating:

> I told them that as I drove by, that there had been questions in my mind about who was telling the truth, and there was a hill, as Mr. Trammell had said that there was, and that we go into TSC quite often and that was where the hill began, and I just felt that he was telling the truth in what he had said.

A second juror also testified regarding the observations which the first juror had reported to the jury:

> . . . And where the policeman disagreed with the statement, saying there was no hill, the policeman said that there was no hill, and this juror member said that, well, she drove by the place on her way home from work and she could see where there was a hill, and I think she even said what street it was, and that is how it went.
>
> . . . .
>
> . . . She was just saying that she could see the defendant's statement might be true because she could see where there was a hill, I guess.
>
> . . . .
>
> . . . Later on, we kind of came back to the part about the statement and then I did mention that I didn't think we were even supposed to look at the scene. That was in our instructions, and somebody else said, yeah, that is right. We weren't supposed to go visit any of the scenes, and we kind of just dropped it then.

The trial court found that the juror's misconduct was not prejudicial to Trammell and thus overruled the motion for a new trial. In arguing that the trial court's finding should be

upheld by this court, the State contends that the juror's observations were favorable to Trammell because they supported the truthfulness of his statement concerning the hill. Trammell, however, contends that the juror's observations tended to support the truthfulness of his confession statement as a whole, which statement was a critical part of the case presented by the State.

There is no question that the investigating juror engaged in misconduct by violating the trial judge's instruction directing that in determining any questions of fact, each juror

> should be governed solely by the evidence introduced before you. . . . Each of you may apply to the subject before you that general knowledge which anyone may be presumed to have, yet, if any of you be personally acquainted with any material or particular fact not supported by the evidence, you should not consider your personal knowledge of such fact or mention it to your fellow jurors.
>
> . . . .
>
> . . . The law demands of you a just verdict uninfluenced by . . . any considerations outside the evidence . . . .

However, in order for juror misconduct to be the basis for a new trial, the misconduct must be prejudicial to the accused. *State v. Woodward*, 210 Neb. 740, 316 N.W.2d 759 (1982). As said in *State v. Menuey*, 239 Neb. 513, 522, 476 N.W.2d 846, 852 (1991), with regard to the misconduct of a bailiff in permitting a discharged alternate juror to intrude into the jury room:

> [N]ot all errors, even if of constitutional magnitude, entitle an accused to the reversal of an adverse trial result; it is only a prejudicial error, that is, an error which cannot be said to have been harmless beyond a reasonable doubt, which requires that a conviction be set aside.

In *State v. McDonald*, 230 Neb. 85, 430 N.W.2d 282 (1988), we held that where the misconduct involves only jurors, the burden to establish prejudice rests on the party claiming the misconduct. We also concluded the fact that two jurors discussed the case between themselves, contrary to their instructions, before it was submitted to them did not entitle the

defendant therein to a new trial. In so ruling, we pointed out that there was no showing as to exactly what the disobedient jurors had said to each other or that any juror had reached any conclusion as to the defendant's guilt or innocence prior to the completion of the trial. In *State v. Woodward, supra*, we held that in order for juror misconduct to vitiate a verdict, it must be shown that the misconduct influenced the jury in arriving at its verdict. We concluded the fact that two jurors inspected the scene of the crime and that some comment may have been made by one concerning what could or could not be seen was not sufficient to invalidate the verdict, as it could not be determined from the record whether the comment was prejudicial or beneficial to the defendant. We also ruled that a trial court's finding that the misconduct did not prejudice the accused would ordinarily not be disturbed on appeal in the absence of an abuse of discretion. In *Phillips v. State*, 157 Neb. 419, 59 N.W.2d 598 (1953), we held that a juror visit to the scene of the crime was not prejudicial. The rebel juror did not impart to his fellow jurors any information involving any material issue in connection with which there was any conflict in the evidence. Neither was there any showing that any juror had been influenced by the information the misbehaving juror conveyed.

Here, however, we are dealing with a renegade juror whose unauthorized investigation and comments to the other jurors tended, as Trammell correctly observes, to corroborate his whole confession. In reporting that Trammell spoke truthfully in regard to the terrain, she implied, and the other jurors were free to infer, that he also spoke truthfully when he confessed his participation in the crime.

While we are not unmindful that in *Arizona v. Fulminante*, ____ U.S. ____, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991), a five-member majority of the U.S. Supreme Court wrote that even the admission of an involuntary confession is subject to harmless-error analysis, the fact remains that a confession is a special type of evidence and that its acceptance basically amounts to a conviction. *State v. Phinney*, 117 N.H. 145, 370 A.2d 1153 (1977). See, also, *State v. Benoit*, 126 N.H. 6, 490 A.2d 295 (1985). In light of the special nature of confessional evidence, we cannot say that an unauthorized visit to the scene

of a crime by a juror who reports information to the other jurors which tends to corroborate a defendant's confession is harmless beyond a reasonable doubt.

We must thus conclude that the trial judge abused his discretion in finding the misconduct nonprejudicial to Trammell.

REVERSED AND REMANDED FOR A NEW TRIAL.

BOSLAUGH, J., dissenting.

I dissent only from that part of the opinion that holds that the misconduct of the jury in this case was prejudicial as a matter of law and, for that reason, the judgment must be reversed and the cause remanded for a new trial.

In his statement to the police, the defendant, Trammell, said that he had observed the burglary from the top of a hill north of Cornhusker Highway, at a point "[b]etween Cornhusker and Superior."

Officer Nelson, on cross-examination, testified that he did not believe parts of the statement which the defendant had made to him. Specifically, Nelson said he did not believe

> [t]he part where [Trammell] described a hill near some houses. That hill would have been close enough for him to run there, to move quickly from the hill to where the crime was . . . taking place, but that it was closer to Superior or because he knew Superior. *20th and Cornhusker is not really a hilly part of Lincoln.*

(Emphasis supplied.)

At the hearing on the motion for new trial one of the jurors, Doris Ward, testified that she lives 3 miles north and a half mile west of 14th and Superior Streets. She uses Cornhusker Highway quite often to go home. On her way home she drove by the site of the burglary. On the next morning, during the deliberations of the jury, she reported her observations to the other members of the jury. This is the misconduct of the jury that, according to the majority, requires the judgment to be reversed.

At the outset, it is far from clear that the defendant and Officer Nelson were talking about the same location. The defendant described a hill somewhere "[b]etween Cornhusker and Superior." Officer Nelson was describing the area at "20th

and Cornhusker," the location where the burglary itself occurred.

In this case, the question as to whether there was a hill near the crime scene was a collateral matter which was not an issue in the case. Although Officer Nelson's testimony indicates that he was not aware of the presence of a hill near the site of the burglary, the defendant's description of such a hill was an insignificant collateral detail in the statement which the defendant gave to police. That statement described the defendant's involvement in the burglary and provided ample evidence to support the conviction irrespective of the existence or nonexistence of the hill in question.

While the majority holds that the juror's observation of a hill "tended . . . to corroborate his whole confession," the observation is trivial in comparison to the other corroboratory evidence which was presented to the jury. In a portion of Trammell's confession which was read to the jury, Trammell recounts concealing "at least three cases or more" of stolen beer and "more than 30" bottles of stolen whiskey at his residence. This confessional evidence is corroborated by the undisputed testimony of the two police officers, who recovered the stolen beer and liquor from the very place within the Trammell residence where the defendant confessed that he had stored it. Certainly that evidence was far superior in corroborating the truthfulness of the defendant's confession when compared to a juror's observation of a hill near the crime scene. Consequently, when viewed in the context of the entire record before us, the juror's actions were inconsequential, and the juror's conduct could not be said to have prejudiced the rights of the defendant as a matter of law.

For a juror's unauthorized inspection of an alleged crime scene to be sufficient to vitiate a conviction, it must be shown to have related to a matter in dispute and to have influenced the jury in arriving at a verdict. *Phillips v. State*, 157 Neb. 419, 59 N.W.2d 598 (1953). See, also, *State v. Woodward*, 210 Neb. 740, 316 N.W.2d 759 (1982). Where the trial court has determined that an unauthorized inspection of the crime scene was not prejudicial to the rights of the defendant, ordinarily its finding will not be disturbed by the appellate court in the

absence of an abuse of discretion. *Id.*

An error is harmless if, on review of the entire record, it did not influence the jury in a verdict adverse to a substantial right of the defendant. *State v. Christian*, 237 Neb. 294, 465 N.W.2d 756 (1991).

The evidence of guilt in this case is overwhelming. The defendant was charged with aiding the consummation of a felony by intentionally aiding another to secrete, disguise, or convert the proceeds of the burglary at the Star City Eagles Club, 2050 Cornhusker Highway, Lincoln, Nebraska, on November 5, 1986. There is no serious dispute in the evidence concerning any of the elements of this crime. The evidence of the State was uncontradicted. Under these circumstances, I believe it is impossible to conclude that the misconduct of the jury was prejudicial as a matter of law.

I would affirm.

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

STATE OF NEBRASKA, APPELLEE, V. HERBERT D. SWILLIE, APPELLANT.

484 N.W.2d 93

Filed May 22, 1992. No. S-91-123.

1. **Convictions: Appeal and Error.** In reviewing a criminal conviction, the Supreme Court must view the evidence in the light most favorable to the prevailing party.
2. _____: _____. The Supreme Court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finders of fact, and the verdict will be affirmed, in the absence of prejudicial error, if properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction.
3. **Trial: Prosecuting Attorneys.** Whether prosecutorial misconduct is prejudicial depends largely on the facts of each case.
4. **Trial: Prosecuting Attorneys: Motions for Mistrial: Juries.** The general rule is that remarks of the prosecutor which do not mislead or unduly influence the jury do not rise to a level sufficient to require granting a mistrial.

Appeal from the District Court for Douglas County: STEPHEN A. DAVIS, Judge. Affirmed.

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

Don Stenberg, Attorney General, and Donald A. Kohtz for appellee.

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

GRANT, J.

Following a jury trial in the district court for Douglas County, defendant, Herbert D. "Willie" Swillie, was convicted of assault in the first degree, in violation of Neb. Rev. Stat. § 28-308 (Reissue 1989), and sentenced to 2 to 3 years in prison, with credit given for time served. Defendant timely appealed, assigning a single error: "The District Court committed reversible error by denying the Defendant's motion for a mistrial based on statements made by the prosecutor to the jury in his final argument." We affirm.

In reviewing a criminal conviction, the Supreme Court must view the evidence in the light most favorable to the prevailing party. *State v. Red Kettle*, 239 Neb. 317, 476 N.W.2d 220 (1991). We do not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finders of fact, and the verdict will be affirmed, in the absence of prejudicial error, if properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Timmerman, ante* p. 74, 480 N.W.2d 411 (1992). Viewed in that light, the record shows the following:

On Thanksgiving Day, November 23, 1989, the victim, a 40-year-old woman, was brutally beaten. A doctor who examined the victim testified that the victim sustained a broken cheekbone, a broken nose, and a punctured eardrum and that her face was "massively swollen." The victim had visited her family from about 3 p.m. to approximately 5 or 6 p.m. for Thanksgiving dinner and then visited a neighbor. After the visit, Jewell Combs walked the victim to the victim's home. At about

8 p.m., when the victim and Combs had been in the victim's house for 5 or 10 minutes, Billy Wright, a longtime friend, arrived. The three visited and had a drink, and Combs left.

Wright then told the victim he had friends waiting out in the car, and the victim told him to invite them in. Wright brought in the defendant and a girl. Wright asked the victim if she knew who the defendant was, and she said that he was Willie Swillie. The victim testified that she did not know that defendant's real name was Herbert until a police officer told her later. After the four visited for a time, Wright asked the victim if she knew where he could get drugs and if she had a syringe. The victim responded "no" to both questions.

Wright and the girl left for about 15 minutes to go to a liquor store, leaving the defendant and the victim in the victim's residence. The defendant made unwelcome advances, which the victim rebuffed. The defendant and the victim then talked about their families and childhoods.

Wright and the girl returned, and Wright and the defendant immediately consumed a fifth of wine. Wright and the girl again left. The victim testified she thought they were going back to the liquor store. When the victim and defendant were alone again, defendant made another advance at the victim and then asked her if she had a syringe. The victim testified that she jokingly said she did and that "I took him to my bathroom and I pointed at my douche bag. And to me it was funny, you know; but evidently it wasn't funny to him because then he started hitting me."

Defendant beat the victim's head into the commode so hard that a piece of the commode broke off. The victim tried to push defendant out of the bathroom, but he continued to beat her. The victim ran into her bedroom to find a knife she had hidden there, but defendant knocked it out of her hand and continued to beat her.

The victim was able to escape, and she ran to a neighbor's house, but no one answered the door. As she was trying to get to another neighbor's door, defendant caught her and dragged her back to her house. Defendant continued to beat the victim until she was unconscious.

When the victim regained consciousness at about 7 or 8

o'clock the next morning, she was lying nude on the hide-a-bed, with the front door of her house wide open. There was blood on the victim's clothes, furniture, and sheets.

The victim went next door, and the neighbors summoned an ambulance and the victim's parents. The victim told the neighbor and a police officer that her attacker was Willie Swillie. At the time of hospitalization, 9:30 a.m., the victim's blood alcohol level was .318, but the doctor testified that when the victim was addressed, the victim appeared oriented and was able to answer questions satisfactorily. She was able to answer questions about her medications and medical history. The victim is an admitted alcoholic and had been drinking heavily on Thanksgiving Day, although she testified she was not intoxicated. The victim was hospitalized for 2 days and after that had to remain in the care of her family for some time.

The victim positively identified the defendant in the courtroom as the man she knew as Herbert Swillie. The victim had known the defendant for 25 years. She and the defendant's sister had gone to high school together, and she and the defendant had remained acquainted in the interim. She stated she had no difficulty recognizing the defendant. She has always maintained that it was defendant who attacked her and testified that there was no doubt in her mind that defendant was the attacker.

Defendant's attorney first mentioned the fact that the police investigating the incident initially thought the charge against defendant should be handled as a misdemeanor. The attorney asked the police officer who investigated the incident, "And isn't it true that when you called the regional investigator, told them basically that you have an intoxicated woman that's been assaulted here and the regional investigator said, nothing more needs to be done with this case?"

The officer responded:

> No. [I] advised [Sergeant Brooks] that at this time the doctor stated that due to the swelling they weren't sure if there were, in fact, broken bones or not and at that time the doctor mentioned that [the victim] would be treated and released. I advised Sergeant Brooks of that and he stated to advise her of a warrant procedure, misdemeanor

warrant procedure . . . .

The police officer further testified on cross-examination that he advised the victim "how to file a misdemeanor warrant."

The victim testified that she was told by a police officer that she could file a complaint with the city prosecutor and that the attack would be prosecuted as a misdemeanor. On December 4, 1989, the victim went "down to this courthouse to the second floor" and filed a complaint against defendant. On April 11, 1990, the victim appeared at "a court proceeding" and testified that defendant had assaulted her.

Defendant's attorney brought out the following evidence of the "prior proceeding" during cross-examination of the victim:

> Q. You have testified, have you not . . . at another hearing in this case; correct?
>
> A. Yes.
>
> Q. Under oath?
>
> A. Yes.
>
> Q. And in front of a Judge?
>
> A. Yes.

Later, the defense attorney again returned to the subject of the "prior proceeding."

> Q. Okay. So the police officer told you how to file a private complaint and then after you got out of the hospital your dad told you to go down and file the private complaint?
>
> A. Yes.
>
> . . . .
>
> Q. Okay. And the next time that you have any court proceedings about this after you come [sic] up to the city prosecutor's office and file a complaint is April 11th, 1990; correct?
>
> A. Yes.
>
> . . . .
>
> Q. And they called the case of State versus Herbert Swillie; that was your case that you filed and this person was standing up there next to some lawyer that was with him?
>
> A. Uh-huh.
>
> Q. And that is the first time since November 23rd, 1989

that you see [sic] this person; correct?

A. That's the first time that I saw him.

Q. Since November 23rd, 1989, was in court when you testified and pointed him out as the person who assaulted you?

A. His arrangement [sic].

Q. And you saw him at an arrangement [sic]?

A. Yes.

Q. Okay. And at arrangement [sic] he walked up in front of the judge?

A. I went up there also, too, and he pleaded not guilty.

In response, on redirect examination of the victim, the prosecutor also inquired into the "prior proceeding."

Q. And as far as the progress of this case and the way it's gone, you don't run the criminal justice system in Omaha, Nebraska, do you?

A. No, I don't.

Q. And the police told you that it was a misdemeanor and to go follow the misdemeanor procedure?

A. That's right.

. . . .

Q. And so basically when you were going through your misdemeanor process you were just one case just like all the rest of the cases that were being lunch-lined through that day?

A. Right.

Q. And until the judge heard what happened to you?

A. Yes.

Q. And then you went upstairs [to the county attorney's office]?

A. Yes.

The defense made no objection to this testimony.

Defendant bases his claim of prosecutorial misconduct on the following emphasized statement made by the prosecutor during final argument:

She came down, filled out her Affidavit just like she was told and, again, Herbert D. Willie Swillie did this to me. The trial date is set off and as we were, I think one of my questions — it is not her answer, it was my

> characterization of it, but she was lunch-lined through there just like everyone else on April 11th, 1990. And, again, this is the guy that beat me up; this is the guy that did this to me with her home-grown pictures. Doesn't even have a police photo of what happened to her. *And at that point the judge stopped it and did what should have been done and it was sent upstairs to felony court where it is now before you.*

(Emphasis supplied.)

The defendant objected and moved for a mistrial, claiming that the prosecutor was arguing evidence not before the jury: "He's explaining to the jury procedures in the legal system that are not before this jury and what it does is that it gives more credibility that a judge says."

> Whether prosecutorial misconduct is prejudicial depends largely on the facts of each case. . . . The impact of any comment made at trial depends on the atmosphere at trial. The trial judge is in a better position to measure the impact a comment has on a jury, and his decision will not be overturned unless clearly erroneous. . . .
>
> The general rule is that remarks of the prosecutor in final argument which do not mislead or unduly influence the jury do not rise to a level sufficient to require granting a mistrial. . . .
>
> . . . Further, it is not prejudicial for the prosecutor to make remarks based on deductions and inferences drawn from the evidence.

(Citations omitted.) *State v. Benzel*, 220 Neb. 466, 477-78, 370 N.W.2d 501, 511 (1985).

The defendant argues that the prosecutor's comment was "intended to direct the jury to the conclusion that the lower court judge felt that this was a very severe case. The prosecutor's remark would lead a reasonable juror to believe that the Defendant was guilty." Brief for appellant at 6. The prosecutor's statement, however improper, did not address the question of the identity of the defendant as the person who had committed the assault.

Defendant had opened the door to probing questions and statements as to the nature of the "prior proceedings."

Defendant seemed to contend that the victim had done something wrong in treating the matter as a misdemeanor and that something was wrong when a judge ordered the matter to be treated as a felony. Defendant did not object to questions directed by the prosecutor to the victim setting out what happened.

In addition, defendant has not shown any prejudice to defendant because of the prosecutor's statement. In *State v. Greeno*, 230 Neb. 568, 572, 432 N.W.2d 547, 551 (1988), we stated: " 'The impact of any comment made at trial depends on the atmosphere at trial. The trial judge is in a better position to measure the impact a comment has on a jury, and his decision will not be overturned unless clearly erroneous.' "

Had the dispositive question before the jury been whether the injuries to the victim were serious enough to constitute assault in the first degree ("serious bodily injury," resulting in a felony charge) or assault in the third degree ("bodily injury," resulting in a misdemeanor charge), defendant's argument would be persuasive. The judge in the lower court apparently did determine that the victim's injuries constituted "serious bodily injury" and that the matter should be handled as a felony. The judge did not indicate that defendant was the person who committed the assault.

Defendant apparently agrees that the severity of the injuries is not in question. His counsel argued to the jury: "The question is not the brutality of the beating because, in fact, we do have a serious bodily injury here. The question is whether my client did it. . . ."

The lower court did not abuse its discretion in refusing to grant defendant's motion for a new trial. The lower court's determination that the matter should be handled as a felony is consistent with the requirements of Neb. Rev. Stat. § 29-510 (Reissue 1989). Defendant's assignment of error is without merit.

AFFIRMED.

IN RE INTEREST OF S.B.E. AND D.E., CHILDREN UNDER 18 YEARS OF AGE.

STATE OF NEBRASKA, APPELLEE AND CROSS-APPELLEE, V. DANDY E., APPELLANT, AND T.E., APPELLEE AND CROSS-APPELLANT.

IN RE INTEREST OF S.S.W. AND M.D.W., CHILDREN UNDER 18 YEARS OF AGE.

STATE OF NEBRASKA, APPELLEE, V. T.E., APPELLANT.

484 N.W.2d 97

Filed May 22, 1992. Nos. S-91-233, S-91-234, S-91-374, S-91-375.

1. **Parental Rights: Appeal and Error.** In an appeal from a judgment terminating parental rights, an appellate court tries factual questions de novo on the record, which requires an appellate court to reach a conclusion independent of the findings of the trial court, but, when evidence is in conflict, an appellate court considers and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another.
2. **Parental Rights: Proof.** To justify termination of parental rights under the provisions of Neb. Rev. Stat. § 43-292(2) (Reissue 1988), the State must prove by clear and convincing evidence that a parent has substantially and continuously or repeatedly neglected the child.
3. _____: _____. 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 provided by clear and convincing evidence.
4. _____: _____. It is only to terminate parental rights pursuant to Neb. Rev. Stat. § 43-292(6) (Reissue 1988) that the State is required to prove that the parents have been provided with a reasonable opportunity to rehabilitate themselves according to a court-ordered plan and have failed to do so.

Appeal from the County Court for Buffalo County: JOHN P. ICENOGLE, Judge. Affirmed.

Greg C. Harris for appellant D.E.

Stephen G. Lowe for appellant T.E.

Thomas S. Stewart, Deputy Buffalo County Attorney, for appellee State.

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

WHITE, J.

On December 15, 1987, the State filed separate petitions for the adjudications of S.S.W., born April 25, 1980; M.D.W.,

born May 1, 1982; S.B.E., born October 2, 1983; and D.E., born December 26, 1984, as neglected children.

On April 8, 1988, the mother of the four minor children, S.S.W., M.D.W., S.B.E., and D.E., and Dandy E., the father of S.B.E. and D.E., appeared in the county court for Buffalo County, Nebraska, to answer to juvenile complaints alleging that the children were juveniles as described in Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1988). That section provides for

> [a]ny juvenile (a) who is homeless or destitute, or without proper support through no fault of his or her parent, guardian, or custodian; who is abandoned by his or her parent, guardian, or custodian; who lacks proper parental care by reason of the fault or habits of his or her parent, guardian, or custodian; whose parent, guardian, or custodian neglects or refuses to provide proper or necessary subsistence, education, or other care necessary for the health, morals, or well-being of such juvenile; whose parent, guardian, or custodian neglects or refuses to provide special care made necessary by the mental condition of the juvenile; or who is in a situation or engages in an occupation dangerous to life or limb or injurious to the health or morals of such juvenile.

The specific allegations of the petitions are not contained in the transcript, but the court ultimately found that the mother and Dandy had (1) engaged in improper disciplining of the children through excessive physical actions, including excessive use of a belt and cigarette lighter burns appearing on the children; (2) neglected to provide proper and adequate supervision, nurturing, or bonding of the children; (3) engaged in psychosocial deprivation, causing a delay in the proper maturation process of the children; (4) struck one of the children on or about the side of the head at a time when the child had medically necessary ear tubes inserted; and (5) allowed the children to be in a situation injurious to their life, well-being, or morals.

As reflected in the order of the county court, the "[mother and Dandy] entered an admission to the allegations made by the State . . . ." Thereafter, the court found that the admissions should be accepted and that the children should be adjudicated

as children described in § 43-247(3)(a). The four were thereupon placed with the Department of Social Services "for appropriate out-of-home placement." There was no appeal from the order adjudicating the children to be neglected and dependent, and that order has become final.

The records of the adjudication are not before this court, and we are limited in consideration of the appeal to the facts as found in the county court's order of adjudication. The putative father of S.S.W. and M.D.W., while made a party at a later stage of this action, was dismissed voluntarily; his parental rights, if any, were not determined or terminated; and he will take no further part in this action.

On November 28, 1990, the county court had before it the petitions for termination of the parental rights of the mother and Dandy toward the children. Although it is not clear from the record, the order terminating parental rights recited that

> [e]vidence was adduced by the offer of exhibits comprised of the depositions of the parties and witness herein and the introduction of records. The Court specifically finds that the following exhibits were received and considered by the Court: Exhibits 1 through 60, except for Exhibits 47, 48 and 57 which were not received over the objections of opposing parties. Thereafter arguments were made by counsel and upon completion thereof the matter was taken under advisement by the Court.

ASSIGNMENTS OF ERROR

The mother, T.E., assigns as error the county court's determinations that sufficient evidence existed to clearly and convincingly prove neglect and that termination was in the best interests of her four children.

Dandy, the father and stepfather, assigns as error (1) that the evidence of neglect and abuse was insufficient, (2) that the county court erred in failing to find that DSS had failed to institute a workable plan of reunification and had set as its goal termination of the mother's and Dandy's parental rights, (3) that the county court disregarded expert testimony on behalf of Dandy, and (4) that the county court considered prior acts of

the mother in terminating Dandy's parental rights.

DISCUSSION

In an appeal from a judgment terminating parental rights, an appellate court tries factual questions de novo on the record, which requires an appellate court to reach a conclusion independent of the findings of the trial court, but, when evidence is in conflict, an appellate court considers and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another. *In re Interest of C.K., L.K., and G.K., ante* p. 700, 484 N.W.2d 68 (1992); *In re Interest of M.P.,* 238 Neb. 857, 472 N.W.2d 432 (1991). See, *In re Interest of A.H.*, 237 Neb. 797, 467 N.W.2d 682 (1991); *In re Interest of J.S., A.C., and C.S.*, 227 Neb. 251, 417 N.W.2d 147 (1987); *In re Interest of T.C.*, 226 Neb. 116, 409 N.W.2d 607 (1987).

Regarding the court's authority to terminate parental rights, Neb. Rev. Stat. § 43-292 (Reissue 1988) provides in part that

> [t]he court may terminate all parental rights between the parents or the mother of a juvenile born out of wedlock and such juvenile when the court finds such action to be in the best interests of the juvenile and it appears by the evidence that . . .
>
> . . . .
>
> (2) The parents have substantially and continuously or repeatedly neglected the juvenile and refused to give the juvenile necessary parental care and protection.

Under § 43-292(2), the State must prove by clear and convincing evidence that a parent has substantially and continuously or repeatedly neglected the child. *In re Interest of L.J., J.J., and J.N.J.*, 220 Neb. 102, 368 N.W.2d 474 (1985).

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 provided by clear and convincing evidence. *In re Interest of C.C.*, 226 Neb. 263, 411 N.W.2d 51 (1987); *In re Interest of T.C., supra.*

The State is correct in its assertion that because the parental rights were terminated under § 43-292(2), and not § 43-292(6),

it is not required to have instituted a workable plan for reunification. As stated in *In re Interest of L.C., J.C., and E.C.*, 235 Neb. 703, 712, 457 N.W.2d 274, 280 (1990), "It is only to terminate parental rights pursuant to subsection (6) of § 43-292 that the State is required to prove that the parents have been provided with a reasonable opportunity to rehabilitate themselves according to a court-ordered plan and have failed to do so."

The fact remains, however, that the State *did* develop a plan—one that was unfair and only thinly disguised as one of reunification. The State dangled the proverbial "carrot" of reunification, openly admitting that the only means to the carrot was admission of sexual abuse. The sexual abuse was not admitted by the parents. Other than the children's hearsay testimony via DSS, no evidence of sexual abuse more solid than speculative explanations of the children's behavior was ever offered into evidence. The sexual abuse allegation was abandoned by the State early in the case. Finally, experts testified that an open admission of sexual abuse would not be dispositive as to the rehabilitation process.

Apparently, no additional evidence was received at the hearing on the petitions for termination, though it was suggested at oral argument that the receipt of the 57 exhibits was in fact a judicial notice of the records of the proceedings and of the various reports, depositions, statements, and physical examinations which occurred from the date of the adjudication to the date of the termination. It would have been an improper exercise of the court's authority to judicially notice nonadjudicative facts.

As we said in *In re Interest of C.K., L.K., and G.K., ante* p. 700, 709, 484 N.W.2d 68, 73 (1992), quoting *State v. Vejvoda*, 231 Neb. 668, 438 N.W.2d 461 (1989),

> "Judicial notice . . . is not the same as extrajudicial or personal knowledge of a judge. 'What a judge knows and what facts a judge may judicially notice are not identical data banks. . . . [A]ctual private knowledge by the judge is no sufficient ground for taking judicial notice of a fact as a basis for a finding or a final judgment.' "

Care should be taken by the court to identify the fact that it is

noticing and its justification for doing so. *Colonial Leasing etc. v. Logistics Control G.I.*, 762 F.2d 454 (5th Cir. 1985). We do recognize, however, that counsel for the parties failed to object to at least 57 exhibits that somehow found their way into evidence. In any circumstance, and as this case is tried de novo on the record, we shall proceed on the basis of the evidence received. We do not by any means suggest that consideration of the introduction of evidence of reports by social service or medical personnel without further identification of the persons preparing or submitting such reports would comport with the due process requirements of a parental rights termination hearing. We merely point out that counsel was present representing Dandy and the mother, and any objection to the consideration of these items of evidence was waived.

From a consideration of the reports and the depositions, it fairly leaps from the record that the children were traumatized to an extent that the mere presence of the mother and Dandy was sufficient to send them into panic and that, effectively, the parent-child relationships had been destroyed by the neglect and cruelty of the parents. There is some complaint in the record of the effect of a social services recommendation that a reunification plan not be effected until the mother and Dandy admitted improper sexual contact with the children. The sexual complaint was apparently withdrawn by the State and did not exist at the time of the order of the court adjudicating the children as neglected and dependent.

We find in our de novo review of the record that the children are neglected children within the purview of § 43-247(3)(a), that it is in the best interests of the children that the parental rights of the mother and Dandy be terminated at this time, and that the parental rights should probably have been terminated at the time of the original adjudication.

The judgment of the county court is affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. DON STENBERG, ATTORNEY GENERAL OF THE STATE OF NEBRASKA, RELATOR, V. ALLEN J. BEERMANN, SECRETARY OF STATE OF THE STATE OF NEBRASKA, AND GARY E. LACEY, COUNTY ATTORNEY OF LANCASTER COUNTY, NEBRASKA, RESPONDENTS.

485 N.W.2d 151

Filed May 22, 1992. No. S-92-260.

1. **Constitutional Law: Initiative and Referendum.** The first power reserved by the people is the initiative whereby laws may be enacted and constitutional amendments adopted by the people independently of the Legislature. Neb. Const. art. III, § 2.
2. _____: _____. The provisions with respect to the initiative and referendum shall be self-executing, but legislation may be enacted to facilitate their operation. Neb. Const. art. III, § 4.
3. **Constitutional Law: Statutes.** Statutes are to be interpreted so as to meet constitutional requirements whenever it can reasonably be done.
4. **Constitutional Law: Initiative and Referendum: Legislature: Statutes.** Under the constitutional provision authorizing the Legislature to enact laws to facilitate the initiative and referendum process, the Legislature may enact reasonable legislation to prevent fraud or to render intelligible the purpose of the proposed law or constitutional amendment.
5. **Constitutional Law: Initiative and Referendum: Statutes.** A law which unnecessarily obstructs or impedes operation of the initiative and referendum process is unconstitutional.
6. _____: _____: _____. Provisions in a statute making it a criminal offense for a person to willfully and knowingly circulate a petition outside the county in which he or she is registered to vote, and providing that signatures secured in such a manner shall not be counted, unnecessarily obstruct the people's right to participate in the initiative and referendum process and are therefore unconstitutional.

Original action. Judgment of unconstitutionality.

Don Stenberg, Attorney General, Steve Grasz, and Dale A. Comer for relator.

Paul D. Kratz, G. Michael Fenner, and Kevin M. Keegan, of McGill, Gotsdiner, Workman & Lepp, P.C., for respondent Beermann.

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

WHITE, J.

This is an original action by the State of Nebraska on the

relation of Don Stenberg, Attorney General, requesting this court to declare certain sections of 1992 Neb. Laws, L.B. 424, to be unconstitutional as violative of Neb. Const. art. III, §§ 2 to 4, as well as of the First Amendment to the U.S. Constitution.

The challenged sections of L.B. 424 are as follows:

> Sec. 14. . . .
>
> . . . .
>
> (4) Every circulator of a petition shall be of the constitutionally prescribed age or upwards and a resident and a registered voter of the State of Nebraska and a resident of the county in which he or she is registered to vote. Any person willfully and knowingly circulating a petition outside of the county in which he or she is registered to vote shall be guilty of a Class I misdemeanor.
>
> (5) All signatures secured in a manner contrary to sections 32-702 to 32-713 shall not be counted. Clerical and technical errors in a petition shall be disregarded if the forms prescribed in this section are substantially followed.

Pursuant to the application of the relator, the respondents, Allen J. Beermann, Secretary of State, and Gary E. Lacey, county attorney of Lancaster County, Nebraska, were temporarily enjoined from enforcing the challenged provisions of the act pending further action by the court. The relator now seeks to convert our previous order to a permanent injunction.

"The first power reserved by the people is the initiative whereby laws may be enacted and constitutional amendments adopted by the people independently of the Legislature." Neb. Const. art. III, § 2. "The provisions with respect to the initiative and referendum shall be self-executing, but legislation may be enacted to facilitate their operation." Neb. Const. art. III, § 4.

In *State, ex rel. Winter, v. Swanson*, 138 Neb. 597, 599, 294 N.W. 200, 201 (1940), we developed a definition and context for legislative "facilitation" when we noted:

> We think the constitutional provision authorizing the legislature to enact laws to facilitate the operation of the initiative power means that it may enact reasonable legislation to prevent fraud or to render intelligible the

> purpose of the proposed law or constitutional amendment. See *State v. Amsberry*, 104 Neb. 273, 177 N.W. 179. Any legislative act which tends to insure a fair, intelligent, and impartial result on the part of the electorate may be said to facilitate the exercise of the initiative power.

In that case we held that the requirement that the form of the petition be filed with the Secretary of State renders the proposal intelligible and eliminates the possibilities of fraud by advising the electorate in advance of the exact provisions of the proposal. The Legislature was authorized to enact said requirements under its granted authority to facilitate the exercise of the initiative power.

In *Klosterman v. Marsh*, 180 Neb. 506, 513, 143 N.W.2d 744, 749 (1966), this court held that

> [c]onstitutional provisions with respect to the right of initiative and referendum reserved to the people should be construed to make effective the powers reserved. The case of State ex rel. Ayres v. Amsberry, 104 Neb. 273, 177 N.W. 179, although later vacated on procedural grounds stated: "The amendment under consideration reserves to the people the right to act in the capacity of legislators. The presumption should be in favor of the validity and legality of their act. The law should be construed, if possible, so as to prevent absurdity and hardship and so as to favor public convenience." The court later said: "Any legislation which would hamper or render ineffective the power reserved to the people would be unconstitutional."

In language vital to the case at hand, we also said, in *State, ex rel. Ayres, v. Amsberry*, 104 Neb. 273, 277, 177 N.W. 179, 180 (1920), "Laws to facilitate the operation of the amendment must be reasonable, so as not to unnecessarily obstruct or impede the operation of the law." It is clearly the duty of this court, however, to give a statute an interpretation which meets constitutional requirements if it can reasonably be done. See, also, *State ex rel. Morris v. Marsh*, 183 Neb. 521, 162 N.W.2d 262 (1968) (one who signs a petition, swearing he is a legally qualified voter of the State of Nebraska, is presumed to be a qualified elector, absent evidence to the contrary; the

presumption does not disappear simply because he or she did not sign his or her full Christian name); *State, ex rel. Winter, v. Swanson, supra* (requirement that a form of initiative petition must be filed with the Secretary of State before petitions are circulated, together with a statement of the names of persons sponsoring, contributing, or pledging to defray expenses, tends to prevent fraud and to render intelligible the purpose of the proposal to be submitted, and by so doing it facilitates the initiative power within the purview of the Constitution).

The effect of the challenged provisions of L.B. 424 is to Balkanize the initiative process in this state. Not one statewide campaign to enact laws, but at least 38 separate campaigns, would now be required. It is difficult to justify a provision that does not and cannot forbid the financing of paid circulators in the individual counties, but forbids circulation across county lines. Indeed, the effect of the law is to place impossible barriers to the economically less fortunate to successfully initiate legislation if they cannot afford to pay local circulators and are forbidden to solicit outside their own counties.

In a participatory system of government the voices pressing their views on their elected officials reflect the broad spectrum of the total society. It is an obvious truth that no one view is more entitled to be expressed than another. The judgment of the majority or the economically privileged as to the accepted and proper view of an issue, and the suppression of the minority's right of expression, is tyranny, no matter how wise and reasoned the majority opinion.

We hold that § 14(4) of 1992 Neb. Laws, L.B. 424, and § 14(5) of the same act, to the extent it is referable to violations of § 14(4), violate Neb. Const. art. III, § 4, by impeding the initiative and referendum process instead of facilitating the process as the Constitution requires.

As the act is violative of the Nebraska Constitution, it is not necessary to answer the challenge that the sections also violate the First Amendment to the U.S. Constitution.

JUDGMENT OF UNCONSTITUTIONALITY.

DEE E. SCHAAD AND KATHRYN J. SCHAAD, APPELLANTS, V. DAVID B. SIMMS ET AL., APPELLEES.

484 N.W.2d 474

Filed May 29, 1992. No. S-85-719.

1. **Jurisdiction: Appeal and Error.** An appellate court acquires no jurisdiction unless the appellant has satisfied the requirements for appellate jurisdiction.
2. **Jurisdiction: Judgments: Final Orders: Appeal and Error.** In the absence of a final judgment or final order in the court from which an appeal is taken, an appellate court acquires no jurisdiction.
3. _____: _____: _____: _____. Because a judgment is the final determination of the rights of the parties to an action, a conditional judgment does not constitute a final and, therefore, appealable order as the basis for appellate jurisdiction.
4. **Judgments: Final Orders.** Conditional orders purporting to automatically dismiss an action upon a party's failure to act within a set time are void as not performing in praesenti, and thus have no force or effect.

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

Roger C. Lott for appellants.

Stephen V. Bartling, of Rehm & Bartling, for appellee Lincoln Bank South.

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

SHANAHAN, J.

Dee E. and Kathryn J. Schaad filed a tort action against David B. Simms, D.B.S. Enterprises, Inc., and Lincoln Bank South. When the district court sustained the demurrer of Lincoln Bank South concerning Schaads' amended petition, the court entered the following in its docket notes: "Plaintiff is given 14 days to file second amended petition or to select to stand on amended petition, in which instance the defendant Lincoln Bank South will stand dismissed from this action without further hearing." Schaads declined to further amend and, instead, filed a motion for new trial, which was overruled.

Schaads have appealed, but the transcript in their appeal contains no order actually dismissing the action in the district court.

Neb. Rev. Stat. § 25-1301(1) (Reissue 1989) states: "A judgment is the final determination of the rights of the parties in an action." Neb. Rev. Stat. § 25-1911 (Supp. 1991) provides that "[a] judgment rendered or final order made by the district court may be reversed, vacated, or modified for errors appearing on the record." Under Neb. Rev. Stat. § 25-1905 (Supp. 1991), the transcript provided to the Supreme Court in an appeal "shall contain the final judgment or order sought to be reversed, vacated, or modified."

"An appellate court acquires no jurisdiction unless the appellant has satisfied the requirements for appellate jurisdiction . . . ." *In re Interest of B.M.H.*, 233 Neb. 524, 527, 446 N.W.2d 222, 224 (1989). In the absence of a final judgment or final order in the court from which an appeal is taken, an appellate court acquires no jurisdiction. *In re Interest of C.D.A.*, 231 Neb. 267, 435 N.W.2d 681 (1989); *Gruenewald v. Waara*, 229 Neb. 619, 428 N.W.2d 210 (1988); *W & K Farms v. Hi-Line Farms*, 226 Neb. 895, 416 N.W.2d 10 (1987).

Moreover, because a judgment is the final determination of the rights of the parties to an action, a conditional judgment does not constitute a final and, therefore, appealable order as the basis for appellate jurisdiction. See, *Maddux v. Maddux*, 239 Neb. 239, 475 N.W.2d 524 (1991); *Romshek v. Osantowski*, 237 Neb. 426, 466 N.W.2d 482 (1991); *State v. Wessels and Cheek*, 232 Neb. 56, 439 N.W.2d 484 (1989); *Schoneweis v. Dando*, 231 Neb. 180, 435 N.W.2d 666 (1989); *Snell v. Snell*, 230 Neb. 764, 433 N.W.2d 200 (1988); *Building Systems, Inc. v. Medical Center, Ltd.*, 228 Neb. 168, 421 N.W.2d 773 (1988); *Hoffman v. Reinke Mfg. Co.*, 227 Neb. 66, 416 N.W.2d 216 (1987); *W & K Farms v. Hi-Line Farms, supra*; *Lemburg v. Adams County*, 225 Neb. 289, 404 N.W.2d 429 (1987); *Fritch v. Fritch*, 191 Neb. 29, 213 N.W.2d 445 (1973).

> [A] conditional judgment is wholly void because it does not "perform in praesenti" and leaves to speculation and conjecture what its final effect may be. [Citation omitted.] . . . [F]inal judgments must not be conditional, and unless there is an equitable phase of the action wherein it is necessary to protect the interests of defendants, a conditional judgment is wholly void.

Lemburg v. Adams County, 225 Neb. at 292, 404 N.W.2d at 431. Accord, *State v. Wessels and Cheek, supra*; *Schoneweis v. Dando, supra*; *Building Systems, Inc. v. Medical Center, Ltd., supra*; *W & K Farms v. Hi-Line Farms, supra*. Moreover, "conditional orders purporting to automatically dismiss an action upon a party's failure to act within a set time are void as not performing in praesenti, and thus have no force or effect." *Schoneweis v. Dando*, 231 Neb. at 182, 435 N.W.2d at 668.

Although the district court declared that Schaads' action against Lincoln Bank South would be dismissed unless Schaads filed an additional amended petition or elected to stand on the amended petition to which the demurrer was sustained, there is no order actually dismissing Schaads' action in the district court; therefore, there is no final and appealable order as a requisite for appellate jurisdiction. Since this court lacks appellate jurisdiction under the circumstances, we dismiss Schaads' appeal.

APPEAL DISMISSED.

ANTELOPE COUNTY FARMERS COOPERATIVE ASSOCIATION, DOING BUSINESS AS UNION OIL COMPANY, APPELLANT, V. CITIZENS STATE BANK OF CLEARWATER, A NEBRASKA BANKING CORPORATION, APPELLEE.

484 N.W.2d 822

Filed May 29, 1992. No. S-89-803.

1. **Summary Judgment.** A summary judgment is properly granted when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue concerning any material fact or as to the ultimate inferences deducible from such fact or facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In appellate review of a summary judgment, the 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.
3. **Bankruptcy: Jurisdiction: Liens: Debtors and Creditors.** A bankruptcy court lacks the jurisdiction to either hear or decide private lien priority disputes

between two creditors which do not directly or indirectly affect the debtor or his property.

4. **Bankruptcy: Liens: Debtors and Creditors.** A bankruptcy trustee occupies the status of a judgment lien creditor. The claim of a judgment lien creditor is inferior to that of a previously perfected statutory lien creditor.
5. **Judgments: Res Judicata.** The doctrine of res judicata dictates that any right, fact, or matter which has been expressly or directly adjudicated on the merits in a previous action before a court acting within its jurisdiction, or which was necessarily included in the determination of the previous action, is conclusively settled by the judgment in the previous action and may not be relitigated by the parties to the previous action, whether the claim, demand, purpose, or subject matter in subsequent litigation would or would not be the same as that in the previous litigation.
6. **Bankruptcy: Liens: Debtors and Creditors.** Confirmation of a bankruptcy plan will bind creditors and the debtor to the terms of that plan, but unless the underlying claim has been disallowed, the lien securing the claim is not extinguished by bankruptcy.

Appeal from the District Court for Antelope County: MERRITT C. WARREN, Judge. Reversed and remanded for further proceedings.

Rodney W. Smith for appellant.

Richard L. Spittler for appellee.

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

GRANT, J.

Plaintiff, Antelope County Farmers Cooperative Association (Co-op), appeals the order of the district court for Antelope County sustaining the motion for summary judgment filed by defendant, Citizens State Bank of Clearwater (Bank), and dismissing Co-op's petition. Co-op's petition, filed December 23, 1988, alleged that Co-op had a first, valid, and perfected lien on the crops of Jack Jones and the proceeds therefrom and that in derogation of that status, the Bank converted proceeds of Jones' corn crop to the Bank's favor.

The Bank filed an answer which denied the priority of Co-op's lien and the allegations of conversion. The answer further alleged that Jones and his wife had filed bankruptcy, that the bankruptcy plan had been confirmed, that the plan provided for distribution of the corn crop check to the Bank,

and that all creditors of the Joneses were bound to the terms of the bankruptcy plan.

The trial court found that the respective security interests of the parties had been determined by the bankruptcy court and that the determination was res judicata and would not be relitigated. The court sustained the Bank's motion for summary judgment and dismissed Co-op's petition, with prejudice and at Co-op's costs.

Co-op timely appealed. Co-op assigns three errors in this court. The assigned errors may be consolidated into one, alleging that the trial court erred in determining that the interest and priority of liens of the two parties had been "adjudicated in the United States Bankruptcy Court . . . and [were] therefore res judicata and could not be relitigated."

The record shows the following relevant facts: Co-op alleged that between 1982 and 1986, it provided agricultural supplies and products to Jack Jones, a farmer in Clearwater, Nebraska, and that Jones has at all relevant times been indebted to Co-op for $65,000. In consideration of Co-op's extension of credit, Jones granted a security interest in his crops and the proceeds therefrom. A security agreement was executed, filed, and perfected.

On January 6, 1987, Jones and his wife, Neta Jones, filed a voluntary petition in bankruptcy, pursuant to 11 U.S.C. ch. 12 (1988), "Adjustment of Debts of a Family Farmer with Regular Annual Income." On June 10, 1987, the debtors filed their amended chapter 12 plan, which provided for four categories of creditors.

The only creditor in "Class (a)" was Antelope County, to which the debtors owed taxes. "Class (b)" creditors were those with security interests in the Joneses' "farmstead" and were listed as the Federal Land Bank and the Bank. "Class (c)" creditors were those creditors secured by interests in farm equipment and crops and were listed as the Co-op, with a security interest of $65,110.64, and the Bank, with a security interest of $178,500. In addition, the Bank had a lien on the Joneses' motor vehicles. Finally, "Class (d)" creditors were those creditors who were not secured by any interest in the debtors' property. This class listed eight creditors. Among them

were the Bank (unsecured for the amount of $109,888, representing "excess debt over value of collateral") and Co-op (unsecured for the entire amount owed by the debtors to Co-op, for the reason that there was "no equity for security interests to attach.")

The plan provided that as to claims in "Class (c)," the debtors would retain the motor vehicles and pay off the debt owed on them. The plan then stated: "Debtors propose to surrender the remaining motor vehicles, farm equipment, 1986 corn crop of approximately 7,000 bushels and the Cargill bean check in the amount of $862.56 to the Citizens State Bank within ten days of confirmation of this Plan."

"Class (d)" creditors were to "be paid all of Debtors' disposable income for a period of three years, in the sum of $0.00 per year."

On July 27, 1987, the U.S. Bankruptcy Court for the District of Nebraska held a confirmation hearing on the debtors' amended plan. The hearing was attended by the debtors' attorney and the trustee. The plan was confirmed.

In July 1987, the 1986 corn crop was sold for $8,990 to Foxley Cattle Company. The check, made out to Co-op, the Bank, and the debtors, was turned over to the Bank according to the terms of the plan, but when the Bank asked Co-op to endorse the check, Co-op refused. On September 4, 1987, the Bank filed an application for contempt, praying that the bankruptcy court find Co-op in contempt and compel it to endorse the check.

In October 1987, the parties filed a stipulation that Co-op would endorse the check, while "not waiving any rights or causes of action that it may have [in] regard to said moneys." In exchange, the Bank agreed to withdraw its application for contempt. Co-op then brought this conversion action in the Antelope County District Court.

A summary judgment is properly granted when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue concerning any material fact or as to the ultimate inferences deducible from such fact or facts and that the moving party is entitled to judgment as a matter of law. *Flamme v. Wolf Ins. Agency*, 239

Neb. 465, 476 N.W.2d 802 (1991); *Gottsch v. Bank of Stapleton*, 235 Neb. 816, 458 N.W.2d 443 (1990). In appellate review of a summary judgment, the 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. *Spittler v. Nicola*, 239 Neb. 972, 479 N.W.2d 803 (1992).

Co-op contends that summary judgment was improper because there are genuine issues of fact which have not been determined, specifically priority and interest in the check for the corn crop.

Because we are concerned with former property of a debtor in bankruptcy, it is first necessary for this court to determine if it has jurisdiction. It has been stated:

> Although bankruptcy courts by statute may hear "any or all cases under title 11 and any or all core proceedings arising under title 11 or arising in or related to a case under title 11," 28 U.S.C. § 157(a) (1988), they may not entertain cases involving noncore, unrelated matters.

In re Gallucci, 931 F.2d 738, 741 (11th Cir. 1991).

Title 28 U.S.C. § 157(b)(2)(K) (1988) provides that "[c]ore proceedings include . . . determinations of the validity, extent, or priority of liens." We are concerned in this case with the determination of the validity and priority of two conflicting liens, but § 157(b)(2)(K) is not dispositive of the issue. The bankruptcy courts and federal courts have interpreted this statute " 'as empowering [bankruptcy courts] *only* to make "determinations of the validity, extent, or priority of liens" *upon property of the estate*.' " (Emphasis in original.) *In re McKinney*, 45 B.R. 790 (Bankr. W.D. Ky. 1985).

Numerous bankruptcy cases have defined "core" and "related" proceedings. In *McKinney*, the U.S. Bankruptcy Court for the Western District of Kentucky stated:

> It should go without saying that mere possession by the trustee of a disputed asset cannot confer jurisdiction if it is otherwise without a statutory basis.
>
> . . . .
>
> ". . . [W]e hold that a bankruptcy court lacks the jurisdiction to either hear or decide private lien priority

> disputes between two creditors which do not directly or indirectly affect the debtor or his property."

McKinney, 45 B.R. at 792 (cited with approval in *In re Gallucci, supra*).

In *Matter of Xonics, Inc.*, 813 F.2d 127 (7th Cir. 1987), the court held that a dispute between two creditors to property formerly belonging to the debtor, but which had been abandoned by the bankruptcy trustee, was not a "core" proceeding over which the bankruptcy court had jurisdiction. In *In re Alexander*, 49 B.R. 733 (Bankr. D.N.D. 1985), the bankruptcy court determined that an action seeking determination of competing priorities of creditors' heirs was not a "core" proceeding. In *Matter of Climate Control Engineers, Inc.*, 51 B.R. 359 (Bankr. M.D. Fla. 1985), the bankruptcy court determined that one count of a debtor's complaint seeking determination of the validity, extent, or priority of creditors' heirs was not a "core" or a "related" proceeding.

Similarly, in *Matter of Phillips House Associates, Inc.*, 64 B.R. 912 (Bankr. W.D. Mo. 1986), the court held that proceedings to determine the priority of liens between two creditors as to property of the debtor did not involve property of the estate and thus were not "core" proceedings. The court noted that determination of the dispute would not add to or subtract from the property of the estate because neither lien was challenged and because the hypothetical status of the bankruptcy trustee was inferior to the status of both creditors.

The *Phillips* court held, however, that because the liens related to property which would not be marketable until a determination of priority was made and because sale of the property was necessary for the debtor to successfully complete his repayment plan, proper administration of the estate would be *impossible* without adjudication of the dispute within the bankruptcy court. Thus, the *Phillips* court felt compelled to find jurisdiction and to determine the status of the liens, "under the rubric of 'necessity' or 'impossibility of administration.' " *Id.* at 916. That situation does not exist in this case.

In the present case, both Co-op and the Bank are statutory lienholders with claims perfected prior to the debtors' filing

bankruptcy. According to the provisions of the Bankruptcy Code, upon filing of the petition in bankruptcy, the bankruptcy trustee occupies the status of a judgment lien creditor. 11 U.S.C. § 544 (1988). The bankruptcy trustee has an interest in property only if the debtor has equity in that property or if the debtor had a claim equal or superior to a judgment creditor in that property.

Any transaction in which a person or entity disposes of or parts with property or an interest in property is deemed a "transfer" by the Bankruptcy Code. 11 U.S.C. § 101(50) (1988). The powers of the trustee to avoid a transfer are detailed in 11 U.S.C. §§ 545-49 (1988). Thus, unless modified by action within the bankruptcy court, a creditor's status is not altered by the filing of a bankruptcy petition, and that creditor's rights relative to other creditors and the debtor remain the same.

The claim of a judgment lien creditor is inferior to that of a previously perfected statutory lien creditor. Neb. U.C.C. § 9-301 (Cum. Supp. 1988). Both Co-op and the Bank are perfected secured creditors for an amount which exceeds the value of the property. The debtors had no equity in the crop. Therefore, the bankruptcy trustee had no interest in the proceeds of the corn crop, and the property which is the subject of this appeal is not property of the estate.

The determination of the dispute in this case will not add to or detract from the Joneses' bankruptcy estate, and the hypothetical status of the trustee would be inferior to the claim of either Co-op or the Bank. The party that prevails in this dispute will be entitled to sole possession of the entire amount, and in spite of the Bank's contention, the debtors' surrender of the property to the Bank is not necessary "in order to complete the terms and conditions of said confirmed Plan." Therefore, jurisdiction of this matter was properly with the district court for Antelope County.

The Co-op contends that since the debtors provided in their plan that the Co-op was secured by an interest in the crops, no proof of claim needed to be filed as to their claim and that, therefore, Co-op has an allowed secured claim as shown in the debtor's plan.

Upon filing a petition in bankruptcy, a debtor must also file,

among other things, a list of all creditors and a schedule of assets and liabilities. 11 U.S.C. § 521 (1988). The local bankruptcy rule provides:

> In a Chapter 12 proceeding, a creditor may file a proof of claim within thirty (30) days following the date the schedules are filed. . . . Except for cause shown and under circumstances which are just and equitable, claims not filed within the time limit shall be allowed or disallowed as shown on the debtor's schedules filed . . . . Claims shall be allowed or disallowed as filed unless an objection is filed within the time limit.

Nebraska Court Rules and Procedure, State and Federal 1992 rule 12-4 at 1140 (West 1991).

The amended plan did list both the Bank and Co-op as secured creditors with an interest in, among other things, the crops and the proceeds therefrom. There is no dispute as to either the amount or the existence of either claim. Rule 12-4 provides that both claims were allowed.

The Co-op also contends that once allowed, a secured claim may be disallowed only according to the procedure in 11 U.S.C. § 502 (1988), which procedure requires an objection, notice, and a hearing upon such objection. A claim may be disallowed only if it is a statutory exception to allowance listed in § 502. Co-op contends that because there was no attempt by the debtors, the trustee, or any other creditor to have the lien disallowed and because Co-op's lien does not fit an exception within § 502, its lien passed through the bankruptcy. Our examination of § 502 shows to our satisfaction that Co-op's lien is not one listed in the § 502 exceptions.

The Bank has not referred to any bankruptcy proceeding which disallowed the claim of Co-op, but cites instead to the confirmation hearing itself as adjudication of priority. Based on the confirmation of the plan without objection, the Bank contends that the issue is res judicata.

The Bank's response is based on the argument that pursuant to 11 U.S.C. § 1227 (1988), the present action is res judicata because "[c]onfirmation of a plan binds both the debtors and its creditors to the provisions of the plan." Brief for appellee at 5. The Bank concludes that Co-op is seeking to "readjudicate

the priority of claims provided by a Chapter 12 plan confirmed by the Bankruptcy Court." Brief for appellee at 8.

Addressing this issue, Co-op contends that "[s]ince the bankruptcy court was without jurisdiction to decide the lien priority question, the doctrine of res judicata can not apply." Brief for appellant at 21.

In *Kerndt v. Ronan*, 236 Neb. 26, 29, 458 N.W.2d 466, 469 (1990), this court held:

> The doctrine of res judicata dictates that any right, fact, or matter which has been expressly or directly adjudicated on the merits in a previous action before a court acting *within its jurisdiction*, or which was necessarily included in the determination of the previous action, is conclusively settled by the judgment in the previous action and may not be relitigated by the parties to the previous action, whether the claim, demand, purpose, or subject matter in subsequent litigation would or would not be the same as that in the previous litigation.

(Emphasis supplied.) See, also, *Western Sec. Bank v. Terry A. Lambert Plumbing, ante* p. 448, 482 N.W.2d 278 (1992).

Chapter 12 has its own provision regarding the binding effect of confirmation of the plan, which reads nearly the same as the chapter 13 provision, with minor differences which are not relevant to our discussion. Section 1227(a) provides:

> [T]he provisions of a confirmed plan bind the debtor, each creditor, each equity security holder, and each general partner in the debtor, whether or not the claim of such creditor, such equity security holder, or such general partner in the debtor is provided for by the plan, and whether or not such creditor, such equity security holder, or such general partner in the debtor has objected to, has accepted, or has rejected the plan.

Thus, the Bank contends that even if Co-op had a superior lien, the bankruptcy judge decided the validity and the priority of liens on the questioned property in favor of the Bank by confirming the plan and that by its failure to appeal in federal court, Co-op is bound by that plan. While we agree with the Bank that a confirmed plan binds all creditors and the debtor, we disagree as to the application of that principle to the present

case.

The U.S. Court of Appeals for the Fifth Circuit considered in *In re Simmons*, 765 F.2d 547 (1985), whether a statutory lien survived a bankruptcy proceeding. In *Simmons*, the debtor filed a petition and plan which listed as unsecured a debt owed to one creditor. The creditor objected and filed a proof of claim which asserted that the creditor was secured by a statutory lien on real property. When the debtor sought to sell the questioned property after confirmation of the plan (which still listed the creditor as unsecured), the creditor asserted his security interest and sought relief from the automatic stay to enforce his lien. An adversary action was instituted by the debtor, seeking cancellation of the creditor's lien. The debtor argued that the creditor, by failing to object to his status as unsecured when the plan was confirmed, accepted this classification.

The bankruptcy court refused to cancel the lien and, further, held that the lien, which was perfected before the debtor filed for bankruptcy, was valid and enforceable, could not be avoided, and was entitled to full satisfaction. In addition, the bankruptcy court held that the creditor had not waived his rights by failing to object at the confirmation hearing to his continued status as an unsecured creditor. The debtor appealed to the U.S. District Court for the Southern District of Mississippi.

The district court affirmed the bankruptcy court's holding that the lien survived the confirmation, but reversed the bankruptcy court's holding that the lien was enforceable. This reversal was based on Mississippi law which required that judgment had to be entered on the lien before it could be enforced. That had not been done.

On appeal to the court of appeals, the debtor asserted that when the plan was confirmed, it bound all creditors to its terms and thereby lifted the lien from the property and vested title to the property, free and clear, in the debtor. Also, the debtor argued that because the creditor's claim was allowed as unsecured in the plan as confirmed, the debt was effectively avoided pursuant to 11 U.S.C. § 506(d) (Supp. II 1978).

In analyzing the status of the parties, the court of appeals stated: "It is clear under the [Bankruptcy] Code that any

statutory lien that is valid under state law remains valid through bankruptcy unless invalidated by some provision of the Code." *Simmons*, 765 F.2d at 556.

The court of appeals determined that the debtor had not brought an action to avoid the lien, pursuant to § 545, and that therefore the lien came within the provisions of § 506(d) of the Bankruptcy Code. Section 506(d) " 'permits liens to pass through the bankruptcy case unaffected' " if no action is brought by the trustee to avoid the lien. *Simmons*, 765 F.2d at 557. The court reasoned that because the creditor's claim was deemed allowed and because no action was brought to avoid the lien under § 502(d), the lien had not been avoided. See, also, *Estate of Lellock v. Prudential Ins. Co. of America*, 811 F.2d 186 (3d Cir. 1987); *Matter of Tarnow*, 749 F.2d 464 (7th Cir. 1984).

The case *Matter of Beard*, 112 B.R. 951 (Bankr. N.D. Ind. 1990), explains that the confirmation hearing is not an adequate forum to determine priority of the liens, so as to bar an affected party from litigation in state court. *Beard* considered whether a tax lien was destroyed by the confirmation of a chapter 13 plan. The court cited 11 U.S.C. § 1327 (1988), which is essentially identical to § 1227, and then drew a distinction between "what a plan may and may not accomplish when it designates the treatment of secured claims." *Beard*, 112 B.R. at 954.

The *Beard* bankruptcy court began with the premise set out in *Simmons*, prohibiting elimination of a lien "simply by failing or refusing to acknowledge it or by calling the creditor unsecured." *Id.* The court then examined the "two different types of proceedings for resolving disputes before the bankruptcy court—adversary proceedings and contested matters." *Beard*, 112 B.R. at 954-55.

The court stated:

> Of the two, adversary proceedings are the more formal. They are initiated by a summons and complaint, to which the defendant is expected to respond. For contested matters, relief is generally sought through a motion and a response is not necessary unless the court requires one. If an adversary proceeding is required to resolve the disputed

> rights of third parties, the potential defendant has the right to expect that the proper procedures will be followed. [Citation omitted.]
>
> The distinction between adversary proceedings and contested matters becomes especially significant where secured claims are concerned.

Beard, 112 B.R. at 955.

The bankruptcy court noted that cases concerning the validity, priority, or extent of a lien require an adversary proceeding because the very existence of the lien is questioned. The court stated, "Thus, if a secured claim is challenged due to questions concerning . . . its priority (the lien's relationship to other claims to or interests in the collateral) . . . an adversary proceeding is required." *Beard*, 112 B.R. at 955.

The *Beard* court held that the confirmation process is not, in itself, an adversary proceeding. The court stated:

> Since [confirmation] is at best a contested matter, the only questions which are properly before the court in the context of confirmation are those which can be raised as contested matters. Only as to issues of this kind will confirmation operate as res judicata. . . .
>
> . . . A challenge which questions the validity or existence of a lien, its extent or the scope of the property encompassed by it, or the lien's priority in relation to other interests, however, requires an adversary proceeding. Disputes of this nature are not resolved by the confirmation process. Therefore, when a plan is confirmed without objection, although the value of an acknowledged lien securing a claim will be binding upon a creditor, a secured creditor is not bound by the terms of the confirmed plan with respect to limitations upon the scope or validity of the lien securing its claim.

Beard, 112 B.R. at 955-56.

We agree fully with the reasoning of both *Simmons* and *Beard*. The plan filed by the debtor in this case classified Co-op as a secured creditor with interest in the corn crop. The plan's listing of Co-op and the Bank as "unsecured" was based on lack of sufficient value in the secured property to satisfy their interests. Section 506 of the Bankruptcy Code provides that an

allowed claim of a creditor which is secured by a lien on property of the estate is secured to the extent of the value of the property and that to the extent that the value of the lien exceeds the value of the property, the creditor is unsecured.

Both Co-op and the Bank have a claim to the check in its entire amount. The extent of either party's unsecured status depends upon a determination within the context of an adversary proceeding as to the priorities of the two liens according to state law.

It is evident that no adversary proceeding was brought to determine the priority of either of the competing liens and that neither lien was avoided in the bankruptcy court. The provision of the bankruptcy plan which listed the Bank as the receiver of the crop check could not be substituted for the process provided for by the Bankruptcy Code.

We determine that bankruptcy law does not permit an allowed secured claim protected by the Bankruptcy Code and this state's statutes to be avoided merely by confirmation of a plan in bankruptcy without an adversary proceeding to protect the rights of creditors. We therefore hold that confirmation of a plan will bind creditors and the debtor to the terms of that plan, but " 'unless the underlying claim has been disallowed the lien securing the claim is not extinguished by bankruptcy.' " *Matter of Riley*, 88 B.R. 906, 911 (Bankr. W.D. Wis. 1987) (quoting *Matter of Spohn*, 61 B.R. 264 (Bankr. W.D. Wis. 1986)).

According to the order of confirmation and the plan upon which it was based, both the Bank and Co-op had an interest in the check. Each interest exceeded the value of the check, and, according to 11 U.S.C. § 1225(a)(5)(C), "the debtor surrenders the property [the grain check] securing such claim to such holder."

The order of confirmation does not make an allocation of the check, but indicates only that it was to be surrendered. The decision of the debtors to relinquish the check to the Bank is in no way based in bankruptcy law and may be ignored. Claim to the check must be decided by Nebraska law between the two creditors, and the debtors could no more determine who should take the check than could they arbitrarily determine which lien was superior.

Because no evidence was adduced at trial as to the priority of the competing liens, we are unable to rule on this matter. We find that it was improper for the trial court to find that the issue before it, namely the priority of the competing liens, was res judicata. The bankruptcy court had not determined this issue, nor did it have jurisdiction to do so. A fact question exists as to the relative priority of the liens of the Bank and Co-op. The court erred in granting the Bank's motion for summary judgment. We therefore reverse the order of the district court and remand the cause for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V. LAURIE J. SASSEN, APPELLANT.

484 N.W.2d 469

Filed May 29, 1992. No. S-90-587.

1. **Arrests: Search and Seizure: Police Officers and Sheriffs.** Once there has been a valid arrest, a search incident to that arrest is also valid. The officers need not state the specific crime for which a defendant is arrested in order to effectuate a valid arrest.
2. **Arrests: Search and Seizure: Weapons: Evidence.** Once there has been a valid arrest, the search incident to that arrest is valid if conducted in the area within the arrestee's "immediate control," the area from within which arrestee could gain possession of a weapon or destructible evidence.
3. **Controlled Substances: Police Officers and Sheriffs: Probable Cause.** The factors listed in Neb. Rev. Stat. § 28-440 (Reissue 1989) are used to determine if the objects were actually drug paraphernalia, not whether the officers had probable cause to believe they were drug paraphernalia.

Appeal from the District Court for Douglas County: JOHN E. CLARK, Judge. Affirmed.

James Martin Davis for appellant.

Don Stenberg, Attorney General, and Kimberly A. Klein for appellee.

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

GRANT, J.

In this case defendant, Laurie J. Sassen, was charged by information with unlawful possession of a controlled substance. Defendant was convicted of the charge by the judge, sitting without a jury. Defendant was sentenced to 1 to 2 years in prison, with credit given for time served. Defendant timely appealed, assigning as error the admission of evidence seized without a warrant and of statements made by defendant, both of which were "the fruits of an unlawful arrest." We find that the defendant's arrest was lawful and affirm her conviction.

In reviewing a criminal conviction, the Supreme Court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and the verdict will be affirmed, in the absence of prejudicial error, if properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Timmerman, ante* p. 74, 480 N.W.2d 411 (1992). Viewed in that light, the record shows the following:

At approximately 1:15 a.m. on December 13, 1989, while assisting with a traffic stop at 52nd and Country Club in Omaha, two police officers observed a Pontiac Sunbird with no front license plate. They then observed that the Sunbird had a rear license plate, but it was a dealer plate, and it was covering what appeared to be a regular license plate. The rear window of the Sunbird was covered with snow, so that one could not see in or out. The officers stopped the Sunbird at 58th and Blondo in Omaha, Douglas County, Nebraska. As the officers were approaching—Officer Carmody on the driver's side and Officer Bakker on the passenger side—the passenger door opened. The defendant was the only occupant of the car.

Officer Carmody tried to talk to defendant through the driver's window, but defendant said that neither the driver's door nor window would open, so she spoke to Officer Bakker, who was by the passenger side. Carmody checked the driver's door later and found it would not open. When asked for identification and proof of ownership, defendant responded

that she did not have a driver's license and that the car did not belong to her. She identified herself as Laurie Sassen.

The officers saw a plastic, zippered bank bag with the name "Bennington Bank" printed on it lying on the seat next to defendant. Officer Bakker asked defendant what the bag contained, but he did not ask her to open it. In response, defendant opened the bag and began taking cosmetics from it. Defendant was holding the bag close to her so that Officer Bakker, from the passenger side, could not see into it. Officer Carmody, by looking through the window on the driver's side, saw that defendant was holding a gray plastic object up against the back of the bag with her thumb while she took other items out. The gray plastic object was later determined to be a scale with a powdery substance on it, but the officers did not know that it was a scale at the time.

Carmody also saw a syringe in the bag. He told Bakker that he had seen a syringe and to ask defendant to step out of the car. When Bakker asked her to get out of the car, defendant picked up the syringe and "looked around as if she was confused." When Bakker again asked defendant to leave the car, defendant threw the syringe on the floor. Carmody testified that it was an ordinary prescription drug syringe with an orange plastic cap over the needle. He could not see any residue on the syringe.

When defendant got out of the car, the officers told her she was under arrest and handcuffed defendant. Defendant was arrested for possession of drug paraphernalia. The officers called for a female officer to search defendant. While the female officer was searching defendant, Officer Carmody searched the passenger compartment of the car. He found a knife with an 8-inch blade between the driver's seat and the floor. Carmody also seized the syringe. When he looked at it more closely, he saw what appeared to be dried blood on the syringe and residue inside it. The residue in the syringe was later determined to be methamphetamine.

While Carmody searched the car, Bakker searched defendant's coat, which she had removed before being handcuffed. In an inside coat pocket, Bakker found a baggie containing Valium tablets. The residue in the baggie tested positive for methamphetamine.

Defendant was taken to the police station. In a search incident to the arrest, defendant's purse, which Carmody had gotten from the car, was searched at the station. Inside the purse, Carmody found defendant's birth certificate, an insurance card, and other identification. He also found several small plastic baggies inside a wallet contained in the purse. Some of the baggies contained a powdery white residue, which contained methamphetamine.

Carmody interviewed defendant at the police station at about 2:30 a.m. Carmody advised defendant of her *Miranda* rights. Defendant stated that she understood them and waived them. Initially, defendant denied the wallet was hers, but later admitted that the wallet and purse were hers. She stated that the powdery substance belonged to a friend. She also admitted that the powdery substance was methamphetamine, or "crank," that she was a methamphetamine user, and that she had used methamphetamine approximately 2 weeks earlier. The interview ended at about 2:45 a.m.

Defendant's first argument is essentially that the arrest was illegal because the officers arrested defendant for possession of drug paraphernalia, an infraction as defined in Neb. Rev. Stat. § 29-431 (Reissue 1989). Defendant contends that the officers have no authority to custodially arrest for infractions, because such an arrest would be in violation of Neb. Rev. Stat. § 29-435 (Reissue 1989), which provides: "Except as provided in section 29-427, for any offense classified as an infraction, a citation shall be issued in lieu of arrest or continued custody pursuant to sections 29-422 to 29-429." Defendant's contentions are without merit.

First, at the time the officers arrested defendant, they had reasonable cause to arrest defendant for at least three misdemeanors: (1) driving without a license plate on the front of the car she was driving, in violation of Neb. Rev. Stat. § 60-323 (Reissue 1988), classified as a Class III misdemeanor by Neb. Rev. Stat. § 60-430 (Reissue 1988); (2) driving without a driver's license, in violation of Neb. Rev. Stat. § 60-413 (Reissue 1988) and also a Class III misdemeanor; and (3) operating a motor vehicle in violation of Neb. Rev. Stat. § 39-6,136(2) (Cum. Supp. 1990), in that the rear window of the

car defendant was driving was completely covered by snow, also a Class III misdemeanor.

We have held that once there has been a valid arrest, a search incident to that arrest is also valid. The officers need not state the specific crime for which a defendant is arrested in order to effectuate a valid arrest. In *State v. Roach*, 234 Neb. 620, 626, 452 N.W.2d 262, 267 (1990), we held: "Nevertheless, the validity of an arrest and the permissibility of a search incident thereto are premised upon the existence of probable cause, not the officer's knowledge that probable cause in fact does exist."

Similarly, in *United States v. Moses*, 796 F.2d 281 (9th Cir. 1986), the court held that although the arresting officer testified she did not think there was probable cause to arrest before the search, such testimony did not foreclose further examination of the probable cause issue. See, also, *Florida v. Royer*, 460 U.S. 491, 103 S. Ct. 1319, 75 L. Ed. 2d 229 (1983); *State v. LaChappell*, 222 Neb. 112, 382 N.W.2d 343 (1986).

In the case before us, there was probable cause to arrest defendant before the arrest or the search. In actuality, the police officer had little choice except to arrest defendant and take defendant into custody. Defendant did not have a driver's license and did not own the car she was driving. To allow defendant to proceed without a license in a car defendant apparently did not own would be the height of irresponsible conduct on the part of the arresting officers.

Once there has been a valid arrest, the search incident to that arrest is valid if conducted in the area within the arrestee's "immediate control," the area from within which the arrestee could gain possession of a weapon or destructible evidence. In *United States v. Robinson*, 414 U.S. 218, 94 S. Ct. 467, 38 L. Ed. 2d 427 (1973), an officer properly arrested the defendant for operating a vehicle without a license and then conducted a thorough search of the defendant's person, discovering heroin in his coat pocket. The Court held that the search was reasonable, stating:

> The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest

> situation that weapons or evidence would in fact be found upon the person of the suspect. . . . It is the fact of the lawful arrest which establishes the authority to search, and we hold that in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a "reasonable" search under that Amendment.

Robinson, 414 U.S. at 235.

Because the arrest of defendant was a valid custodial arrest, the searches of defendant's person, purse, and coat and of the car are valid. Under *Roach*, the officers do not have to specify the correct crime when they arrest, as long as probable cause exists to arrest for some crime. Probable cause for arrest existed in this case, and the searches were valid searches incident to arrest.

In addition, the officers could validly arrest defendant for possession of drug paraphernalia under these circumstances. Possession of drug paraphernalia is an infraction under Neb. Rev. Stat. § 28-441 (Reissue 1989). Again, § 29-435 states: "Except as provided in section 29-427, for any offense classified as an infraction, a citation shall be issued in lieu of arrest or continued custody pursuant to sections 29-422 to 29-429."

Neb. Rev. Stat. § 29-427 (Reissue 1989) states:

> Any peace officer having grounds for making an arrest may take the accused into custody or, already having done so, detain him further when the accused fails to identify himself satisfactorily, or refuses to sign the citation, or when the officer has reasonable grounds to believe that . . . such action is necessary in order to carry out legitimate investigative functions . . . .

The officers arrested Sassen for possession of drug paraphernalia, and the following investigation was directly related to that charge. The officers observed Sassen with the syringe, as well as her visible nervousness and her "furtive gesture" of throwing the syringe on the floor when she was asked to step out of the car. They observed that she had a dealer plate over the regular license plate on the back and that she had a bank bag on the seat beside her. Additionally, they noticed

that she was holding something against the back of the bank bag that she did not want them to see. The situation required more investigation, and the officers arrested Sassen in order to carry out the investigation. In this situation, an arrest for an infraction is permissible.

We hold that the officers had the authority to arrest defendant for the infraction of possession of drug paraphernalia. Although the offense is only an infraction, for which officers are instructed to give only citations, this situation came within one of the exceptions listed in § 29-427.

Appellant then argues that even if the officers have the authority to arrest for infractions under certain circumstances, the officers in this case had no probable cause to believe that defendant had committed the infraction of possession of drug paraphernalia. This contention is without merit.

The appellant argues that Neb. Rev. Stat. § 28-440 (Reissue 1989) contains the factors to use in determining if probable cause exists to find that an object is drug paraphernalia. That is not what § 28-440 is. The statute states: "In determining *whether an object is drug paraphernalia, a court or other authority shall consider, in addition to all other logically relevant factors*, the following . . . ." (Emphasis supplied.) The factors listed in § 28-440 are used to determine if the objects were actually drug paraphernalia, not whether the officers had probable cause to believe they were drug paraphernalia. Some of the factors on the list, such as the existence of residue of a controlled substance on the object and expert testimony concerning the object's use, are not factors that could be considered by police officers in determining whether they have probable cause because those factors could not be available to the officers until either after a lab test or during the trial.

In addition, the statute includes the language "in addition to all other logically relevant factors." The list in § 28-440 is illustrative, not exclusive. Defendant's behavior, as well as all the circumstances surrounding the stop and arrest, also provided the officers with probable cause to believe the syringe was drug paraphernalia. She was driving a car with the regular license plate covered with a dealer plate, she had no license, nor could she show ownership of the car. She was carrying a bank

bag on the seat beside her, and when asked what was in it, she held it so one of the officers could not see in it. While going through it, she held something back against the back of the bag. When she picked up the syringe, she looked nervous and confused, and when asked to step out of the car, she threw the syringe on the floor. The officers had probable cause to believe the syringe was drug paraphernalia.

Because we hold that defendant's arrest was legal, we need not consider her argument that the statements she made to the police after her arrest were the product of an unlawful arrest. Appellant's assignments of error are without merit.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. SCOTT GILDEA, APPELLANT.

484 N.W.2d 467

Filed May 29, 1992. No. S-90-976.

Postconviction: Appeal and Error. In an appeal involving a proceeding for postconviction relief, the trial court's findings will be upheld unless such findings are clearly erroneous.

Appeal from the District Court for Holt County: EDWARD E. HANNON, Judge. Affirmed.

Scott Gildea, pro se.

Don Stenberg, Attorney General, and Donald A. Kohtz for appellee.

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

WHITE, J.

Pursuant to a plea bargain the appellant, Scott Gildea, pled guilty to the offense of first degree sexual assault, Neb. Rev. Stat. § 28-319(1)(c) (Reissue 1989), and was sentenced to a term of from 7 to 10 years' imprisonment in the Nebraska Department of Correctional Services, with credit for time spent

in custody prior to sentencing.

At the sentencing hearing the court was informed by counsel for the State and for the appellant of the terms of the bargain, those terms being that the county attorney would, in exchange for a plea of guilty, recommend a sentence of probation after a 90-day mentally disordered sex offender examination. At sentencing the court determined that the appellant was a nontreatable mentally disordered sex offender and sentenced the defendant to the term set forth above.

On June 19, 1989, after the sentencing of June 16, the defendant moved the court for an order pursuant to Neb. Rev. Stat. § 29-2308.01 (Reissue 1989) for the reduction of the sentence. The hearing was held on August 18, and at that hearing counsel for defense and prosecution were heard. It is at this time the county attorney, contrary to his previously expressed consent to the plea bargain, recommended to the court that the sentence of 7 to 10 years' imprisonment be retained. The court so ordered. The appellant did not appeal from the order refusing to order reduction in sentence; instead, he filed this postconviction action.

The basis of the postconviction action was (1) that the defendant was not advised that the trial court was not bound by the recommendation of the county attorney as to the sentence to be imposed and (2) that, in any event, the county attorney failed to keep the plea bargain when he recommended at the hearing on the motion for reduction of sentence that the sentence imposed by the trial court be retained. After hearing, the trial court denied the motion for postconviction review. We affirm.

The assignments of error in this court reflect the complaints made in the petition for postconviction review and will be dealt with seriatim. It is true that the language of the trial judge in discussing the sentence that could be imposed after a plea of guilty could conceivably be said to be confusing, to wit:

> THE COURT: You understand that the punishment that the Court will impose upon you will be determined only after the pre-sentence investigation is made and after the report of the doctors on the mentally disordered sex offender statute, and also, of course, after a hearing, a

sentencing hearing which all of the facts bearing on that are developed, do you understand that?

MR. GILDEA: Yes, sir.

The import of that statement by the court is that the court was not bound to take the recommendation of the county attorney as witnessed by the plea bargain. In addition, however, the defense counsel at the original sentencing was subpoenaed by the prosecution and testified. Forrest Peetz, appellant's counsel at the sentencing, was asked, "Q. Regarding the plea negotiation, during those conversations did you ever inform Mr. Gildea that the court would not be bound by any plea recommendation I, as the State, would make? A. Absolutely."

The trial court found that the appellant was fully informed that the court was not bound to accept the recommendation of the county attorney as to sentence and that appellant could not reasonably have relied on such a belief, since he had information completely to the contrary.

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. Dixon*, 237 Neb. 630, 467 N.W.2d 397 (1991). The first assignment of error is without merit.

As to the second assignment of error, that the county attorney violated the plea agreement by failing to recommend the agreed-upon plea recommendation at the subsequent motion for reduction of sentence hearing, we observe that appellant has cited no authority for the proposition that the county attorney is bound other than by the express terms of his agreement, but also in all subsequent court proceedings, nor unfortunately is the State able to supply us authority to the contrary. However, the court found, and we agree, that the strict terms of the plea bargain agreement were adhered to by the county attorney and will not be extended beyond the bare terms of that agreement. The second assignment of error is without merit.

This court, having found no error, affirms the order denying postconviction relief.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOHN O. CAVE, APPELLANT.

484 N.W.2d 458

Filed May 29, 1992. No. S-90-1153.

1. **Homicide: Words and Phrases.** A person commits first degree murder by killing another purposely and with deliberate and premeditated malice.
2. _____: _____. Second degree murder is defined as causing the death of another intentionally, but without premeditation.
3. _____: _____. The definition of manslaughter includes the intentional killing of another, without malice, upon a sudden quarrel.
4. **Homicide: Convictions: Proof: Intent.** In order to convict a person of second degree murder, the State is required to prove all three elements—the death, the intent to kill, and causation—beyond a reasonable doubt. No element is presumed upon proof of the others, nor is any element presumed in the absence of proof by the defendant of the converse of that element.
5. **Homicide.** The fact that a homicide which would otherwise constitute a second degree murder occurs upon a sudden quarrel is an additional circumstance which serves to mitigate the intentional killing.
6. **Verdicts: Appeal and Error.** On a claim of insufficiency of the evidence, the Supreme Court will not set aside a guilty verdict in a criminal case if the verdict is supported by relevant evidence.
7. **Convictions: Appeal and Error.** In determining the sufficiency of the evidence to support a conviction, the Supreme Court does not resolve conflicts of evidence, pass on the credibility of witnesses, evaluate explanations, or reweigh the evidence.
8. **Criminal Law: Appeal and Error.** When the trial of a criminal case is to the court rather than a jury, the trial court's factual findings are given the same effect as a jury verdict and will not be set aside unless clearly erroneous.
9. **Homicide: Words and Phrases.** As used in the manslaughter statute, Neb. Rev. Stat. § 28-305 (Reissue 1989), a sudden quarrel is a legally recognized and sufficient provocation which causes a reasonable person to lose normal self-control.
10. **Homicide.** In determining whether an intentional killing occurred upon a sudden quarrel, the question is whether there existed reasonable and adequate provocation to excite the passion of the defendant and obscure and disturb his power of reasoning to the extent that he acted rashly and from passion, without due deliberation and reflection, rather than from judgment.
11. **Homicide: Intoxication.** The test for determining whether an allegedly provocative act is sufficient to reduce a murder to manslaughter is an objective one, and therefore qualities peculiar to the defendant which render him particularly excitable, such as intoxication, are not considered.
12. **Homicide.** Provocation by one other than the person killed cannot provide the basis for reducing a murder to manslaughter.
13. **Trial: Evidence: Appeal and Error.** A prerequisite to an appeal based upon the erroneous admission of evidence is a timely objection stating the specific grounds for the objection unless the grounds are apparent from the context.

14. **Trial: Evidence: Waiver: Appeal and Error.** Failure to make a timely objection to evidence results in a waiver of the right on appeal to assert prejudicial error concerning the evidence received without objection.

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

Thomas M. Kenney, Douglas County Public Defender, and Kelly S. Breen for appellant.

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

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

WHITE, J.

This is a criminal case in which the defendant-appellant, John O. Cave, was charged with first degree murder for the killing of Rose Kimball (count I), attempted first degree murder for the shooting of Linda Meck (count III), and two counts of using a firearm in the commission of a felony (counts II and IV). See Neb. Rev. Stat. §§ 28-303, 28-201, and 28-1205 (Reissue 1989). The defendant pled not guilty and also, though the record does not so reflect, apparently waived his right to a jury trial, resulting in the case being tried to the Douglas County District Court sitting without a jury. The court found the defendant guilty of both counts of use of a firearm in the commission of a felony and, regarding counts I and III, guilty of the lesser-included offenses of second degree murder and attempted second degree murder. See Neb. Rev. Stat. § 28-304 (Reissue 1989).

The court sentenced the defendant to life imprisonment on count I, 15 to 30 years' imprisonment on count III, and 6 to 15 years' imprisonment on each of counts II and IV. The court ordered that the sentences imposed on counts II and IV run consecutively to those imposed on counts I and III and that the sentence imposed on count III run concurrently with those imposed on counts I and II. Finally, the court granted the defendant credit for 163 days' time served and ordered him to pay the costs of the action. From the foregoing judgment and sentences, the defendant appeals.

FACTUAL BACKGROUND

During November and December 1989, the defendant lived with Linda Meck, Marvin Morton, and Linda's 10-year-old son, Lance, at their residence in Omaha, Nebraska. Linda subsequently married Marvin, and at the time of trial, she was known as Linda Morton. Linda had offered the defendant a place to stay after he broke up with his girl friend. Linda testified that during this time period, the defendant was depressed over the breakup and was drinking heavily.

On December 29, Linda spent the day with her best friend, Rose Kimball. At approximately 5 p.m., Linda, Rose, Lance, and Rose's 2-year-old daughter, Marie, stopped by Linda's residence. They found the defendant sitting in the living room drinking wine. Linda testified that the defendant was "pretty out of it," meaning he was very intoxicated. When Linda told Marvin that they were going over to Rose's, the defendant decided to go along.

Linda, Rose, the two children, and the defendant left in Rose's car. They stopped at a liquor store, where Linda bought the defendant some wine, and then at a fast-food restaurant, where they purchased some food, before going to Rose's house. As they ate their dinner at Rose's, the defendant twice asked Rose if he could stay at the house. When Rose responded in the negative, the defendant became upset and angry. Linda testified that the defendant told them that "if he couldn't have — have both of us, he didn't want nobody to have us." Linda also testified that after the breakup with his girl friend, the defendant wished to pursue a romantic relationship with Rose, but Rose was not interested.

At approximately 6 p.m., Rose went upstairs to take a nap, telling Linda to wake her in time for their 7 o'clock Alcoholics Anonymous meeting. The defendant also went upstairs to take a nap at this time. A short time later, Linda sent Lance to wake Rose. After telling his mother that he had awakened Rose, Lance went back upstairs to play with an Atari computer game located in one of the bedrooms. Lance testified that while he was upstairs, he heard Rose and the defendant arguing in the hallway. He heard Rose say, "Johnny, you're going — you're going to your brother's house." Lance further testified that as

they were walking downstairs, Lance heard the defendant tell Rose, "If I can't have you, no one can."

The argument continued downstairs, with the defendant again asking if he could stay and Rose again denying the request. At that point, Rose told Linda it was time to leave and told the defendant she was going to take him home. Linda and Rose then told Lance, who was to watch the baby, that they were leaving, and the three adults walked out to the car. Linda testified that the defendant was quiet as they approached the car and that there was no yelling, screaming, or fit of anger at this point. Lance, however, testified that he heard screaming coming from the driveway, which caused him to look out the bedroom window.

In any event, Rose got into the driver's seat of the car; Linda sat in the front passenger-side seat; and the defendant got into the backseat behind Linda. As Rose put the key in the ignition, Linda heard a scream and two noises that sounded like "a firecracker." Lance testified that he heard five or six "firecrackers" from the upstairs bedroom. Linda placed her hands behind her head to protect herself and then turned to the defendant and asked, "John, why did you hit Rose and I?" Linda then saw that Rose was bleeding from the mouth, and she jumped out of the car and instructed Lance, who was coming from the house, to call the police.

Emergency personnel arrived shortly thereafter. The defendant was gone by this time, though neither Linda nor Lance remembered seeing him leave the scene. The defendant turned himself over to authorities in Missoula, Montana, on December 31, 1989. He subsequently waived his right to extradition and was returned to Nebraska for trial.

A pathologist who performed the autopsy on Rose testified that she sustained two gunshot wounds to the head, one of which resulted in multiple fractures and a right subdural hemorrhage and caused her death. Linda survived despite suffering three gunshot wounds to the back of her head as well as wounds to her hands.

Linda testified that she did not see the defendant with a gun at any time on December 29. However, she did testify to seeing him with a small handgun during the time he lived with her. She

testified that she saw the defendant remove the gun from under a cushion on the couch where he slept. Linda further testified that on December 18, the defendant discharged the gun inside her house in front of Lance. She also testified that on December 28, the day before the occurrence at issue, the defendant discharged the gun into the air as Rose was driving down the street with Marie and Lance.

ASSIGNMENTS OF ERROR

On appeal, the defendant argues (1) that the evidence is insufficient as a matter of law to sustain the convictions of second degree murder and attempted second degree murder and (2) that the trial court erred in admitting testimony regarding his discharge of a handgun during the days and weeks prior to the shootings.

SUFFICIENCY OF THE EVIDENCE

As previously noted, the State charged the defendant in this case with one count of first degree murder and one count of attempted first degree murder. A person commits first degree murder by killing another purposely and with deliberate and premeditated malice. § 28-303(1). The trial court found that the State failed to carry its burden of proving that the shootings were premeditated and therefore did not convict the defendant of these two crimes. The trial court did, however, find that the shootings were intentional and, accordingly, found the defendant guilty of the lesser-included offenses of second degree murder and attempted second degree murder. § 28-304(1). For his first assignment of error, the defendant argues that the evidence is insufficient to sustain these convictions.

As an initial matter, we note the defendant's contention that "the Due Process Clause of the Fourteenth Amendment requires that the prosecution prove beyond a reasonable doubt the absence of heat of passion in order to obtain a conviction for Second Degree Murder." Brief for appellant at 13. The defendant relies heavily upon the U.S. Supreme Court's decision in *Mullaney v. Wilbur*, 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975), for the proposition that the State carries such a burden. However, *Mullaney* involved a murder

prosecution under a statute defining the crime as the unlawful killing of another with "malice aforethought." Me. Rev. Stat. Ann. tit. 17, § 2651 (West 1964) (repealed 1976). Despite the fact that malice aforethought was an essential element of the offense, the trial court instructed the jury that it could presume the existence of malice aforethought from proof that the killing was intentional and unlawful unless the defendant proved by a preponderance of the evidence that he acted in the heat of passion. The Supreme Court held that this instruction violated the defendant's due process rights by shifting to him the burden of disproving an essential element of the crime.

In *Patterson v. New York*, 432 U.S. 197, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977), the Supreme Court addressed the applicability of *Mullaney* to a scheme more similar to the one involved in this case. In *Patterson*, the defendant shot and killed his estranged wife's former fiance after finding his wife and the former fiance together. The defendant was charged with second degree murder under a New York statute defining the offense as intentionally causing the death of another. N.Y. Penal Law § 125.25(1) (McKinney 1987). The same statute provides for an affirmative defense based upon evidence that the defendant "acted under the influence of extreme emotional disturbance." *Id.* New York also recognizes the crime of manslaughter, which is defined as the intentional killing of another "under circumstances which do not constitute murder because [the defendant] acts under the influence of extreme emotional disturbance." N.Y. Penal Law § 125.20(2) (McKinney 1987). Pursuant to this scheme, the trial court instructed the jury that if it found beyond a reasonable doubt that the defendant had intentionally killed the victim, but he proved by a preponderance of the evidence that he had done so under the influence of extreme emotional disturbance, it had to find him guilty of manslaughter rather than murder. The jury found the defendant guilty of murder, and he appealed.

On appeal, the defendant argued that the New York murder statute was functionally equivalent to the one struck down in *Mullaney* and was therefore unconstitutional. The Supreme Court rejected this argument, stating:

> We cannot conclude that Patterson's conviction under

> the New York law deprived him of due process of law. The crime of murder is defined by the statute . . . as causing the death of another person with intent to do so. The death, the intent to kill, and causation are the facts that the State is required to prove beyond a reasonable doubt if a person is to be convicted of murder. No further facts are either presumed or inferred in order to constitute the crime. . . .
>
> . . . It seems to us that the State satisfied the mandate of [*In re*] *Winship*, [397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970),] that it prove beyond a reasonable doubt "every fact necessary to constitute the crime with which [Patterson was] charged."

Patterson, 432 U.S. at 205-06. The Court concluded that the New York Legislature's decision to impose upon the defendant the burden of proving additional circumstances which lessen his culpability does not violate due process.

Under Nebraska law, second degree murder is defined as causing the death of another intentionally, but without premeditation. § 28-304(1). The definition of manslaughter includes the intentional killing of another, without malice, upon a sudden quarrel. Neb. Rev. Stat. § 28-305(1) (Reissue 1989); *State v. Pettit*, 233 Neb. 436, 445 N.W.2d 890 (1989) (to sustain a conviction for voluntary manslaughter, the State must not only prove that the defendant killed another upon a sudden quarrel, but also that he intended to kill the other person). In order to convict a person of second degree murder, the State is required to prove all three elements—the death, the intent to kill, and causation—beyond a reasonable doubt. None of the elements is presumed upon proof of the others, nor is any element presumed in the absence of proof by the defendant of the converse of that element. As in New York, the fact that a homicide occurs "upon a sudden quarrel" is an additional circumstance which serves to mitigate an intentional killing. § 28-305(1); *Pettit, supra*.

It is clear that whether a state's homicide laws violate due process depends a great deal upon the manner in which a state defines the crime charged. *State v. Chelette*, 453 So. 2d 1282 (La. App. 1984), citing *Engle v. Isaac*, 456 U.S. 107, 102 S. Ct. 1558, 71 L. Ed. 2d 783 (1982). Given the similarity between the

second degree murder and manslaughter statutes of this state and those of New York, it is by no means clear that in a prosecution for second degree murder, the burden is on the State to prove the absence of a sudden quarrel beyond a reasonable doubt. We do not decide the question, however, because even assuming the State carried such a burden, the evidence is sufficient to sustain the convictions in this case.

On a claim of insufficiency of the evidence, the Supreme Court will not set aside a guilty verdict in a criminal case if the verdict is supported by relevant evidence. *State v. Fellman*, 236 Neb. 850, 464 N.W.2d 181 (1991). In determining the sufficiency of the evidence to support a conviction, this court does not resolve conflicts of evidence, pass on the credibility of witnesses, evaluate explanations, or reweigh the evidence. *State v. Oldfield*, 236 Neb. 433, 461 N.W.2d 554 (1990). Such matters are for the trier of fact. *Id.* When the trial of a criminal case is to the court rather than a jury, the trial court's factual findings are given the same effect as a jury verdict and will not be set aside unless clearly erroneous. *Id.*

The crime of manslaughter developed at common law in recognition of the fact that some intentional killings are committed under extenuating circumstances which mitigate, though they do not justify or excuse, the killing. *Pettit, supra.* Thus, " '[a]s a concession to human frailty,' " intentional killings which would otherwise constitute murder are reduced to voluntary manslaughter if committed " 'in the heat of passion as a result of severe provocation.' " *Id.* at 449, 445 N.W.2d at 899, quoting 2 Charles E. Torcia, Wharton's Criminal Law § 153 (14th ed. 1979).

The fact that two people argue before one intentionally kills the other does not necessarily convert the crime from murder to manslaughter. Rather, as used in § 28-305(1), a sudden quarrel is a legally recognized and sufficient provocation which causes a reasonable person to lose normal self-control. *Pettit, supra.* The question is " 'whether there existed reasonable and adequate provocation to excite the passion of the defendant and obscure and disturb his power of reasoning to the extent that he acted rashly and from passion, without due deliberation and reflection, rather than from judgment . . . .' " *Id.* at 454,

445 N.W.2d at 901, quoting *Savary v. State*, 62 Neb. 166, 87 N.W. 34 (1901). The test is an objective one. *Patterson, supra.* Qualities peculiar to the defendant which render him particularly excitable, such as intoxication, are not considered. 2 Wayne R. LaFave & Austin W. Scott, Jr., Substantive Criminal Law § 7.10(10) (1986).

With these principles in mind, we address separately the defendant's contentions that the evidence is insufficient to sustain his convictions for second degree murder and attempted second degree murder.

Rose Kimball and the defendant clearly argued prior to the shootings. However, the record indicates that this argument resulted from the defendant's anger at Rose's refusal to allow him to stay at her house. In rejecting the defendant's request, Rose explained that she did not want anyone in the house with her 2-year-old daughter except Lance. The record reveals that, to the extent Rose became angry at all, her anger resulted from the defendant's refusal to accept her initial decision and his insistence on pursuing the matter after such refusal. Given the defendant's intoxication and past romantic advances, Rose's steadfast refusal to give the defendant permission to stay does not seem unreasonable. More importantly, her behavior is certainly not the sort of "severe" provocation that would excite the passion of a reasonable person, causing the person to lose normal self-control. See *Braunie v. State*, 105 Neb. 355, 180 N.W. 567 (1920) (evidence that the victim provoked the defendant to anger, by itself, is insufficient as a matter of law to reduce a murder to manslaughter). Given the defendant's statement to the effect that if he could not have Rose, no one could, it is not seriously disputed that the defendant caused the death of Rose and intended to do so. Therefore, the trial court did not err in finding the defendant guilty of second degree murder for the death of Rose Kimball.

With regard to the shooting of Linda Meck, an additional factor is involved. In *State v. Bautista*, 193 Neb. 476, 227 N.W.2d 835 (1975), the defendant was involved in a fight with another man at a club. The defendant left briefly to take his nephew home, then returned to the club with a gun. Upon returning, the defendant encountered the other man's father,

and when the father refused to disclose his son's whereabouts, the defendant shot and killed him. The defendant was convicted of second degree murder, and he appealed, arguing that the trial court erred in failing to instruct the jury on manslaughter and provocation. This court affirmed the conviction, holding that the evidence did not support an instruction on provocation because any provocation which existed resulted from the acts of the victim's son, not the victim himself.

Here, there is no evidence that the defendant quarreled with Linda Meck at any time. Whatever provocation existed resulted from the defendant's argument with Rose, not Linda. Therefore, while the claimed provocation is as inadequate to support a manslaughter conviction for Linda's shooting as it is for Rose's, we also hold that the defendant's argument regarding the shooting of Linda must fail based upon the decision in *Bautista*. Again, noting Linda's testimony that the defendant's threatening statement was directed at both her and Rose, there is evidence that the defendant intended to kill them both. Thus, the State presented sufficient evidence to sustain the defendant's attempted second degree murder conviction for the shooting of Linda Meck. The defendant's first assignment of error is without merit.

THE CHALLENGED TESTIMONY

For his second assignment of error, the defendant argues that the trial court erred in admitting Linda Meck's testimony regarding his discharge of a firearm on December 18 and December 28. The defendant argues that the challenged testimony is irrelevant to the critical issue in the case—his mens rea on the day of the shooting—and constitutes inadmissible evidence of his character.

Without deciding the question, we note that it is at least arguable that the defendant's discharge of a weapon as Rose Kimball drove down the street the night before her murder is relevant evidence of his intent or plan to kill her and thus is admissible under Neb. Evid. R. 401 and 404(2), Neb. Rev. Stat. §§ 27-401 and 27-404(2) (Reissue 1989). In any event,

> in a bench trial of a law action, including a criminal case

> tried without a jury, erroneous admission of evidence is not reversible error if other relevant evidence, admitted without objection or properly admitted over objection, sustains the trial court's factual findings necessary for the judgment or decision reviewed; therefore, an appellant must show that the trial court actually made a factual determination, or otherwise resolved a factual issue or question, through use of erroneously admitted evidence in a case tried without a jury.

State v. Lomack, 239 Neb. 368, 370, 476 N.W.2d 237, 239 (1991).

Moreover, the defendant did not object to any of the challenged testimony at trial. A prerequisite to an appeal based upon the erroneous admission of evidence is a timely objection stating the specific grounds for the objection unless the grounds are apparent from the context. *State v. Coleman*, 239 Neb. 800, 478 N.W.2d 349 (1992), citing Neb. Evid. R. 103(1)(a), Neb. Rev. Stat. § 27-103(1)(a) (Reissue 1989). "One function of a proper objection is to direct the court's attention to questioned admissibility of particular evidence so that the court may intelligently, quickly, and correctly rule on the reception or exclusion of evidence." *Coleman*, 239 Neb. at 812, 478 N.W.2d at 357. A litigant is not entitled to silently allow the opposing party to produce evidence and then, upon entry of an adverse verdict, "wander among the Nebraska Evidence Rules" on appeal, in hopes of obtaining a reversal. *Id.* Rather, if a party fails to make a timely objection to evidence, the party waives the right on appeal to assert prejudicial error concerning the evidence received without objection. *State v. Cox*, 231 Neb. 495, 437 N.W.2d 134 (1989).

The defendant waived any objection to the challenged testimony by failing to object to it at trial, and thus his second assignment of error is also without merit. Accordingly, the judgment of the trial court is affirmed.

AFFIRMED.

FAHRNBRUCH, J., concurring in the result.

While concurring with the majority in the result reached in this case, I, nevertheless, continue to adhere to the analyses of the manslaughter statute set forth in the dissents in *State v.*

Pettit, 233 Neb. 436, 445 N.W.2d 890 (1989), and the analysis set forth in *State v. Batiste*, 231 Neb. 481, 437 N.W.2d 125 (1989).

BOSLAUGH, J., joins in this concurrence.

STATE OF NEBRASKA, APPELLEE, V. JAMES L. VANCE, APPELLANT.

484 N.W.2d 453

Filed May 29, 1992. No. S-90-1231.

1. **False Imprisonment: Words and Phrases.** A person commits false imprisonment if he knowingly restrains or abducts another person under terrorizing circumstances or under circumstances which expose the person to the risk of serious bodily injury. "Restrain" is defined as the restriction of a person's movement in such a manner as to interfere substantially with his liberty by means of force, threat, or deception. "Abduct" is defined as the restraint of a person with intent to prevent his liberation by endangering or threatening to endanger the safety of any human being.
2. **Trial: Joinder: Indictments and Informations.** 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. _____: _____: _____. Two or more defendants may be charged in the same indictment, information, or complaint if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.
4. _____: _____: _____. 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.
5. _____: _____: _____. 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.

6. **Trial: Joinder: Appeal and Error.** When issues of prejudicial joinder and prejudicial failure to sever are not before the trial court, the defendant cannot raise these issues on appeal. Issues not properly presented to and passed upon by the trial court may not be raised on appeal.
7. **Criminal Law: Directed Verdict.** In a criminal case a court can direct a verdict only when (1) there is a complete failure of evidence to establish an essential element of the crime charged, or (2) evidence is so doubtful in character, lacking probative value, that a finding of guilt based on such evidence cannot be sustained.
8. **Convictions: Appeal and Error.** In determining whether evidence is sufficient to sustain a conviction in a jury trial, an appellate 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.
9. **Verdicts: Appeal and Error.** On a claim of insufficiency of evidence, an appellate court will not set aside a guilty verdict in a criminal case where such verdict is supported by relevant evidence. Only where evidence lacks sufficient probative force as a matter of law may an appellate court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt.
10. **Sentences: Appeal and Error.** A sentence imposed within the statutory limits will not be disturbed on appeal absent an abuse of discretion.
11. _____: _____. The mere fact that a defendant's sentence differs from those which have been imposed on coperpetrators in the same court does not, in and of itself, make the defendant's sentence an abuse of discretion; each defendant's life, character, and previous conduct may be considered in determining the propriety of the sentence.

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

Martin J. Kushner, of Kushner Law Office, for appellant.

Don Stenberg, Attorney General, and Delores Coe-Barbee for appellee.

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

FAHRNBRUCH, J.

James L. Vance appeals his convictions and sentences on two counts of false imprisonment and two counts of use of a firearm in the commission of a felony. His sentences total not

less than 6 nor more than 14 years' imprisonment.

The defendant claims his trial was unfair because it was joined with the trial of a coperpetrator, who was tried not only for the same offenses, but also for first degree forcible sexual assault.

Specifically, Vance claims that (1) the trial court erred in granting the prosecution's request to join his trial with that of the coperpetrator, Mark Schumacher, (2) there was insufficient evidence to convict him of the charges brought against him, and (3) the sentences imposed were excessive. We affirm.

Upon motion of the State and following a hearing, Vance's trial was joined with that of Schumacher. Both men were charged with two counts of false imprisonment in the first degree, each a Class IV felony, and two counts of use of a firearm in the commission of a felony, each a Class III felony. Schumacher was charged with an additional count, first degree forcible sexual assault, a Class II felony.

A person commits false imprisonment if he knowingly *restrains or abducts* another person under *terrorizing circumstances or under circumstances which expose the person to the risk of serious bodily injury.* Neb. Rev. Stat. § 28-314 (1)(a) (Reissue 1989). "Restrain" is defined as the *restriction of a person's movement in such a manner as to interfere substantially with his liberty by means of force, threat, or deception.* Neb. Rev. Stat. § 28-312(1) (Reissue 1989). "Abduct" is defined as the *restraint of a person with intent to prevent his liberation by endangering or threatening to endanger the safety of any human being.* § 28-312(2).

Vance was found guilty of all four charges brought against him, and he was sentenced to a total of 6 to 14 years' imprisonment. Schumacher was found guilty of all five charges brought against him, and he was sentenced to a total of 7 to 13 years' imprisonment. On appeal to this court, Schumacher's convictions and sentences were affirmed. *State v. Schumacher, ante* p. 184, 480 N.W.2d 716 (1992).

FIRST ASSIGNED ERROR

Vance's first assignment of error claims the trial court erred in granting the prosecution's pretrial motion to join his trial

with that of Schumacher. He asserts that the joinder resulted in prejudice.

Neb. Rev. Stat. § 29-2002 (Reissue 1989) 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.
>
> (2) Two or more defendants may be charged in the same indictment, information, or complaint if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.
>
> (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.

The record fails to reflect that Vance objected to having his case tried with Schumacher's case or made any motion to sever his case from that of Schumacher. The record also fails to disclose any attempt on the part of Vance during the trial to establish any prejudicial effect which could result from the joint trial. See *State v. Cook*, 182 Neb. 684, 157 N.W.2d 151 (1968).

When issues of prejudicial joinder and prejudicial failure to sever are not before the trial court, the defendant cannot raise these issues on appeal. Issues not properly presented to and passed upon by the trial court may not be raised on appeal. *State v. Beins*, 235 Neb. 648, 456 N.W.2d 759 (1990).

Therefore, the issue of whether the joinder of Vance's and Schumacher's cases for trial was improper is not before this court. Vance's first assignment of error is without merit.

SECOND ASSIGNED ERROR

In his second assignment of error, Vance argues that the evidence was insufficient to convict him of the charges brought against him. After the prosecution rested, Vance moved for directed verdicts in his favor, which motion was overruled. Vance then adduced no evidence. Upon submission of Vance's case, the jury found Vance guilty of the four charges against him.

As we held in *Schumacher, ante* at 186, 480 N.W.2d at 718:

> "In a criminal case a court can direct a verdict only when (1) there is a complete failure of evidence to establish an essential element of the crime charged, or (2) evidence is so doubtful in character, lacking probative value, that a finding of guilt based on such evidence cannot be sustained."

Quoting *State v. Pierce*, 231 Neb. 966, 439 N.W.2d 435 (1989). Accord, *State v. Zitterkopf*, 236 Neb. 743, 463 N.W.2d 616 (1990); *State v. Pettit*, 233 Neb. 436, 445 N.W.2d 890 (1989).

> In determining whether evidence is sufficient to sustain a conviction in a jury trial, an appellate 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. Fleck, 238 Neb. 446, 447, 471 N.W.2d 132, 134 (1991). Accord, *State v. Zitterkopf, supra*; *State v. Reynolds*, 235 Neb. 662, 457 N.W.2d 405 (1990); *State v. Olsan*, 231 Neb. 214, 436 N.W.2d 128 (1989).

> On a claim of insufficiency of evidence, an appellate court will not set aside a guilty verdict in a criminal case where such verdict is supported by relevant evidence. Only where evidence lacks sufficient probative force as a matter of law may an appellate court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt.

State v. Fleck, 238 Neb. at 447, 471 N.W.2d at 134. Accord, *State v. Lonnecker*, 237 Neb. 207, 465 N.W.2d 737 (1991); *State v. Robertson*, 223 Neb. 825, 394 N.W.2d 635 (1986).

The facts, construed most favorably to the State, are generally set forth in *State v. Schumacher, ante* p. 184, 187, 480 N.W.2d 716, 718 (1992):

> About midnight on April 2, 1990, Schumacher and James Vance appeared at the door of an Omaha home shared by a 21-year-old woman and her fiance. After the woman allowed the pair to enter the house, Schumacher and Vance brandished a firearm and demanded money or drugs. When the couple said they had nothing to hand over, Vance and Schumacher led the woman, at gunpoint, out of the house and into a car, and then drove to a nearby house. Vance took the woman to the house while Schumacher remained with the car.
>
> When the door to the house opened, Vance entered, pointed his firearm at the people inside, and demanded drugs from them. A man in the house said he did not have any drugs, but knew where he could get some. Vance then forced the man and the previously seized female victim out of the house at gunpoint, and all three went back to Schumacher and the car. Vance and Schumacher then took their captives to yet another house and, en route, discussed whether they would kill their female victim. When the four arrived, Vance forced the male captive to go up to the front door of the house while Schumacher remained with the woman in the car.

In the car, when Schumacher was alone with the woman, he committed first degree forcible sexual assault upon her. The police, who were responding to a call regarding the earlier episode, arrived on the scene. Vance, who was hiding in bushes near the car, ran away. The officers caught Schumacher in the

act of assaulting the female victim in the car. Vance was arrested the next day.

The evidence against Vance and the evidentiary inferences for the State warranted submission of his case to the jury. Therefore, the district court correctly overruled Vance's request for directed verdicts in his favor. The evidence was more than sufficient for the jury to have concluded beyond a reasonable doubt that Vance falsely imprisoned both a male and a female victim under terrorizing circumstances and that a firearm was used in the commission of the crimes. Defendant's second assignment of error is without merit. Each of Vance's convictions is affirmed.

THIRD ASSIGNED ERROR

In his final assignment of error, Vance claims that the sentences imposed are excessive.

False imprisonment is a Class IV felony, punishable by a maximum of 5 years' imprisonment, a $10,000 fine, or both. Use of a firearm in commission of a felony is a Class III felony, punishable by 1 to 20 years' imprisonment, a $25,000 fine, or both. Neb. Rev. Stat. § 28-1205(3) (Reissue 1989) requires that sentences imposed for use of a firearm be consecutive to any other sentence imposed.

Vance was sentenced to consecutive terms of 1½ to 3 years for each of the false imprisonment felonies and 1½ to 4 years for each of the use of a firearm felonies, for a total of 6 to 14 years' imprisonment. All of those sentences are within the statutory limits. A sentence imposed within the statutory limits will not be disturbed on appeal absent an abuse of discretion. *State v. Partee, ante* p. 473, 482 N.W.2d 272 (1992).

Vance argues that his sentences were in error because he received more severe sentences than did Schumacher for the same offenses. Schumacher received 1 to 2 years on each false imprisonment conviction and 1 year on each use of a firearm conviction. Schumacher was also sentenced on the sexual assault conviction.

> [T]he mere fact that a defendant's sentence differs from those which have been imposed on coperpetrators in the same court does not, in and of itself, make the defendant's

> sentence an abuse of discretion; each defendant's life, character, and previous conduct may be considered in determining the propriety of the sentence.

State v. Boppre, 234 Neb. 922, 965, 453 N.W.2d 406, 435-36 (1990).

The trial court found that Vance's criminal record was "absolutely deplorable." A review of Vance's presentence investigation reflects that he has an extensive juvenile record. When he was old enough to be charged as an adult, he was fined and jailed for numerous law violations, both traffic offenses and misdemeanors. He had previously been convicted of robbery. The probation officer who compiled Vance's presentence investigation concluded: "Based upon the defendant's prior arrest record as well as the serious nature of the current offense, it is the opinion of this officer that the only appropriate recommendation is incarceration. It appears society must be protected from Mr. Vance." The probation officer also reported: "The defendant did not admit any involvement in any wrongdoing regarding the convictions." Vance told the probation officer that he felt he was set up by his acquaintances so they could keep $1,000 he gave them for drugs. When we consider the seriousness of the crimes the jury found Vance committed, the terroristic character of the crimes, and the fact that Vance used a gun in the commission of his crimes, any sentences less than those imposed would depreciate the seriousness of Vance's offenses and create disrespect for the law. It cannot be said the trial court abused its discretion in imposing the sentences that it did. The sentences imposed upon Vance were appropriate and are affirmed.

The defendant's third assignment of error is without merit.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JONATHAN W. LOVEJOY, APPELLANT.

484 N.W.2d 451

Filed May 29, 1992. No. S-91-270.

Constitutional Law: Double Jeopardy: Proof. Neither the Double Jeopardy Clause of U.S. Const. amend. V nor the language of Neb. Const. art. I, § 12, prohibits a subsequent prosecution where all the elements of the offense sought to be later prosecuted were not required to be proved in securing a conviction under the first prosecution.

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.

Don Stenberg, Attorney General, and Delores Coe-Barbee for appellee.

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

PER CURIAM.

Defendant-appellant, Jonathan W. Lovejoy, was adjudged guilty of third-offense driving while under the influence, a violation of Neb. Rev. Stat. § 39-669.07 (Cum. Supp. 1990). He was later, in a subsequent proceeding arising out of the same driving incident, adjudged guilty of operating a motor vehicle during the period his operator's license had been revoked, also a violation of § 39-669.07. In attacking the revocation conviction, Lovejoy asserts that the district court erred in overruling his plea in bar, which he denominated as a motion to dismiss. We affirm.

Lovejoy contends that as the revocation conviction resulted from a prosecution conducted after the one in which he was tried for the operating offense, the subsequent prosecution violates U.S. Const. amend. V, which, in relevant part, reads, "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb," made applicable to the several states by the Due Process Clause of U.S. Const. amend. XIV. *Illinois v. Vitale*, 447 U.S. 410, 100 S. Ct. 2260, 65 L. Ed. 2d 228

(1980). He also asserts the subsequent prosecution offends Neb. Const. art. I, § 12, which provides that no "person shall . . . be twice put in jeopardy for the same offense."

This appeal is controlled by our recent decisions in *State v. Cribbs, ante* p. 687, 484 N.W.2d 84 (1992), and *State v. Woodfork*, 239 Neb. 720, 478 N.W.2d 248 (1991), which ruled that the Double Jeopardy Clause of U.S. Const. amend. V prohibits a subsequent prosecution only where, in securing the first conviction, all the elements of the offense sought to be later prosecuted were necessarily proved in the first prosecution. See, also, *United States v. Felix*, ____ U.S. ____, 112 S. Ct. 1377, 118 L. Ed. 2d 25 (1992) (reiterating that mere overlap in proof between two prosecutions does not establish a double jeopardy violation). We now adopt the same analysis and reach the same conclusion with respect to the Double Jeopardy Clause contained in Neb. Const. art. I, § 12, as we did with respect to the Double Jeopardy Clause of U.S. Const. amend. V.

In order to prove that one was driving under the influence, the State must, in the words of § 39-669.07(1), establish that the accused was

> operat[ing] or . . . in the actual physical control of any motor vehicle:
>
> (a) While under the influence of alcoholic liquor or of any drug;
>
> (b) When such person has a concentration of ten-hundredths of one gram or more by weight of alcohol per one hundred milliliters of his or her blood;
>
> (c) When such person has a concentration of ten-hundredths of one gram or more by weight of alcohol per two hundred ten liters of his or her breath; or
>
> (d) When such person has a concentration of ten-hundredths of one gram or more by weight of alcohol per one hundred milliliters of his or her urine.

On the other hand, in order to establish that one was driving while his or her operator's license was revoked, the State must prove, in the words of § 39-669.07(5), that the accused was "operating a motor vehicle on the highways or streets of this state while his or her operator's license has been revoked

pursuant to subdivision (2)(c) of this section . . . ." Subdivision (2)(c) provides that one convicted two or more times within a 10-year period of driving while under the influence shall have his or her operator's license revoked for a period of 15 years.

It is obvious from the text of § 39-669.07 that in securing the earlier conviction for driving while under the influence, the State was required to prove not only that Lovejoy was either driving or had actual physical control of a motor vehicle but in addition that he was either under the influence of alcohol or drugs or had more than the proscribed concentration of alcohol in his blood, breath, or urine. Driving under a revoked license is not an element of the offense of driving while under the influence of alcohol or drugs. Nor is the use of alcohol or drugs an element of the offense of driving while one's operator's license is revoked. Thus, the State was not required to prove in the second prosecution (driving while his operator's license had been revoked) all the elements needed to succeed in the first prosecution (driving while under the influence).

Accordingly, the district court did not err in overruling Lovejoy's plea in bar.

AFFIRMED.

CAPORALE, J., dissenting.

I adhere to the views expressed in my dissent in *State v. Cribbs, ante* p. 687, 484 N.W.2d 84 (1992), and Judge Boslaugh's dissent in *State v. Woodfork*, 239 Neb. 720, 478 N.W.2d 248 (1991), in which I joined. Having expressed those views, I do not intend to continue to reiterate them as dissents in the future.

BOSLAUGH, J., joins in this dissent.

GARY KRAMER, APPELLANT, V. ALLEN DENOYER, DOING BUSINESS AS D & H SERVICE, APPELLEE.

484 N.W.2d 447

Filed May 29, 1992. No. S-91-547.

1. **Workers' Compensation: Appeal and Error.** An appellate court may modify, reverse, or set aside the Workers' Compensation Court's decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.
2. **Workers' Compensation.** Employment of farm or ranch laborers is declared not to be hazardous occupations and is not within the provisions of the compensation act. Neb. Rev. Stat. § 48-106(2) (Reissue 1988).
3. _____. Where an employee is transported from an exempt employment situation to his or her covered employment site in employer-controlled or employer-supplied transportation, an injury during that journey arises out of and in the course of the covered employment.

Appeal from the Nebraska Workers' Compensation Court. Reversed and remanded for further proceedings.

Earl D. Ahlschwede, of Mayer, Burns & Ahlschwede, for appellant.

Walter E. Zink II, of Baylor, Evnen, Curtiss, Grimit & Witt, for appellee.

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

PER CURIAM.

Plaintiff appeals from a decision of the Workers' Compensation Court which held that defendant was an employer of farm or ranch labor and therefore exempt from coverage under the compensation act. The court ordered the plaintiff's claim dismissed. Plaintiff assigns as error this finding and the order of dismissal. We reverse.

Pursuant to Neb. Rev. Stat. § 48-185 (Supp. 1991), an appellate court may modify, reverse, or set aside the Workers' Compensation Court's decision only when

> (1) the compensation court acted without or in excess of its powers, (2) the judgment, order, or award was procured

> by fraud, (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award, or (4) the findings of fact by the compensation court do not support the order or award.

Kraft v. Paul Reed Constr. & Supply, 239 Neb. 257, 475 N.W.2d 513 (1991).

The plaintiff-appellant, Gary Kramer, was employed by Allen DeNoyer, doing business as D & H Service, the defendant-appellee, from the summer of 1989 to January 20, 1990. DeNoyer owned and operated an automobile service station in North Loup, Nebraska, as well as two hog breeding and feeding operations, one north and one southwest of North Loup. Each hog operation consisted of 50 to 75 hogs, and the animals were sold either as breeding stock or as feeders.

Kramer would work from 8 a.m. to 6 p.m., either at the service station pumping gas, doing service work, or running errands, or at the two farms doing chores such as feeding and watering the livestock, cleaning pens, fixing fence, or whatever was necessary. The record does not disclose what percentage of his time Kramer spent at the service station as compared to the farms.

On January 20, 1990, after performing some general tasks at the gas station, Kramer, using a Ford pickup truck furnished him by his employer, drove to the north farm to do chores. After finishing his work there, Kramer drove to the southwest operation and completed whatever chores were necessary there. He then intended to return to town to work at the service station, but discovered that his vehicle was stuck in the snow on the farm. Kramer testified that "my pickup got stuck. I got the — scooped some of the snow away, tried to make it back up the hill. I couldn't make it, so I went for help." While walking on the shoulder of the highway, in search of a phone to call for help, Kramer slipped on the snow and ice and fell, injuring his leg.

The sole issue in this case is whether the plaintiff was covered under the Workers' Compensation Act. Neb. Rev. Stat. § 48-106(2) (Reissue 1988) provides in part as follows: "The following are declared not to be hazardous occupations and not within the provisions of the Nebraska Workers' Compensation

Act: Employers of household domestic servants and employers of farm or ranch laborers."

The compensation court in its order of dismissal, after reciting the facts describing the hog operations, then made the following findings:

> Did the above described hog breeding operation constitute a farming operation within the meaning of Section 48-106? We hold that it did and we find that the defendant was an "employer of farm or ranch laborers" in connection with the hog breeding operation. It follows that the said activity or operation, in which the plaintiff was engaged at the time of said accident and injury, was exempt from the coverage of the Workers' Compensation Law.

We assume without deciding that the hog breeding operation was a farming operation and that when an employee was performing duties there, DeNoyer was an " 'employer of farm or ranch laborers.' " However, we find that conclusion irrelevant to a determination of this case for the reason that undisputedly, Kramer had concluded those farm labors and was in the process of returning to the service station, as required by that employment.

This court first adopted the "employer-supplied transportation" rule to workers' compensation cases in *Schademann v. Casey*, 194 Neb. 149, 231 N.W.2d 116 (1975). We said,

> [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.

Id. at 156-57, 231 N.W.2d at 122.

In *Butt v. City Wide Rock Exc. Co.*, 204 Neb. 126, 281 N.W.2d 406 (1979), an employee was injured while driving the employer's truck from the employee's home to the employer's shop. This court upheld the award of benefits, stating:

> The general rule is that an injury sustained by an employee while going to and from his work does not arise out of and in the course of his employment. *Acton v. Wymore School Dist. No. 114*, 172 Neb. 609, 111 N.W.2d 368. However, where transportation to the place of work is furnished by the employer and the injury occurs while the workman is being transported in a vehicle under the control of the employer, the injury may arise out of and in the course of the employment. *Schademann v. Casey*, 194 Neb. 149, 231 N.W.2d 116.

Butt, 204 Neb. at 127, 281 N.W.2d at 407.

The same rule was applied in *Kopfman v. Freedom Drilling Co.*, 220 Neb. 323, 370 N.W.2d 89 (1985).

> In that situation we conclude that transportation 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.

Id. at 327, 370 N.W.2d at 92.

In *Millard v. Hyplains Dressed Beef*, 237 Neb. 907, 468 N.W.2d 124 (1991), we affirmed a summary judgment in favor of the employer which was defending a suit for damages at common law brought by personal representatives of deceased employees. In holding that the estates could not maintain wrongful death actions because the Nebraska Workers' Compensation Act provided the exclusive remedy, the court concluded 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." *Id.* at 911, 468 N.W.2d at 127.

DeNoyer supplied Kramer with a vehicle for transportation of Kramer in conjunction with Kramer's employment. At the time of his injury, Kramer had completed his chores at the hog operations and was traveling to the service station. In accordance with *Schademann v. Casey, supra*, Kramer's return trip to the station was within the scope of his employment there.

The fact that the injury occurred while Kramer was seeking assistance, rather than actually driving the truck, is immaterial because Kramer was injured during a trip directly involving a vehicle supplied by his employer for transportation in conjunction with his employment. His activities in seeking help were directly related to using the mode of transportation furnished.

One can distinguish this case in the sense that the previously cited cases involved either transportation from home to employment covered by the Workers' Compensation Act or transportation between two employment tasks that were both covered by the act. In the case before us, the employee had just finished an activity exempted from the application of the Workers' Compensation Act and was on his way to employment that is covered by the act. However, this case is analogous to cases which concern employees who are using employer-supplied transportation to travel from their residences to the worksite, since they are also transferred in employer-supplied transportation from a noncovered situation into a covered one. Therefore, we hold that where an employee is transported from an exempt employment situation to his or her covered employment site in employer-controlled or employer-supplied transportation, an injury during that journey arises out of and in the course of the covered employment.

The finding of the compensation court that the "activity or operation, in which the plaintiff was engaged at the time of said accident and injury, was exempt from the coverage of the Workers' Compensation Law" is not supported by sufficient competent evidence and is clearly erroneous.

The judgment is reversed, and the cause is remanded for further proceedings consistent with this opinion. The request for attorney fees is denied.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

BOSLAUGH, J., dissenting.

I dissent from that part of the majority opinion which holds that whenever an employee is transported from an exempt employment situation to a covered employment site in

employer-controlled or employer-supplied transportation, an injury during that journey always automatically arises out of and in the course of the covered employment.

The majority opinion concludes that because the plaintiff had completed his duties at the farm, which was not covered employment, and was in the process of returning to his duties at the service station, which was covered employment, his injury was covered under the Workers' Compensation Act because the defendant supplied the plaintiff with a vehicle for transportation in conjunction with his employment. However, the vehicle supplied by the defendant in this case was used by the plaintiff in conjunction with his duties at both the farm and the service station.

Because the plaintiff had completed his chores at the hog farm and was returning to the service station (in the vehicle supplied by the defendant for use in conjunction with the plaintiff's duties at the farm as well as the service station), the return trip to the service station was not within the scope of his employment at the station.

> Where an employee leaves the place where his duties are to be performed or where his service requires his presence to engage in other objectives, not incident to his employment, the relation of employee and employer does not exist until he returns to a place where, by the terms of his employment, he is required to perform services.

Solheim v. Hastings Housing Co., 151 Neb. 264, 276, 37 N.W.2d 212, 219 (1949). See, also, *Gibb v. Highway G.M.C. Sales & Service Corp.*, 178 Neb. 127, 132 N.W.2d 297 (1964); *McDuffee v. Seiler Surgical Co., Inc.*, 172 Neb. 325, 109 N.W.2d 384 (1961); *Luke v. St. Paul Mercury Indemnity Co.*, 140 Neb. 557, 300 N.W. 577 (1941).

In *Solheim*, the plaintiff, who was employed by both the Hastings Housing Company and the Kearney Construction Company as the manager of construction, was injured while returning to Hastings from a trip to Kearney, where he had traveled to perform duties relating to his employment as construction manager of the Kearney Construction Company. There were no duties relating to the plaintiff's employment as construction manager of the Hastings Housing Company

which required the plaintiff to travel to Kearney. This court found that while the plaintiff was on the trip from Hastings to Kearney and back, he was not performing duties relating to the Hastings Housing Company such as to bring him within the scope of his employment with that company and that the plaintiff had no basis for a claim against the Hastings Housing Company.

In the present case, the plaintiff testified that when he was at the southwest hog farm he was doing chores and that he was not performing service station activities. Accordingly, the rule set forth in the *Solheim* decision applies. The trip *to the farm and back* was required by his noncovered employment. Although the plaintiff was driving a vehicle supplied by his employer, the plaintiff had not returned to a place where by the terms of his employment he was required to perform services related to his job at the service station.

The decision of the compensation court should have been affirmed.

STATE OF NEBRASKA, APPELLEE, V. FLAVIO CANIZALES, APPELLANT.

484 N.W.2d 446

Filed May 29, 1992. No. S-91-582.

Costs: Parties. Generally, a trial court may award and tax costs and apportion the same between the parties on the same or adverse sides as in its discretion it may think right and equitable, but costs may not be taxed against persons who are not parties to the litigation.

Appeal from the District Court for Hall County: WILLIAM H. RILEY, Judge. Reversed and remanded with directions.

Martin G. Cahill, Deputy Hall County Public Defender, for appellant.

Don Stenberg, Attorney General, and Mark D. Starr for appellee.

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

BOSLAUGH, J.

The defendant, Flavio Canizales, was charged with attempted second degree murder and use of a weapon to commit a felony. In the trial court the defendant was represented by the public defender.

On November 2, 1990, the trial court authorized the defendant to take discovery depositions. On January 11, 1991, the information was dismissed on the motion of the county attorney. All costs were taxed to the State.

On April 18, 1991, the defendant filed a motion which requested that the trial court determine the "assessment of costs in this matter." On April 30, 1991, the trial court ordered that "said costs are to be paid P.D." From this order the defendant has appealed.

The order of January 11, 1991, taxing the costs to the State was correct. The order of April 30, 1991, retaxing the costs to the "P.D." was erroneous.

Neb. Rev. Stat. § 25-1711 (Reissue 1989) provides in part, "[T]he court may award and tax costs, and apportion the same between *the parties* on the same or adverse sides, as in its discretion it may think right and equitable." (Emphasis supplied.) The statute does not provide that costs may be taxed against persons who are not parties to the litigation.

Ludwig v. Board of County Commissioners, 170 Neb. 600, 103 N.W.2d 838 (1960), held that costs may be taxed only against parties to the litigation. *Ludwig* was an action between "residents, electors, and taxpayers in Sarpy County" and three Sarpy County commissioners who failed to comply with a redistricting statute. The trial court found that the defendant county commissioners had failed to comply with the redistricting statute; however, the trial court taxed the costs of the action to the county. This court held that the trial court was in error in taxing costs to the county because the county was not a party to the action.

In the *Ludwig* case we said:

> Plaintiffs by cross-appeal also assigned and argued that

the trial court erred in finding that defendant commissioners acted in good faith, and that the trial court erred in taxing costs to the county. We agree. The costs should have been all taxed to defendants Schram, Kostal, and Krist, who were county commissioners on December 29, 1958, and who then failed and refused to comply with the statute, as they were required to do. The county was not a party in this action. We have been cited no authority, and upon diligent search have found none, which could justify taxing costs to the county, which was not a party to the litigation.

In that connection, section 25-1711, R. R. S. 1943, provides: "In other actions the court may award and tax costs, and apportion the same between the parties on the same or adverse sides, as in its discretion it may think right and equitable." It deals solely with parties in the action. Also, section 25-1933, R. R. S. 1943, deals solely with such parties, and provides: "When a judgment, decree or final order is reversed, vacated or modified, the court may render judgment for all costs against the appellee or appellees or some of them, or may direct that each party pay his own costs or apportion the costs among parties or direct that judgment for costs abide the event of a new trial as, in its discretion, the equities of the cause may require." *Ludwig*, 170 Neb. at 619, 103 N.W.2d at 850.

The judgment is reversed and the cause remanded with directions to tax all costs in this matter to the State.

REVERSED AND REMANDED WITH DIRECTIONS.

HAROLD LAMONT OTEY, APPELLEE AND CROSS-APPELLANT, V. STATE OF NEBRASKA ET AL., APPELLANTS AND CROSS-APPELLEES.

485 N.W.2d 153

Filed May 29, 1992. No. S-91-762.

1. **Equity: Courts: Evidence: Appeal and Error.** In all appeals from the district court in suits in equity in which review of some or all of the findings of fact of the

district court is asked by the appellant, it shall be the duty of the Court of Appeals or the Supreme Court to retry the issue or issues of fact involved in the finding or findings of fact complained of upon the evidence preserved in the bill of exceptions and, upon trial de novo of such question or questions of fact, reach an independent conclusion as to what finding or findings are required under the pleadings and all the evidence without reference to the conclusion reached in the district court or the fact that there may be some evidence in support thereof.

2. **Actions: Injunction: Equity.** An action for injunction sounds in equity.
3. **Judgments: Appeal and Error.** Regarding a question of law, an appellate court has an obligation to reach a conclusion independent of that of the trial court in a judgment under review.
4. **Constitutional Law: Jurisdiction: Death Penalty: Board of Pardons.** In Nebraska, as a matter of law, the judicial branch of government has no jurisdiction to review the granting or denial of clemency in a death sentence case by the Board of Pardons.
5. **Constitutional Law: Jurisdiction: Board of Pardons.** The Governor, Attorney General, and Secretary of State, sitting as a board, shall have power to remit fines and forfeitures and to grant respites, reprieves, pardons, or commutations in all cases of conviction for offenses against the laws of the state, except treason and cases of impeachment.
6. **Constitutional Law: Jurisdiction.** The powers of the government of this state are divided into three distinct departments, the legislative, executive, and judicial, and no person or collection of persons being one of these departments shall exercise any power properly belonging to either of the others, except as otherwise expressly directed or permitted. This language prohibits one branch of government from encroaching on the duties and prerogatives of the others or from improperly delegating its own duties and prerogatives.
7. **Constitutional Law: Jurisdiction: Board of Pardons.** The judicial branch has no authority to question the qualifications of the members of the Board of Pardons so long as they are the duly elected, qualified, and acting Governor, Secretary of State, and Attorney General of Nebraska.
8. _____: _____: _____. Article IV, § 13, of the Nebraska Constitution entrusts the clemency power exclusively in the executive branch of government. Accordingly, the judicial branch of government may not interfere with the Board of Pardons' exercise of that power.
9. **Jurisdiction: Death Penalty: Supreme Court: Board of Pardons.** Nebraska statutes place authority to suspend the execution of a death sentence in the Nebraska Supreme Court or one of its judges and authority to commute a death sentence in the Board of Pardons.
10. **Jurisdiction: Courts: Death Penalty.** The district court originally imposing the death sentence may suspend a death sentence only in a case in which the convict is found to be mentally incompetent or pregnant.
11. **Injunction: Death Penalty: Board of Pardons.** An injunction is an extraordinary remedy available in the absence of an adequate remedy at law and where there is a real and imminent danger of irreparable injury. Unless it can be shown that reasonable grounds exist for apprehending that absent the injunction

the actions will be done, the injunction will be denied. The Board of Pardons may set the time and date of execution only when it denies an application for the exercise of pardon authority.

12. **Board of Pardons: Due Process.** The exercise or nonexercise of a discretionary power to grant clemency is not subject to ordinary due process requirements.
13. **Jurisdiction: Courts: Board of Pardons: Probation and Parole.** Unlike probation, pardon and commutation decisions have not traditionally been the business of courts; as such, they are rarely, if ever, appropriate subjects for judicial review.
14. **Constitutional Law: States.** A state creates a protected liberty interest through the use of explicitly mandatory language in connection with the establishment of specified substantive predicates to limit discretion.
15. **Board of Pardons: Death Penalty.** Whenever an application for the exercise of the pardon authority is filed with the secretary of the Board of Pardons by a committed offender who is under a sentence of death, the sentence shall not be carried out until the board rules upon such application. If the board denies the relief requested it may set the time and date of execution and refuse to accept for filing further applications from such offender.
16. **Constitutional Law: Board of Pardons: Sentences.** There are no provisions in Nebraska's Constitution or in its statutes that create a liberty interest in commutation hearings other than the right to file an application for commutation.
17. **Board of Pardons: Sentences.** The Nebraska Board of Pardons has the unfettered discretion to grant or deny a commutation of a lawfully imposed sentence for any reason or for no reason at all.
18. **Trial: Board of Pardons: Waiver: Appeal and Error.** In a legal proceeding, when a litigant makes an objection and then withdraws it, upon appeal, the litigant will not be heard to complain of error in that regard. There is no reason why this procedural bar should not apply to commutation hearings.
19. **Board of Pardons: Probation and Parole.** The Board of Parole is within the Board of Pardons for administrative purposes only.
20. **Constitutional Law: Board of Pardons: Death Penalty: Probation and Parole.** The constitutional prerogative of the Board of Parole to advise the Board of Pardons on the merits of an application for commutation of an offender's death sentence does not give the offender a right to require the Board of Parole to make a recommendation to the Board of Pardons.
21. **Pleadings.** The court may, either before or after judgment, in furtherance of justice, and on such terms as may be proper, permit a party to amend any pleading, process, or proceeding, by inserting other allegations material to the case.
22. _____. The decision to grant or deny an amendment to a pleading rests in the discretion of the court.
23. **Public Meetings: Notice: Waiver: Time.** Any person who has notice of a meeting and attends the meeting should be, and is, required to object specifically to the lack of public notice at the meeting, or the person will be held to have waived his right to object on that ground at a later date. A timely objection will permit the

public body to remedy its mistake promptly and defer formal action until the required public notice can be given.

24. **Rules of Evidence.** Relevant evidence may be excluded by a trial court if its probative value is substantially outweighed by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

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

Don Stenberg, Attorney General, J. Kirk Brown, and Sharon M. Lindgren, Special Assistant Attorney General, for appellants.

James R. Mowbray and Dorothy Walker, of Mowbray & Walker, P.C., and Shawn D. Renner, of Cline, Williams, Wright, Johnson & Oldfather, for appellee.

BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and FAHRNBRUCH, JJ., and HAMILTON and ICENOGLE, D. JJ.

PER CURIAM.

For reasons hereinafter set forth, a district court order enjoining the enforcement of Harold Lamont Otey's death sentence and requiring a new commutation hearing before the Nebraska Board of Pardons is reversed, and the cause is remanded to the district court with directions to dismiss Otey's petition.

Otey's petition to stay his execution was filed in the district court for Lancaster County after the Nebraska Board of Pardons refused to commute his death sentence to life imprisonment.

Enjoined by the district court from carrying out Otey's death sentence were the State of Nebraska; the Nebraska Board of Pardons; Board of Pardons members Governor E. Benjamin Nelson, Secretary of State Allen Beermann, and Attorney General Donald B. Stenberg; and Nebraska State Penitentiary Warden Frank Hopkins, who by virtue of his office is designated as executioner under Neb. Rev. Stat. § 29-2544 (Reissue 1989). Demurrers to Otey's petition by defendants Harold Clarke, director of the Nebraska Department of Correctional Services; Bob Houston, deputy warden of the

Nebraska State Penitentiary; and John Doe, real name unknown, appointed by Hopkins as executioner of the State of Nebraska, were sustained, and those defendants were dismissed from Otey's lawsuit.

The enjoined defendants timely filed their appeal with this court. The record reflects that Otey was convicted in 1978 of first degree murder for the slaying of Jane McManus while in the perpetration of a first degree sexual assault. The district court for Douglas County sentenced Otey to death. After numerous unsuccessful appeals by Otey in state and federal courts, this court, on March 19, 1991, issued Otey's death warrant, which carried an execution date of June 10, 1991. See *State v. Otey*, 236 Neb. 915, 464 N.W.2d 352 (1991) (history of Otey's appeals), *cert. denied* ____ U.S. ____, 111 S. Ct. 2279, 115 L. Ed. 2d 965 (June 6, 1991). When Otey filed an application for commutation with the Board of Pardons, his execution was automatically stayed. See Neb. Rev. Stat. § 83-1,132 (Reissue 1987).

In a May 24, 1991, letter to Governor Nelson, Otey's attorney, Victor Covalt, stated in part, "I would be happy to meet with you or any of your staff at any time *to discuss Mr. Otey or the Pardons Board procedure* ***in this unusual case***." (Emphasis supplied.) In a letter to Beermann dated May 30, 1991, Covalt wrote, "I would also appreciate some arrangement for filing [Otey's commutation] Application on Sunday, June 9, 1991." Following receipt of these letters, a June 6, 1991, meeting of the Board of Pardons was set. The meeting was called at the request of Stenberg to take testimony and discuss procedures for processing death penalty commutation applications. Taking active roles at the hearing were Covalt, Board of Parole Chairman Ronald Bartee, Clarke, and Michael Jacobs, the McManus family attorney. Larry Beaty, the Board of Pardons administrative assistant, reported that notice of the June 6 meeting had been publicized in the Midlands Business Journal of Omaha and the Lincoln Journal-Star newspaper. Also present were Nebraska's Governor, Secretary of State, and Attorney General, who comprise the Board of Pardons. See, Neb. Const. art. IV, § 13; Neb. Rev. Stat. § 83-1,126 (Reissue 1987). Although the stated

purpose of the meeting was to discuss capital cases in general, board members also discussed the likelihood of an imminent filing of a commutation application by Otey, as well as procedures which would apply specifically in Otey's case.

Covalt, in his presentation on behalf of Otey, referred specifically to Otey's case and thanked

> the Board for taking this time to look at procedures *and give us some guidance on how to do this* because it's our job to bring it forward to you in the best manner possible and so it's simply in the request, my statement with requesting that procedure be established on capital cases, being far different from the misdemeanor cases often heard, that the public, Mr. Jacobs, myself, Mr. Otey, all have a fair opportunity to make a full discussion of this case so you can make a full and well-advised opinion.

(Emphasis supplied.)

BOARD-APPROVED PROCEDURES

During the June 6 meeting, the Board of Pardons voted to (1) allow the filing of a commutation application at any time before expiration of the deadline, rather than to allow filings only during office hours; (2) consider Otey's application, if filed, at the next regularly scheduled meeting on June 28, 1991; (3) consider the application after a hearing that would allow for unlimited time for the attorneys for the applicant, for the State, and for family members or their representatives, but limiting all other persons to 5-minute presentations; and (4) allow Otey to provide a statement to the Board of Pardons, rather than to appear in person. At the June 6 hearing, Bartee assured the Board of Pardons that an investigative report by the Nebraska Board of Parole regarding Otey could be prepared in time for a June 28 commutation hearing. Covalt requested that the Board of Pardons require a "full investigation."

It is to be noted that in fixing the procedures for death sentence commutations, the Board of Pardons, in substance, granted the requests in Covalt's letters of May 24 and 30. The Board of Pardons made arrangements for Otey's commutation application to be filed at any time before expiration of the deadline, rather than to allow filings only during office hours.

The board also decided to allow Covalt unlimited time to present Otey's plea and to allow Otey an opportunity to present a statement to the board. As Covalt requested, the procedure provided by the Board of Pardons afforded additional guidance as to the procedures to be followed in Otey's commutation hearing.

The following day, June 7, 1991, Otey filed an application with the Board of Pardons seeking to have his death sentence commuted to life imprisonment. This resulted in an automatic stay of execution until a ruling by the pardons board on Otey's application. See § 83-1,132.

A few days after the June 6 meeting, Bartee spoke with Beermann to clarify the role of the Board of Parole in death penalty commutation applications. By deposition, Bartee testified at the district court trial that Beermann told him that the Board of Parole was "strictly to interview Mr. Otey; that we were not to give a recommendation." Bartee said that he was instructed to conduct the interview by asking a list of questions provided by Otey's attorney.

THE COMMUTATION HEARING

Otey's public commutation hearing was held on June 28 and 29, 1991. Notice of the hearing was publicized in the Midlands Business Journal of Omaha and the Lincoln Journal-Star newspaper. Additionally, news releases giving notice of the commutation hearing were circulated. At the hearing, the Board of Parole's investigative report was received into evidence. Governor Nelson stated that the hearing would be informal and that the rules of evidence would not apply. He noted that it was not the task of an executive board of clemency to determine legal guilt or innocence nor to determine the merits of the death penalty as a sentencing alternative in the courts.

In his opening statement, Otey's attorney, Covalt, provided details of Otey's background and stated his own belief that Otey was now a "different man than the man fourteen years ago." Covalt announced that "we are accepting the guilt finding, and we are not arguing with that." Covalt basically presented his views on why Otey should be granted clemency. Appearing on

behalf of the State of Nebraska were two Assistant Attorneys General, Sharon Lindgren and J. Kirk Brown. Before Lindgren's opening statement, Stenberg stated that although his Attorney General's office is responsible for handling criminal appeals, including death penalty matters, he had not instructed Lindgren and Brown as to what opinions they should or should not offer at Otey's commutation hearing.

Included in the materials presented to the Board of Pardons were Otey's videotaped statement to the Board of Pardons and statements of numerous witnesses in favor of Otey's commutation application. Before the beginning of testimony in opposition to the application, Otey's counsel *made and then withdrew Otey's objection* to the "unfairness" of appearing in a proceeding before a state board in which he was also being opposed by counsel for the State. Stenberg noted that the composition of the Board of Pardons, which includes the Attorney General, was decided by the people of Nebraska in their Constitution. He also stated that "[i]t was obviously necessary for me to make an initial decision that . . . the State should be represented and the general direction needed to be given to the staff which is what I have done. The presentation they have put together I have not heard." Lindgren and Brown each then made presentations to the board which included photographs of the crime scene and Otey's audiotape confession to police. A substantial number of other witnesses testified in opposition to Otey's application for commutation.

Approximately 1 hour after the close of all the evidence, the Board of Pardons voted 2 to 1 to deny Otey's application for commutation. Beermann voted in favor of commutation. The board then set Otey's execution for July 1, 1991, and, pursuant to § 83-1,132, the Board of Pardons stated that it does "refuse to accept for filing further applications [for commutation] from the applicant, Harold Lamont Otey." We take judicial notice that on June 30 the U.S. Court of Appeals for the Eighth Circuit stayed Otey's execution until August 5, 1991. Thus, Otey had ample time to request that the Supreme Court or one of its judges stay Otey's Board of Pardons death warrant. See § 29-2544 and Neb. Rev. Stat. § 29-2545 (Reissue 1989).

DISTRICT COURT ACTION

On July 1, 1991, Otey filed in the district court for Lancaster County an "Application for Writ of Mandamus and/or Request for Temporary and Permanent Injunction." Otey simultaneously filed a "Motion for Temporary Restraining Order" prohibiting his execution. That motion was granted by the court on July 2. At that time, neither the State of Nebraska nor the Board of Pardons had been named as a defendant. Defendants Nelson, Beermann, Stenberg, Clarke, and Hopkins each filed demurrers to the original petition, challenging the district court's jurisdiction over their persons and the subject matter and alleging that Otey failed to state facts sufficient to constitute a cause of action. These demurrers, other than the one filed by Clarke, were overruled as to Otey's first three causes of action.

The State of Nebraska and the Board of Pardons were added as defendants in an amended petition filed July 5, 1991. The transcript reflects that the trial court, apparently on its own motion, considered that the demurrers filed on behalf of the defendants in response to Otey's original petition were deemed to apply to the State of Nebraska and the Board of Pardons as to Otey's amended petition. The demurrers were then overruled as to Otey's first three causes of action.

OTEY'S AMENDED PETITION

In what Otey called the first cause of action of his amended petition, Otey alleged that Stenberg had prejudged Otey's commutation application and had acted as both a prosecutor and arbiter of Otey's claims, thereby violating Otey's rights to a "fair hearing," as guaranteed by the 8th and 14th Amendments to the U.S. Constitution and by article I, §§ 3 and 9, of the Nebraska Constitution.

In what Otey called his second cause of action, Otey alleged that the direction to the Board of Parole not to make a recommendation to the Board of Pardons regarding commutation deprived him of his rights under the Due Process and Equal Protection Clauses of the 14th Amendment to the U.S. Constitution and under article I, §§ 3 and 26, and article IV, § 13, of the Nebraska Constitution.

In what Otey called his third cause of action, he alleged that the direction by the Board of Pardons to the Board of Parole not to make a recommendation on the merits of Otey's commutation application deprived the Board of Parole of its constitutionally granted prerogative under article IV, § 13, of the Nebraska Constitution.

Demurrers filed in response to Otey's original petition were also deemed by the district court to apply to Otey's amended petition. The demurrers were sustained as to Otey's fourth cause of action, which alleged a violation of Nebraska's public meetings law, and that cause of action was dismissed by the district court.

OTEY'S PRAYER

In the prayer of his amended petition, Otey asked, inter alia, for a temporary restraining order and for a temporary and a permanent injunction "prohibiting Defendants from killing Plaintiff until such time as he has received a new commutation hearing before a fair and unbiased board of clemency, complete with a recommendation on the merits of his commutation application by the Board of Parole, and further injunctive relief mandating such a hearing."

FOUR DEFENDANTS' ANSWERS

In their respective answers to the amended petition, Nelson, Beermann, Stenberg, and Hopkins, inter alia, (1) challenged the district court's jurisdiction over the subject matter of Otey's amended petition; (2) claimed that Otey had waived any right to object to the composition of the Nebraska Board of Pardons and to request that one or more of the members of the board be disqualified; (3) claimed that by failing to object to the report of the Nebraska Board of Parole and by specifically failing to object to the report's failure to contain a recommendation at any time prior to the filing of the district court lawsuit, Otey had waived any challenges that he might have to said report and to its failure to contain a recommendation; (4) claimed that prior to filing his application for commutation Otey did not object to any members of the Nebraska Board of Pardons or request that any of the members be disqualified from hearing his application; (5) claimed that Otey made no objection to

Lindgren's participating in the hearing until after she had made an opening statement, (6) claimed that although Otey, at the beginning of Brown's and Lindgren's presentation, objected to their participation at the hearing because they were members of Stenberg's staff, *the objection was later withdrawn by Otey.*

Without explanation in the record, trial was had on Otey's petition, and judgment was entered by the trial court before the State of Nebraska and the Board of Pardons were required to file their answers. Otey's amended petition was filed July 5, 1991. In their brief, the State of Nebraska and the Board of Pardons acknowledge that they were served after the amended petition was filed. Under Neb. Rev. Stat. § 25-821 (Reissue 1989), those two defendants had 30 days after they were served in which to file an answer to Otey's amended petition. Since the amended petition was filed July 5, the State of Nebraska and the Board of Pardons could not have been served earlier than on that date. Because the 30th day fell on Sunday, the State of Nebraska and the Board of Pardons had until August 5 to file their answers. Trial was had on July 24, 1991, and the trial court entered its order including its injunction on July 31.

TRIAL COURT'S FINAL ORDER

In its final order, the district court found it had jurisdiction to enter its injunction pursuant to Neb. Const. art. V, § 9, which grants equity jurisdiction to the district courts. The court stated that it was not reviewing the decision of the Board of Pardons nor the reasons given by members of the board for their decision. On appeal, the appellants, in their first two assignments of error, claim that the district court erred in finding that it had jurisdiction to review the actions of the Board of Pardons and in reviewing the actions of the Board of Pardons, in violation of article II, § 1, of the Nebraska Constitution.

STANDARD OF REVIEW

> In all appeals from the district court in suits in equity in which review of some or all of the findings of fact of the district court is asked by the appellant, it shall be the duty of the Court of Appeals or the Supreme Court to retry the issue or issues of fact involved in the finding or findings of

> fact complained of upon the evidence preserved in the bill of exceptions and, upon trial de novo of such question or questions of fact, reach an independent conclusion as to what finding or findings are required under the pleadings and all the evidence without reference to the conclusion reached in the district court or the fact that there may be some evidence in support thereof.

Neb. Rev. Stat. § 25-1925 (Supp. 1991). See, also, *State v. Nebraska Assn. of Pub. Employees*, 239 Neb. 653, 477 N.W.2d 577 (1991). An action for injunction sounds in equity. *City of Newman Grove v. Primrose, ante* p. 70, 480 N.W.2d 408 (1992). Regarding a question of law, an appellate court has an obligation to reach a conclusion independent of that of the trial court in a judgment under review. *Baker v. St. Paul Fire & Marine Ins. Co., ante* p. 14, 480 N.W.2d 192 (1992).

In Nebraska, as a matter of law, the judicial branch of government has no jurisdiction to review the granting or denial of clemency in a death sentence case by the Board of Pardons. Article IV, § 13, of the Nebraska Constitution states, in part, that "[t]he Governor, Attorney General and Secretary of State, sitting as a board, shall have power to remit fines and forfeitures and to grant respites, reprieves, pardons, or commutations in all cases of conviction for offenses against the laws of the state, except treason and cases of impeachment." We have long held that *the exercise of clemency authority "is not a right given for a consideration to the individual by the legislature, but a free gift from the supreme authority, confided to the chief magistrate, and to be bestowed according to his own discretion."* (Emphasis supplied.) *Pleuler v. The State*, 11 Neb. 547, 575, 10 N.W. 481, 489 (1881). See, also, *Campion v. Gillan*, 79 Neb. 364, 112 N.W. 585 (1907). At the time of that holding, the pardon powers were vested solely in the Governor. They are now vested in the Board of Pardons.

The separation of powers clause found in Neb. Const. art. II, § 1, reads:

> The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons being one of these departments, shall exercise any power

> properly belonging to either of the others, except as [otherwise] expressly directed or permitted.

This language "prohibits one branch of government from encroaching on the duties and prerogatives of the others or from improperly delegating its own duties and prerogatives." *State ex rel. Spire v. Conway*, 238 Neb. 766, 773, 472 N.W.2d 403, 408 (1991).

In *Conway*, we held that article II, § 1, precluded a state senator from simultaneously serving as an assistant professor at a state college. We noted that the Legislature is the sole judge of the qualifications of its members by virtue of Neb. Const. art. III, § 10, and that the Legislature had decided that the senator's position at the college did not prohibit him from taking his seat in the Unicameral. With regard to whether Conway could retain his legislative seat, we stated that the "principle of the separation of powers which is at the heart of this controversy prevents us from hearing a matter the determination of which the Constitution entrusts to another coordinate department, or branch, of government." *Conway*, 238 Neb. at 773, 472 N.W.2d at 408. The judicial branch has no authority to question the qualifications of the members of the Board of Pardons so long as they are the duly elected, qualified, and acting Governor, Secretary of State, and Attorney General of Nebraska. No issue has been raised that any of the board members were not the duly elected, qualified, and acting officials of their respective offices.

Article IV, § 13, of the Nebraska Constitution entrusts the clemency power exclusively in the executive branch of government. Accordingly, the judicial branch of government may not interfere with the Board of Pardons' exercise of that power.

In arguing their assignment of error that the district court erred in granting injunctive relief, the appellants challenge the authority of the district court for Lancaster County to enjoin the enforcement of a criminal conviction and sentence imposed by another district court, which conviction and sentence have been affirmed by this court. The defendants also argue that there was no real or imminent threat of execution to Otey on July 31, 1991, the date of the district court's final injunction.

This was because the three outstanding death warrants, one from this court, one issued by the Board of Pardons, and one of which we take judicial notice issued by the district court for Douglas County, had expired on or before July 1, 1991. We have found no statutory authority that would permit an executioner to carry out a death sentence at any time not set forth in a death warrant. Moreover, the U.S. Court of Appeals had, on June 30, enjoined Otey's execution. The federal appeals court's injunction was entered before the district court for Lancaster County had entered its temporary restraining order on July 2. The federal court's injunctive order was still in effect on the dates the district court for Lancaster County entered its other subsequent injunctive orders.

Nebraska statutes place authority to suspend the execution of a death sentence in the Nebraska Supreme Court or one of its judges and authority to commute a death sentence in the Board of Pardons. §§ 29-2544 and 29-2545. The district court originally imposing the death sentence may suspend a death sentence only in a case in which the convict is found to be mentally incompetent or pregnant. Neb. Rev. Stat. §§ 29-2537 and 29-2541 (Reissue 1989). We have found no statutory provision authorizing a nonsentencing district court to stay or suspend a death sentence imposed by another district court. We take judicial notice that not only did the Board of Pardons, after it denied Otey clemency, set the time and date for Otey's execution, but that it issued its warrant to the warden of the Nebraska State Penitentiary to carry out Otey's execution. We further take judicial notice that the Board of Pardons applied for and received from the clerk of the Douglas County District Court a death warrant directed to the warden to carry out Otey's execution. Since no issue as to Otey's competency was raised, any request for a stay of execution should have been made to Nebraska's Supreme Court or one of its members. §§ 29-2544 and 29-2545.

An injunction is an extraordinary remedy available in the absence of an adequate remedy at law and where there is a real and imminent danger of irreparable injury. *Grein v. Board of Education*, 216 Neb. 158, 343 N.W.2d 718 (1984). Unless it can be shown that reasonable grounds exist for apprehending that

absent the injunction the actions will be done, the injunction will be denied. *Id.* The Board of Pardons may set the time and date of execution only when it denies an application for the exercise of pardon authority. § 83-1,132. In this case, after denying Otey's commutation application on June 29, the Board of Pardons issued a death warrant which expired at 11:59 p.m. on July 1, the board ordered execution date. The clerk of the district court for Douglas County, at the request of the Board of Pardons, issued a death warrant directing that Otey's execution be carried out at the time set by the Board of Pardons. It too expired at 11:59 p.m., July 1. Once the time for Otey's execution had passed, the death warrants had no validity and the Board of Pardons had no authority to issue a new death warrant without denying a new application for commutation. Besides having no authority to enjoin Otey's execution, there was no reasonable basis on which the district court could find that Otey's execution would take place absent the injunction. Otey's request of the district court for an injunction should have been denied.

DUE PROCESS CLAIMS

Otey claims that his due process rights under the federal and state Constitutions were violated during his commutation proceedings.

In the first three causes of action of his amended petition, Otey basically complains that he was denied due process, i.e., a "fair hearing" under the 8th and 14th Amendments to the U.S. Constitution and under article I, §§ 3 and 9; article I, §§ 3 and 26; and article IV, § 13, of Nebraska's Constitution. Otey made no argument under the Eighth Amendment, and we will not consider whether the Eighth Amendment is applicable here. See *State v. Moss, ante* p. 21, 480 N.W.2d 198 (1992).

With regard to the actions of the Board of Pardons in the exercise of its power to grant commutations, we have held that "[t]he exercise or nonexercise of a discretionary power to grant clemency is not subject to ordinary due process requirements." *Whited v. Bolin*, 210 Neb. 32, 35, 312 N.W.2d 691, 693 (1981) (citing *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 99 S. Ct. 2100, 60 L. Ed. 2d 668 (1979)).

An examination of federal case law in the context of prisoner's rights indicates that a clemency decision of the Nebraska Board of Pardons does not implicate any interest protected by the Due Process Clause. We embrace the principles established in *Greenholtz v. Nebraska Penal Inmates, supra*, and its progeny. In *Greenholtz*, the U.S. Supreme Court held that a reasonable entitlement to due process is not created merely because a state provides for the *possibility* of parole. Rather, the existence of a liberty interest may depend on the wording of the state statutes. *Id.* The Nebraska statute examined in *Greenholtz* specified that an individual *shall* be paroled *unless* release should be deferred for one of four specified reasons. The Court concluded that this language in the statute created a protectable expectancy of parole. *Id.*

Citing *Greenholtz*, the U.S. Supreme Court, in *Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458, 464, 101 S. Ct. 2460, 69 L. Ed. 2d 158 (1981), noted that "[u]nlike probation, pardon and commutation decisions have not traditionally been the business of courts; as such, they are rarely, if ever, appropriate subjects for judicial review." The Connecticut statute in question granted "unfettered discretion" to its pardons board and, "having no definitions, no criteria, and no mandated 'shalls', create[d] no analogous duty or constitutional entitlement." 452 U.S. at 466. The U.S. Supreme Court stated that

> [i]n terms of the Due Process Clause, a Connecticut felon's expectation that a lawfully imposed sentence will be commuted or that he will be pardoned is no more substantial than an inmate's expectation, for example, that he will not be transferred to another prison; it is simply a unilateral hope.

Id. at 465. The U.S. Supreme Court held that the Connecticut statute conferred no rights on its inmates "beyond the right to seek commutation." *Id.* at 467.

In sum, a state creates a protected liberty interest through the use of " 'explicitly mandatory language' " in connection with the establishment of " 'specified substantive predicates' " to limit discretion. *Kentucky Dept. of Corrections v. Thompson*, 490 U.S. 454, 463, 109 S. Ct. 1904, 104 L. Ed. 2d 506 (1989).

See, also, *Dace v. Mickelson*, 816 F.2d 1277 (8th Cir. 1987); *Parker v. Corrothers*, 750 F.2d 653 (8th Cir. 1984).

An examination of the Nebraska Constitution and statutes governing the exercise of pardon authority reveals that, in relevant part, the Board of Pardons "shall":

1. Consult with the Board of Parole concerning applications for the exercise of pardon authority. Neb. Rev. Stat. § 83-1,127(4) (Reissue 1987).

2. Consider an application with or without a hearing by the board at its next regular meeting or within 30 days, whichever is earlier. If a hearing is held, it shall be conducted in an informal manner, but a complete record of the proceedings shall be made and preserved. Neb. Rev. Stat. § 83-1,129(2) (Reissue 1987).

3. After consideration of the application, and after such further investigations as it may deem appropriate, either grant or deny the relief requested, or grant such other relief as may be justified. Neb. Rev. Stat. § 83-1,130(1) (Reissue 1987).

In addition, § 83-1,132 provides that

> [w]henever an application for exercise of the pardon authority is filed with the secretary of the Board of Pardons by a committed offender who is under a sentence of death, the sentence shall not be carried out until the board rules upon such application. If the board denies the relief requested it may set the time and date of execution and refuse to accept for filing further applications from such offender.

Before the June 6, 1991, meeting of the Board of Pardons, the internal policies and procedures of the Board of Pardons were essentially a restatement of these statutes. Because there were virtually no procedures set forth which were specific to death penalty cases, and because no member of the Board of Pardons had ever presided over such a case, the purpose of the June 6 meeting was to promulgate procedures for capital cases.

In accord with federal case law, there are no provisions in Nebraska's Constitution or in its statutes creating a liberty interest in commutation hearings other than the right to file an application for commutation. Nor do the procedures agreed upon by the Board of Pardons at its June 6 meeting create a liberty interest. There are no "substantive predicates" which

limit the Board of Pardons' discretion in granting commutations, i.e., no specific criteria which an applicant must meet to earn a commutation from the Board of Pardons, no conditions which must first be met, no specific conduct which the applicant must have avoided, no guidelines of any kind which must be followed by the board. In short, the Nebraska Board of Pardons has the unfettered discretion to grant or deny a commutation of a lawfully imposed sentence for any reason or for no reason at all.

A review of Nebraska's Constitution, statutes, and procedures reveals that no right has been conferred upon Otey beyond the right to seek a commutation. He was afforded this right. Having followed its own procedures in granting him a hearing, having consulted with the Board of Parole, and having considered Otey's application, the Board of Pardons fulfilled any obligation it had to Otey. Neither the federal nor Nebraska Constitution requires more.

PARTICIPATION OF ASSISTANT ATTORNEYS GENERAL

Although Otey was not entitled to any due process rights at his clemency hearing, we will, nonetheless, examine the district court's finding that Otey was denied a fair hearing through the participation of Assistant Attorneys General Lindgren and Brown, which Otey claims resulted in Attorney General Stenberg acting as both prosecutor and arbiter of Otey's claims.

In his appeal brief, Otey does not argue that Stenberg should have been disqualified from participation at his Board of Pardons hearing. Rather, Otey argues that

> [i]t is the position on the merits of [Otey's] plea taken by Brown and Lindgren, *in the name of the State and on the express orders of the Attorney General*, coupled with the Attorney General's intensive efforts to slant the Pardons Board's procedures to Mr. Otey's disadvantage, that offends due process.

(Emphasis in original.) Brief for appellee at 40.

At his commutation hearing, Otey, in substance, made a similar complaint. He subsequently withdrew the complaint after assurances by Governor Nelson that the Board of Pardons

would not be unduly prejudiced by "adversarial" argument. In a legal proceeding, when a litigant makes an objection and then withdraws it, upon appeal, the litigant will not be heard to complain of error in that regard. See *Chief Indus. v. Hamilton Cty. Bd. of Equal.*, 228 Neb. 275, 422 N.W.2d 324 (1988). There is no reason why this procedural bar should not apply to commutation hearings, assuming arguendo that Otey had any right whatsoever to complain about Lindgren's and Brown's participation in the commutation proceedings.

Again assuming arguendo that Otey had a right to a commutation hearing without the participation of Lindgren and Brown, an issue we need not decide, Otey has not shown that he was prejudiced as a result of their participation. Otey does not complain about the substance of the presentation made by Lindgren and Brown. At oral argument before this court, Otey conceded that the State's presentation before the pardon board contained no false statements. No allegation is made that any evidence or testimony presented by the State could not have been otherwise obtained by the board pursuant to its subpoena power under Neb. Rev. Stat. § 83-1,128 (Cum. Supp. 1990). Because Nebraska's Constitution makes no provision for a replacement for a Board of Pardons member under any circumstance, had Attorney General Stenberg recused himself from the hearing, the resulting 1 to 1 vote of the remaining members of the Board of Pardons would have nonetheless denied Otey commutation of his death sentence.

Otey has not pointed to the commutation proceedings record where he requested that Stenberg disqualify himself as a member of the Board of Pardons. Our examination of that record has failed to disclose any such request. Therefore, Otey was procedurally barred from raising any issue on that point in the district court. See *ConAgra, Inc. v. Cargill, Inc.*, 223 Neb. 92, 388 N.W.2d 458 (1986).

EQUAL PROTECTION

Otey also complained that his federal and state constitutional rights to equal protection of the law were violated by the Board of Pardons' allegedly ordering the Board of Parole not to make a recommendation as to commutation.

The district court found that the direction to the Nebraska Board of Parole not to make a recommendation (1) violated Otey's "right to be treated the same as others similarly situated in connection with his commutation application," apparently in violation of the Equal Protection Clauses of the U.S. and Nebraska Constitutions, and (2) "deprived the Board of Parole of its constitutionally granted prerogative and deprived [Otey] of the benefit of any recommendation the Nebraska Board of Parole may have made." These findings were in error.

The chairperson of the Board of Parole, Bartee, testified in the district court that he could not recall another case in which the Board of Pardons had directed the Board of Parole to not make a recommendation. At the commutation hearing, a transcript of which was introduced at the district trial, Beermann stated that the request was an "unusual step." Apparently it was standard procedure *in past noncapital crime* commutation applications for the Board of Parole to give a recommendation. The record does not support Otey's contention that a request of the Board of Pardons, if any, violated his right to equal protection. Neither Bartee nor Beermann, who have served in their positions for 7 and 21 years, respectively, had ever had experience with a death penalty case. More importantly, Bartee's district court testimony repeatedly reflects that the Board of Parole does not handle commutation applications in death penalty cases or in cases such as Otey's, where an application is submitted to the Board of Pardons by the offender himself. To the following questions, Bartee gave the following answers:

> Q. . . . You have previously testified that Mr. Otey's application was one that he filed just as an individual without previously receiving a Board of Parole recommendation; is that correct?
>
> A. That's correct.
>
> Q. In that situation, was it unusual that the Board of Parole did not make a recommendation?
>
> A. No, it was not.
>
> Q. [I]n that situation, was it contrary to the ordinary practice for the Board of Parole to not make a recommendation on Mr. Otey's commutation appli-

cation?

A. No, it was not.

Q. Would it be correct to say that it would have been unusual for the Board of Parole to have made a recommendation on an application such as Mr. Otey's?

A. That would be correct.

The trial court erred in finding a violation of Otey's "right to be treated the same as others similarly situated." In any event, by the nature and severity of the crimes involved, there is a substantial and rational basis for treating commutations in capital cases differently from commutations in noncapital cases.

Article IV, § 13, of the Nebraska Constitution provides, in part, that "[t]he Board of Parole *may* advise the Governor, Attorney General and Secretary of State on the merits of any application for remission, respite, reprieve, pardon or commutation but such advice shall not be binding on them." (Emphasis supplied.) The Legislature has determined that the Board of Parole is within the Board of Pardons for administrative purposes only and that "[n]othing in this act shall be construed to give the . . . Board of Pardons any authority, power, or responsibility over the [parole] board, its employees, or the exercise of its functions under the provisions of this act." Neb. Rev. Stat. § 83-188 (Reissue 1987). Because there is indeed a constitutional prerogative given to the Board of Parole to advise the Board of Pardons, which prerogative is reinforced by the language of § 83-188, the Board of Parole's acquiescence to the request of Beermann was a discretionary choice on the part of the Board of Parole. Thus, the Board of Pardons could not and did not deprive the Board of Parole of its prerogative to make a recommendation. The Board of Parole could have made a recommendation had it been so inclined regardless of any request or direction by a member of the Board of Pardons or by the Board of Pardons acting in its corporate capacity. The directive to not make a recommendation came from Beermann, not from the Board of Pardons in its corporate capacity. Beermann admitted at the district court trial that he had not consulted with the other two members of the Board of Pardons in making what has been

labeled his "direction."

The constitutional prerogative of the Board of Parole to advise the Board of Pardons on the merits of an application for commutation of an offender's death sentence does not give the offender a right to require the Board of Parole to make a recommendation to the Board of Pardons. The trial court was in error in requiring the Board of Parole to make a recommendation in Otey's case. To show that he was prejudiced by the Board of Parole's failure to make a recommendation, Otey would have to make a showing (1) that but for Beermann's request or direction to Bartee, the Board of Parole, by corporate action, would have made a favorable recommendation for commutation of Otey's death sentence and (2) that the Board of Pardons would have followed that recommendation. There is nothing in the record reflecting that the Board of Parole as a corporate entity would make a favorable recommendation for commutation of Otey's sentence, nor is there anything in the record to show that the Board of Pardons would follow such a recommendation. As previously stated, it was customary for the Board of Parole *not* to make a recommendation when an individual filed an application for commutation. Moreover, by failing to object to the report of the Nebraska Board of Parole and by specifically failing to object to the report's failure to contain a recommendation at any time prior to the filing of the district court lawsuit, Otey waived any challenges he might have had to the Board of Parole report and to its failure to contain a recommendation. He thus was procedurally barred from raising these issues in the district court. See *Chief Indus. v. Hamilton Cty. Bd. of Equal.*, 228 Neb. 275, 422 N.W.2d 324 (1988).

CROSS-APPEAL

PUBLIC MEETINGS ACT

Having found no legal infirmity in the actions of the Board of Pardons or its proceedings, we now address Otey's assignments of error on cross-appeal. Otey claims the district court erred in overruling his motion for leave to file a second amended petition, which would have added a fourth cause of

action alleging that the June 6, 1991, meeting of the Board of Pardons violated Nebraska's public meetings law, Neb. Rev. Stat. § 84-1408 et seq. (Reissue 1987 & Cum. Supp. 1990). The motion to amend was filed July 22, 1991, and denied by the court on July 23, 1991, the day before the trial.

"The court may, either before or after judgment, in furtherance of justice, and on such terms as may be proper, [permit a party to] amend any pleading, process or proceeding, by . . . inserting other allegations material to the case . . . ." Neb. Rev. Stat. § 25-852 (Reissue 1989). The statute is to be liberally construed so as to prevent a failure of justice. *Nebraska Equal Opp. Comm. v. State Emp. Retirement Sys.*, 238 Neb. 470, 471 N.W.2d 398 (1991). Thus, the decision to grant or deny an amendment to a pleading rests in the discretion of the court. *Id.*

In any event, Otey's public meetings law complaint is procedurally barred by this court's prior holdings. Otey's complaint that a published notice did not show that the procedures in connection with Otey's commutation hearing would be considered at the June 6 hearing borders on the frivolous. Otey's counsel, in his letters of May 24 and May 30, asked for a discussion of the procedures to be used in Otey's commutation hearing and for special consideration as to the time for filing Otey's application. The record reflects that Brown gave personal notice of the June 6 meeting to Otey's counsel, Covalt, through a telephone call to Covalt's secretary on May 31 and a letter to Covalt dated the same day. Covalt appeared and participated in the June 6 meeting. He made no objection concerning any deficiency in the public notice as to the agenda. With regard to an alleged violation of the public meetings law, we have said:

> "Any person who has notice of a meeting and attends the meeting should be [and is] required to object specifically to the lack of public notice at the meeting, or be held to have waived his right to object on that ground at a later date. A timely objection will permit the public body to remedy its mistake promptly and defer formal action until the required public notice can be given. . . ."

Witt v. School District No. 70, 202 Neb. 63, 67, 273 N.W.2d 669, 672 (1979) (quoting *Alexander v. School Dist. No. 17*, 197

Neb. 251, 248 N.W.2d 335 (1976)). Having made no objection at the June 6 hearing concerning a lack of sufficient public notice, Otey cannot now complain of a violation of the public meetings law. The record reflects that notice of the June 6 meeting was published in newspapers in Lincoln and Omaha.

Refusal To Allow Attorneys As Witnesses

Otey also claims that the district court erred in refusing to disqualify Brown and Lindgren as attorneys for the State and in precluding their testimony at trial. The district court overruled Otey's motion to disqualify Brown and Lindgren, ruling that "[t]here is not a sufficient showing that [they] are necessary witnesses." For the same reason, the district court refused to allow Brown and Lindgren to testify when called as witnesses for Otey and refused to admit their depositions into evidence. The trial court, after reviewing the deposition testimony of Brown and Lindgren, stated, "I don't believe that that testimony really adds to the record that is already before the Court in the form of the record made before the hearing . . . ."

While conceding that the record is sufficient with regard to other issues, Otey argues that

> the testimony of Mr. Brown and Ms. Lindgren was the best evidence available that (1) Attorney General Stenberg and Mr. Brown orchestrated procedural changes by the Board relating to the expected hearing on Mr. Otey's commutation application and for the purpose of prejudicing Mr. Otey's chance for a commutation; (2) that Attorney General Stenberg directed, knew the substance of, and participated in preparation of the State's presentation in opposition to Mr. Otey's application; and (3) Mr. Brown and Ms. Lindgren were, in fact, acting as State prosecutors in their appearance before the Board of Pardons.

Brief for appellee on cross-appeal at 75.

"[R]elevant, evidence may be excluded [by a trial court] if its probative value is substantially outweighed by . . . considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Neb. Rev. Stat. § 27-403 (Reissue 1989). The depositions of Brown and Lindgren,

received by the court only as offers of proof, contain no evidence that Attorney General Stenberg orchestrated procedural changes for the purpose of prejudicing Otey's chance for a commutation. Lindgren's and Brown's deposition testimony relating to Stenberg's knowledge or participation in the presentation made on behalf of the State at the commutation hearing is cumulative to that already in the record, as is the testimony relating to the role of Brown and Lindgren at the commutation hearing. The trial court properly acted within its discretion in disallowing the testimony of Brown and Lindgren, in refusing to disqualify them as counsel, and in refusing to admit their depositions in evidence.

CONCLUSION

The district court erred in enjoining Otey's execution. A commutation decision of the Nebraska Board of Pardons, a discretionary act of grace from the executive branch, does not trigger the requirements of the Due Process Clause. In a death penalty case in Nebraska, it is the judicial branch of government that sentences a convicted felon to death. It is during the judicial procedure that a defendant is entitled to the full panoply of due process rights. In Nebraska, commutation of a death sentence by the State is purely a matter of grace exercised by the executive branch, and no due process rights are available to the applicant. Commutation is the giving back of an offender's life, which has been taken away by due process in the state's judicial process. In seeking clemency, the offender can expect only the right to make an application for clemency. In this state, the Board of Pardons has unfettered discretion to grant or deny clemency. There was no infringement on Otey's equal protection rights, nor any other state or federal constitutional infirmity in connection with Otey's commutation proceedings.

The judgment of the district court is reversed, its injunction is dissolved, and the district court is ordered to dismiss Otey's petition. Since all of the death warrants have expired and since it was this court that on March 19, 1991, issued the death warrant which was stayed by operation of law when Otey made his application for clemency to the Board of Pardons, any

further application for a death warrant should be filed with this court.

REVERSED AND REMANDED WITH DIRECTIONS.

AUDREY HUNT, APPELLANT AND CROSS-APPELLEE, V. METHODIST HOSPITAL AND JOHN SMITH, M.D., APPELLEES, AND JAMES M. HORROCKS, M.D., APPELLEE AND CROSS-APPELLANT.

485 N.W.2d 737

Filed June 5, 1992. No. S-89-444.

1. **Pleadings.** The decision as to whether to allow or deny amendments to the pleadings after a trial has begun is a matter for the discretion of the trial court.
2. _____. Pleadings may not be amended at certain stages of the trial so as to change the issues.
3. **Trial: Witnesses.** The extent to which a witness on redirect examination may explain testimony elicited on cross-examination lies primarily in the discretion of the trial court.
4. **Trial: Evidence: Rules of Evidence.** Evidence which does not have 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 is not relevant.
5. _____: _____: _____. Summaries may be allowed into evidence when the volume of documents being summarized is so large as to make their use impractical or impossible.
6. **Verdicts: Jurors: Rules of Evidence.** 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.
7. **Verdicts: Juries.** A juror may testify as to whether the jury considered prejudicial information emanating from sources extraneous to the evidence presented at trial, but a juror's testimony may not be used to establish the effect of such information upon the jury or its influence on the jury or jury motives, methods, misunderstanding, thought processes, or discussions during deliberations which entered into the verdict.

8. **Constitutional Law: Jury Trials.** Under the constitutional guarantee of jury trial, a party litigant is entitled, unless he or she waives the right, to have his or her case tried by 12 impartial qualified jurors. Implicit in "trial" by 12 impartial qualified persons is the concept that there be consideration of the issues and the evidence and deliberation thereon upon the part of all 12.
9. **Trial: Juries.** It is improper for jurors to discuss a case among themselves until all the evidence has been presented, counsel have made final arguments, and the case has been submitted to them after final instructions by the trial court.
10. **New Trial: Jury Misconduct: Proof.** In order for a new trial to be ordered because of juror misconduct, the party claiming the misconduct has the burden to show by clear and convincing evidence that prejudice has occurred.
11. **Verdicts: Jury Misconduct: Proof.** Proof of mere indiscretion in the conduct of a juror is not sufficient to avoid a verdict unless the proof establishes that the juror's conduct was of such character that prejudice may be presumed.
12. **Verdicts: Jury Misconduct.** Juror misconduct complained of must relate to a matter in dispute relevant to the issues in the case, and the misconduct must have influenced the jurors in arriving at a verdict.
13. **Jury Misconduct: Trial.** When an allegation of juror misconduct is made and is supported by a showing which tends to prove that serious misconduct occurred, the trial court should conduct an evidentiary hearing to determine whether the alleged misconduct actually occurred. If it occurred, the trial court must then determine whether it was prejudicial to the extent the defendant was denied a fair trial. If the trial court determines that the misconduct did not occur or that it was not prejudicial, adequate findings should be made so that the determination may be reviewed.

Appeal from the District Court for Douglas County: JOHN E. CLARK, Judge. Remanded with direction.

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

Thomas J. Shomaker and Clark J. Vanskiver, of Sodoro, Daly & Sodoro, for appellee Methodist Hospital.

Fredric H. Kauffman and Kathleen A. Jaudzemis, of Cline, Williams, Wright, Johnson & Oldfather, for appellee Smith.

William M. Lamson, Jr., and Lyman L. Larsen, of Kennedy, Holland, DeLacy & Svoboda, for appellee Horrocks.

BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

PER CURIAM.

The plaintiff, Audrey Hunt, was admitted to the defendant

Methodist Hospital on July 11, 1984, by the defendant Dr. James M. Horrocks, an internist, for treatment of an ulcer on her left foot. After consultation with the defendant Dr. John Smith, a vascular surgeon, it was determined that an arteriogram should be performed to determine whether an arterial bypass operation might improve the blood flow to the plaintiff's leg.

An arteriogram was performed by the defendant Smith on July 13, 1984. An arterial bypass operation was performed on July 16, 1984. This malpractice action is concerned only with complications which developed following the arteriogram procedure and resulted in serious injury to the plaintiff's arm.

The arteriogram was performed by introducing a catheter into the patient's right axillary artery. Bleeding at the site where the artery is punctured is the most common risk of an arteriogram, and the plaintiff was monitored for this complication. No nurse, doctor, or medical student noted any bleeding at the puncture site during the first 6 hours following the procedure, which is the critical time period following the arteriogram.

On July 17, 1984, a large ecchymotic area was noted by a nurse on the plaintiff's posterior right upper arm. An ecchymosis is evidence of blood in the tissue and is very common following puncture of an artery or vein.

The plaintiff was monitored by Horrocks, Smith and his associate, Dr. Eugene A. Waltke, and by medical students and nurses. From July 17 through 21, 1984, there were no significant findings relating to Hunt's right arm. On July 21, the physicians diagnosed a venous thrombosis in the plaintiff's right arm because of massive swelling in her arm. The physicians then treated her arm for this condition.

From July 21 to 25, there was no evidence of permanent paresis in the plaintiff's arm, and it appeared that she was responding to the treatment. On July 25, the plaintiff's condition changed in that her right arm became pale and cool, and there was no pulse. Following these changes, Dr. Waltke performed surgery on the arm and discovered that the plaintiff was bleeding from the axillary artery. Dr. Waltke performed that surgery because Dr. Smith was out of town.

The blood from the leaking puncture site compressed the artery, so that the blood flow to the nerves in the lower part of the arm and hand was inadequate. As a result, some of the nerves in the lower extremity died, and the plaintiff now has a claw hand and has lost the use of her right arm.

The case was finally tried in 1989. The jury returned a verdict for the defendants, and the plaintiff has appealed.

In the plaintiff's first assignment of error, she alleges that the trial court erred in refusing to give a requested instruction that Dr. Waltke was the agent of Dr. Smith and that if the jury found that Dr. Waltke was negligent, it should find that Dr. Smith was negligent. In her brief, the plaintiff does not argue why it was error for the trial court to refuse her requested instruction. Instead, she argues that the trial court erred by refusing to allow her to amend her petition to conform to the evidence that Waltke was the agent of Smith. No error was assigned regarding the refusal of the trial court to permit the amendment, which was not requested until the fourth day of testimony, just before the plaintiff rested.

Dr. Waltke was not a party to the action and is not mentioned in any place in the third cause of action in the sixth amended petition, which is the cause of action in which the specifications of negligence alleged against Smith were made. Specifically, the plaintiff alleged that Smith was negligent in failing to properly monitor the plaintiff, in failing to timely diagnose the complications resulting from the angiography, in failing to utilize ultrasound, and in failing to pursue conservative treatment of the plaintiff.

In the order on the pretrial conference made on February 17, 1989, the trial court noted that the issues had been framed and the plaintiff's specifications of negligence as to each defendant had been narrowed and that the plaintiff's claim against each defendant was based upon specific acts of negligence. The order set out both the "Uncontroverted Facts" and the "Issues of Fact, *and No Others*, Remaining To Be Litigated upon the Trial." (Emphasis supplied.) This order was effective as a limitation of issues and was approved "as to form and consent [sic]" by all counsel, including the counsel for the plaintiff.

The instruction requested by the plaintiff went further than

merely instructing that Waltke was the agent of Smith. It also submitted the issue of negligence by Waltke to the jury, and there was no evidence to support a submission of that issue to the jury. There was no testimony by any of the plaintiff's expert witnesses to the effect that Waltke had deviated from the standard of care.

The trial court refused to give the requested instruction because there was no evidence that Dr. Waltke had violated the applicable standard of care and because the issue of respondeat superior had never been pled. The trial court refused to allow the plaintiff to amend the petition at the conclusion of the plaintiff's evidence because the amendment would have prejudiced the defendants in that the case had proceeded on the theory of specific acts of negligence by Smith, and the defendants were entitled to assume there was no issue as to negligence by Waltke.

The decision as to whether to allow or deny amendments to the pleadings after a trial has begun is a matter for the discretion of the trial court. *Associated Wrecking v. Wiekhorst Bros.*, 228 Neb. 764, 424 N.W.2d 343 (1988). "Pleadings . . . may not be amended at certain stages so as to change the issues . . . ." *Id.* at 767, 424 N.W.2d at 347. Because the plaintiff's requested amendment to the pleadings would have changed the issue of Smith's liability for negligence from liability for specific acts of negligence to include liability for unalleged negligent acts by Waltke, it was not error for the trial court to deny the plaintiff's request to amend the pleadings at the conclusion of the evidence.

There is nothing in the evidence to support a finding that Waltke was negligent in his treatment of the plaintiff. None of the plaintiff's expert witnesses testified that Dr. Waltke breached the applicable standard of care as to his diagnosis or operation on plaintiff.

Accordingly, the proposed amendment to the pleadings and the requested instruction were properly refused by the trial court.

For her second assignment of error, the plaintiff alleges that the trial court erred in refusing to allow Dr. Paul Somsky, on redirect examination, to respond to questions as to why he had

not reviewed the plaintiff's medical records prior to testifying at the trial. The answer expected was that Somsky, due to his medical condition, did not expect to testify and therefore did not have an opportunity to review the records before being called.

Prior to the trial, the plaintiff had designated Somsky as an expert witness. Due to a heart attack experienced by Somsky in April 1988, the plaintiff filed a motion to substitute another expert witness. Although that motion was sustained, the plaintiff never designated a substitute expert witness. On the second day of testimony, the plaintiff moved to submit a discovery deposition of Somsky taken by the defendants because Somsky was unable to testify in person due to his poor health. The trial court denied this request. Somsky then appeared at the trial, and the trial court instructed the plaintiff that Somsky was not to be questioned about his medical condition during his testimony.

At the trial Somsky volunteered on direct examination, at least twice, that he had not reviewed the plaintiff's medical records prior to taking the stand.

The extent to which a witness on redirect examination may explain testimony elicited on cross-examination lies primarily in the discretion of the trial court. *State v. Walker*, 225 Neb. 794, 408 N.W.2d 294 (1987).

In this case, Somsky's medical condition was not relevant to any of the issues because it did not have " '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.' " *Crowder v. Aurora Co-op Elev. Co.*, 223 Neb. 704, 721, 393 N.W.2d 250, 262 (1986). Accordingly, the trial court did not abuse its discretion in refusing to allow Somsky to explain on redirect the reason for his lack of familiarity with the plaintiff's medical records.

In her third assignment of error, the plaintiff argues that the trial court erred by excluding exhibit 12, a summary of nurses' notes regarding the plaintiff's right arm. The trial court sustained the defendants' objection to the offer of exhibit 12 because it was an incomplete summary of the plaintiff's medical records, all of which had already been received in evidence.

Exhibit 12 had been prepared by Dr. Delbert D. Neis, who testified as an expert witness for the plaintiff. To assist his testimony he had prepared and used exhibits 2 and 3, which were partial summaries of the plaintiff's medical records. On redirect examination the plaintiff offered exhibit 12, which was but another incomplete summary of the plaintiff's medical records that Neis had prepared. The trial court sustained the defendants' objection to exhibit 12. It was merely a partial summary of the plaintiff's records, which were already in evidence.

Exhibit 12 did not purport to be a complete summary of the plaintiff's medical records. It was, in fact, only a summary of some of the matters the plaintiff's witness felt were important. To that extent it was argumentative in nature and not a proper item of evidence. The plaintiff's witness was allowed to testify at length concerning the matters listed on exhibit 12, and there was no prejudice to any substantial right of the plaintiff in refusing the offer of exhibit 12.

Summaries may be allowed into evidence " 'when the volume of documents being summarized is so large as to make their use impractical or impossible . . . .' " *Crowder v. Aurora Co-op Elev. Co.*, 223 Neb. at 717, 393 N.W.2d at 259. That part of the hospital records which was summarized on exhibit 12 was not so voluminous that it was impossible for the jury to use.

> [A]n otherwise admissible and relevant summary may be excluded under Neb. Evid. R. 403 (Neb. Rev. Stat. § 27-403 (Reissue 1985)), which provides: "Although relevant, evidence may be excluded 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."

Id. at 720-21, 393 N.W.2d at 261.

The plaintiff's final assignment of error alleges that the trial court erred in failing to grant a new trial on the ground of juror misconduct because certain jurors held presubmission discussions, contrary to the trial court's admonitions "not to discuss the case with anyone" and "not to form or express an opinion until such time as you have heard all the evidence and

the case is submitted to you for your deliberation and decision." By cross-appeal, the defendant Horrocks argues that the trial court erred in admitting the five affidavits of three jurors and a discharged alternate juror offered by the plaintiff in support of her motion.

In one affidavit a juror explains how certain evidence and the instructions influenced him. In another affidavit a juror declares that certain jurors discussed the case prior to submission and expressed her opinion as to how those discussions influenced the jurors. In two separate affidavits another juror explains how the evidence and instructions influenced him and declares that following a particular witness' testimony, there ensued a presubmission discussion among three or four jurors concerning the effect certain trial developments were having on the probable outcome of the case. The discharged alternate juror's affidavit reveals that presubmission discussions took place over a 5-day period and declares that these discussions prejudiced plaintiff's case.

Neb. Rev. Stat. § 27-606(2) (Reissue 1989) provides:

> 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.

We have held that a juror may testify as to whether the jury considered prejudicial information emanating from sources extraneous to the evidence presented at trial, but that a juror's testimony may not be used to establish the effect of such information upon the jury or its influence on the jury or jury motives, methods, misunderstanding, thought processes, or

discussions during deliberations which entered into the verdict. *State v. McDonald*, 230 Neb. 85, 430 N.W.2d 282 (1988); *Rahmig v. Mosley Machinery Co.*, 226 Neb. 423, 412 N.W.2d 56 (1987); *State v. Steinmark*, 201 Neb. 200, 266 N.W.2d 751 (1978).

Thus, the affidavits were admissible only to show that presubmission discussions took place among certain jurors over 5 days of this 7-day trial. The other comments in the affidavits are entirely useless.

Neb. Const. art. I, § 6, and U.S. Const. amend. VII each guarantee the "right of trial by jury." As said in *City of Flat River v. Edgar*, 412 S.W.2d 537, 539 (Mo. App. 1967):

> Under the constitutional guarantee of jury trial, a party litigant is entitled, unless he waives the right, to have his case tried by twelve impartial qualified jurors. Implicit in "trial" by twelve impartial qualified persons is the concept that there be consideration of the issues and the evidence and deliberation thereon upon the part of all twelve . . . .

Derived from the constitutional concept of a right to a jury trial is the principle that "it is improper for jurors to discuss a case among themselves until all the evidence has been presented, counsel have made final arguments, and the case has been submitted to them after final instructions by the trial court." *State v. Washington*, 182 Conn. 419, 425, 438 A.2d 1144, 1147 (1980); *State v. McDonald, supra*; *United States v. Nance*, 502 F.2d 615 (8th Cir. 1974), *cert. denied* 420 U.S. 926, 95 S. Ct. 1123, 43 L. Ed. 2d 396 (1975); *United States v. Klee*, 494 F.2d 394 (9th Cir. 1974), *cert. denied* 419 U.S. 835, 95 S. Ct. 62, 42 L. Ed. 2d 61; *People v. Gilyard*, 124 Ill. App. 2d 95, 260 N.E.2d 364 (1970); *City of Pleasant Hill v. First Baptist Church*, 1 Cal. App. 3d 384, 82 Cal. Rptr. 1 (1969). In *People v. Saunders*, 120 Misc. 2d 1087, 467 N.Y.S.2d 110, 113 (1983), the court stated that the jury's actions in ignoring the judge's admonition not to discuss the case prior to deliberations violated the "defendant's right to have his guilt or innocence determined by a jury of twelve persons deliberating as one . . . ." Finally, the court in *Pool v. C., B. & Q. R. Co.*, 6 F. 844, 850 (1881), stated: "There is no right more sacred than the right to a fair trial. There is no wrong more grievous than the negation of

that right. An unfair trial adds a deadly pang to the bitterness of defeat."

In cases where jurors have discussed the case with one another prior to deliberations, courts have uniformly found such conduct improper. *Edney v. Baum*, 44 Neb. 294, 62 N.W. 461 (1895); *State v. McDonald, supra*; *State v. Isley*, 195 Neb. 539, 239 N.W.2d 262 (1976); *State v. Drake*, 31 N.C. App. 187, 229 S.E.2d 51 (1976); *Winebrenner v. United States*, 147 F.2d 322 (8th Cir. 1945); *Glasgow Realty Company v. Metcalfe*, 482 S.W.2d 750 (Ky. App. 1972); *City of Pleasant Hill v. First Baptist Church, supra*; *People v. Hunter*, 370 Mich. 262, 121 N.W.2d 442 (1963).

The U.S. Court of Appeals for the Eighth Circuit issued the seminal opinion which has served as a guide for other jurisdictions on this issue. In *Winebrenner v. United States, supra*, the court held that instructions by judges advising jurors that they might discuss the case among themselves prior to submission is reversible error and in violation of the Fifth and Sixth Amendments to the federal Constitution. Several reasons were advanced for this conclusion:

> If . . . the jurors may discuss the case among themselves, either in groups of less than the entire jury, or with the entire jury, they are giving premature consideration to the evidence. By due process of law is meant "a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial." The jury should not discuss the case among themselves because, first, they have not heard all of the evidence; second, they have not heard the instructions of the court as to how this evidence is to be considered by them, and neither have they heard the arguments of counsel.

147 F.2d at 328.

The court further noted the psychological implications of jurors' discussing a case prior to its submission for deliberation:

> A juror having in discussion not only formed but expressed his view as to the guilt or innocence of the defendant, his inclination thereafter would be to give special attention to such testimony as to his mind strengthened, confirmed or vindicated the views which he

> had already expressed to his fellow jurors, whereas, had there been no discussion and no expression of tentative opinion, he would not be confronted with embarrassment before his fellow jurors should he change the tentative opinion which he might entertain from hearing evidence.

Id.

In *Pool v. C., B. & Q. R. Co.*, 6 F. at 850, the court in that case observed:

> Now, the human mind is constituted so that what one himself publicly declares touching any controversy is much more potent in biasing his judgment and confirming his predilections than similar declarations which he may hear uttered by other persons. When most men commit themselves publicly to any fact, theory, or judgment they are too apt to stand by their own public declarations, in defiance of evidence. This pride of opinion and of consistency belongs to human nature.

Thus, a juror who has expressed his or her view in a discussion regarding facts or the guilt, innocence, or liability of the parties "would be inclined thereafter to give special attention to testimony strengthening or confirming the views already expressed to fellow jurors." *State v. Washington*, 182 Conn. at 426, 438 A.2d at 1147.

As confirmed by case law, the constitutional right in both civil and criminal cases protects parties from juror discussions prior to deliberations. Anything short of silence is juror misconduct, and at some point, nondeliberation dialogue prejudices a party and voids the trial.

However, in order for a new trial to be ordered because of juror misconduct, the party claiming the misconduct has the burden to show by clear and convincing evidence that prejudice has occurred. *Ellis v. Far-Mar-Co*, 215 Neb. 736, 340 N.W.2d 423 (1983); *State v. McDonald*, 230 Neb. 85, 430 N.W.2d 282 (1988). "Proof of mere indiscretion in the conduct of a juror is not sufficient to avoid a verdict unless the proof establishes that the juror's conduct was of such character that prejudice may be presumed." *Auer v. Burlington Northern RR. Co.*, 229 Neb. 504, 515, 428 N.W.2d 152, 160 (1988); *Schwank v. County of Platte*, 152 Neb. 273, 40 N.W.2d 863 (1950). Moreover, the

"misconduct complained of must relate to a matter in dispute relevant to the issues in the case, and the misconduct must have influenced the jurors in arriving at a verdict." *Ellis v. Far-Mar-Co*, 215 Neb. at 743, 340 N.W.2d at 427.

The burden of the trial court in determining whether there is juror misconduct was first articulated in *State v. Steinmark*, 201 Neb. 200, 266 N.W.2d 751 (1978). Therein, this court wrote:

> When an allegation of misconduct is made, and is supported by a showing which tends to prove that serious misconduct occurred, the trial court should conduct an evidentiary hearing to determine whether the alleged misconduct actually occurred. If it occurred, the trial court must then determine whether it was prejudicial to the extent the defendant was denied a fair trial. If the trial court determines that the misconduct did not occur, or that it was not prejudicial, adequate findings should be made so that the determination may be reviewed.

Id. at 204-05, 266 N.W.2d at 754. See, *United States v. McKinney*, 429 F.2d 1019 (5th Cir. 1970), rev'd on rehearing 434 F.2d 831; *State v. McDonald, supra*. Thus, a judge must conduct an evidentiary hearing to determine whether a party was denied a fair trial; in any event, should the court conclude that no misconduct or prejudice occurred, it must make adequate findings so that the ruling may be reviewed.

State v. Steinmark, supra, is a useful case in respect to the trial court's duty to provide a satisfactory hearing on the juror misconduct. *Steinmark* involved a defendant who asserted that the trial court did not afford him an adequate hearing in regard to juror misconduct. Presented at the hearing was an affidavit in which a juror testified that several other jurors repeated rumors they had heard about the defendant and had drawn conclusions regarding several pieces of evidence. In vacating the denial of a new trial, we declared that the "matters alleged in the affidavit [were] a sufficient showing in support of the allegations of misconduct to require an evidentiary hearing to determine whether misconduct occurred and whether it was prejudicial. . . ." *Id.* at 205, 266 N.W.2d at 754. We also recited the obligation of the trial court in determining the validity of

misconduct allegations and explained that the determination of misconduct was a question for the trial court, which question required an "independent evaluation of all the circumstances in the case." *Id.* In conclusion, we wrote:

> The record indicates that the issue of the alleged misconduct of the jury and its effect upon the verdict in this case *was resolved in a summary manner*. While we are not prepared to say, upon the basis of the present record, that the defendant is entitled to a new trial, we believe the cause should be remanded for a further hearing upon the matter of misconduct of the jury as alleged in the motion for new trial.

(Emphasis supplied.) *Id.*

The uncontradicted affidavits in this case establish that juror misconduct occurred. It thus became the trial court's duty to determine whether that misconduct prejudiced the plaintiff. Accordingly, the cause is remanded with the direction that the trial court conduct an evidentiary hearing to determine what was said during the presubmission discussions and whether those discussions prejudiced the plaintiff.

REMANDED WITH DIRECTION.

HASTINGS, C.J., not participating.

BOSLAUGH, J., dissenting.

I dissent only from that part of the opinion which holds that the misconduct alleged in the affidavits of two jurors and one alternate requires that the cause be remanded and the trial court directed to conduct a further evidentiary hearing to determine whether what was said by the jurors during the presubmission discussions prejudiced the plaintiff.

Neb. Rev. Stat. § 27-606(2) (Reissue 1989) severely restricts the evidence which can be considered in determining whether juror misconduct or prejudice occurred. Only evidence of "*extraneous prejudicial information* . . . improperly brought to the jury's attention" or "*outside influence*" improperly brought to bear upon any juror may be considered as the basis for remanding the cause in this case. (Emphasis supplied.) In this case there was neither.

As we said in *Rahmig v. Mosley Machinery Co.*, 226 Neb.

423, 455, 412 N.W.2d 56, 77 (1987):

> In Neb. Evid. R. 606(2), the important phrase is "extraneous prejudicial information," and within that phrase the crucial word is *extraneous*, which means "existing or originating outside or beyond : external in origin : coming from the outside . . . brought in, introduced, or added from an external source or point of origin." Webster's Third New International Dictionary, Unabridged 807 (1981).

I believe the majority opinion erroneously equates pre-submission discussion among some of the jurors with extraneous prejudicial information or outside influence. It then declares that "[a]nything short of silence is juror misconduct" and appears to adopt a per se rule requiring the trial court in such cases to conduct extensive evidentiary hearings to determine whether prejudice occurred.

An example as to how this statute is applied in juror misconduct cases is found in *Watkins v. Taylor Seed Farms, Inc.*, 295 Ark. 291, 748 S.W.2d 143 (1988). In the *Watkins* case, it was alleged that two jurors had made these comments in the presence of the jury:

> (1) The first woman said, "W.B. 'Tuffy' Howard, (appellants' attorney), got custody of some children for a man and after the man got custody of the children, he murdered them." (2) A second woman replied, "Yes, that's the kind of man he is." These two jurors, whom Seymour claimed had made the remarks, also testified as a part of appellants' offer of proof. The first one, Mary Seale, denied having made any statements about Howard, but did remember hearing someone make them. The second juror, Donna Cornelison, testified that the jurors had discussed the attorneys but that she did not make nor recall any remarks, as those described by Seymour, having been made in the presence of the jury.

295 Ark. at 292, 748 S.W.2d at 144.

The Arkansas court held that this was not evidence of extraneous prejudicial information that had improperly been brought to the jury's attention. The court concluded by saying:

> Nonetheless, Rule 606(b) ensures that jury deliberations

> should remain secret, unless it becomes clear that the jury's verdict was tainted by a showing of extraneous prejudicial information or some improper outside influence. The evidence the appellants proffer here is not included in the exception under Rule 606(b), and, therefore, allowing the testimony, we believe, would violate the public policy that protects the privacy of the jury room.

295 Ark. at 294-95, 748 S.W.2d at 145.

While the older cases seem to support the rule that the trial court is required to admonish the jury that they are not to discuss the case among themselves until it has been submitted to them, some of the modern cases indicate the rule is not universal. In *United States v. Klee*, 494 F.2d 394, 395-96 (9th Cir. 1974), the court stated:

> In support of a motion for a new trial, *Klee presented an affidavit of one of the jurors which says that eleven of the fourteen jurors (including alternates) discussed the case during recesses and that nine of the jurors expressed premature opinions about Klee's guilt. If the affidavit is true, the jurors disregarded the court's admonition.*
>
> While we are aware that most judges give similar admonitions to juries, we have never had occasion to pass upon either the propriety of or the necessity for such an admonition. *The circuits are not in agreement on the question.* See, *e. g.*, Winebrenner v. United States, 8 Cir., 1945, 147 F.2d 322; 23A C.J.S. Criminal Law § 1361 (1961). *But cf.* United States v. Carter, 10 Cir., 1970, 430 F.2d 1278, 1279; Rotolo v. United States, 5 Cir., 1968, 404 F.2d 316, 317; United States v. Viale, 2 Cir., 1963, 312 F.2d 595, 602.

(Emphasis supplied.)

In *United States v. Viale*, 312 F.2d 595, 602 (2d Cir. 1963), the court stated:

> It has never been the law of this circuit that the trial judge must admonish the jurors not to discuss the case among themselves, although it has been the practice of most of the judges to suggest that it is advisable to refrain from such discussion until the case is concluded. Compare

> Myres v. United States, 8 Cir., 174 F.2d 329. In any event, we hold that the trial judge did not commit any error in this matter, especially since counsel did not request such an instruction, and since such an instruction was in fact given the second day of the trial.

It seems to me that the showing made by the plaintiff at the hearing on the motion for new trial in this case falls far short of the clear and convincing evidence that is required as a basis for remanding the cause.

Generally, the misconduct alleged in the affidavits offered by the plaintiff pertains to discussions that took place among certain of the jurors prior to the case's being submitted to the jury for deliberation. The plaintiff offered five affidavits at the hearing on the motion for new trial. Four of the affidavits were from three jurors. The fifth affidavit was from an alternate juror who did not participate in the deliberations. Two of the affidavits related only to the thought processes of the jury and how the evidence and the instructions of the court influenced the verdict. These two affidavits clearly were inadmissible. A second affidavit from Gerald Klug, one of these jurors, mentioned discussion among a few jurors in the jury room as to how they felt certain factors were affecting the probable outcome of the trial. This affidavit contained a statement that "at no time were specific conclusions drawn from these comments."

The affidavit of Pamela Bahn stated in part:

> At each recess, Judge Clark instructed us not to discuss the case with our fellow jurors or others to make certain of a fair trial. However, unfortunately, several of the other jurors disregarded the Court's instruction. Up until the last two days of the trial there was a lot of discussion regarding either the lawyers' conduct or aspects of the case . . . . The comments were like one of the lawyers kept twitching with his hair, or, boy, this lawyer was good. . . .

Sharon L. Foster, who was the alternate juror, stated in her affidavit:

> In my opinion some of the jurors violated the judge's repeated instructions not to discuss the case until deliberations. . . .

> . . . .
>
> . . . The comments were in reference to the lawyers and doctors as well as Mrs. Hunt. These comments pertained to perceived competence or incompetence of all parties involved. A comment was made about Mrs. Hunt's business management style.

(Emphasis omitted.)

The affidavits reveal that the jurors felt great sympathy for the plaintiff, who, without question, received a serious injury as a result of complications following the arteriogram procedure. They also show that on the basis of the evidence and the instructions, the jury was compelled to return a verdict for the defendants.

It is also clear from the affidavits that the alleged jury misconduct consisted only of discussions among the jurors themselves about such matters as the attorneys' performance at trial and the case as presented by the evidence at the trial. There are no allegations that the jury considered extraneous prejudicial information or that outside influence was improperly brought to bear upon any juror.

There is no question that the jury's disregard of the trial court's admonition not to discuss the case prior to submission for deliberation was improper. The issue is whether there has been a sufficient showing by clear and convincing admissible evidence of misconduct and prejudice to require that the cause be remanded and further hearings held.

In *State v. McDonald*, 230 Neb. 85, 94, 430 N.W.2d 282, 288 (1988), this court held that where jury misconduct "involves juror behavior only, the burden to establish prejudice rests on the party claiming the misconduct." In *McDonald*, evidence of alleged jury misconduct was presented at the hearing on the defendant's motion for new trial. That evidence consisted of testimony by defense trial counsel's wife that she overheard two jurors discussing evidence which had been presented at trial. We affirmed the trial court's finding that the defendant was not prejudiced by the jury's misconduct.

In this case, the majority opinion cites no case where the jury was properly admonished and instructed, but presubmission discussion of the case by the jurors was found to be so

prejudicial as to require a new trial or a further hearing. Most of the cases cited in the majority opinion which found prejudice involved the jury's considering extraneous information or being improperly influenced by outside sources.

In holding that the cause should be remanded and an evidentiary hearing held to determine what was said during presubmission discussion by some of the jurors and whether those discussions prejudiced the plaintiff, the majority cites *State v. Steinmark*, 201 Neb. 200, 266 N.W.2d 751 (1978). However, the *Steinmark* case involved alleged jury misconduct by consideration of extraneous prejudicial information during deliberation.

> " 'Extraneous influence' has been construed to cover publicity received and discussed in the jury room, consideration by the jury of evidence not admitted in court, and communications or other contact between jurors and third persons, including contacts with the trial judge outside the presence of the defendant and his counsel. By contrast, evidence of discussions among jurors, intimidation or harassment of one juror by another, and other intra-jury influences on the verdict . . . is not competent to impeach a verdict."

United States v. Wilson, 534 F.2d 375, 378-79 (D.C. Cir. 1976), quoting *Government of Virgin Islands v. Gereau*, 523 F.2d 140 (3d Cir. 1975).

It is clear from the affidavits submitted at the hearing on the plaintiff's motion for new trial that the only misconduct which the plaintiff alleges occurred was the jury's violation of the trial court's admonition not to discuss the case prior to deliberation. There are no allegations that any juror considered extraneous information or was improperly influenced by outside sources.

Winebrenner v. United States, 147 F.2d 322 (8th Cir. 1945), described as a seminal case in the majority opinion, was decided by a divided court. In that case the trial court had incorrectly instructed the jury that it was permissible for the jurors to discuss the case among themselves before the case had been submitted to them. In his dissent to the majority opinion which ordered that the judgments be reversed and the cause remanded for a new trial, Judge Woodrough observed that "[n]o normal

honest Americans ever worked together in a common inquiry for any length of time with their mouths sealed up like automatons or oysters." 147 F.2d at 330. He further stated, "The defendants had no right to, and I assume they had no interest to have the jurors subjected to extraordinary, suspicious and unnatural silence among themselves." *Id.*

The trial court's order overruling the plaintiff's motion for a new trial and its not conducting a further hearing on the matter of the alleged jury misconduct were within the trial court's discretion and should not be overturned except for an abuse of discretion. *State v. Robbins*, 207 Neb. 439, 299 N.W.2d 437 (1980); *United States v. Nance*, 502 F.2d 615 (8th Cir. 1974). See, also, *U.S. v. Cuthel*, 903 F.2d 1381 (11th Cir. 1990); *United States v. Edwards*, 696 F.2d 1277 (11th Cir. 1983); *United States v. Campbell*, 684 F.2d 141 (D.C. Cir. 1982); *United States v. Wilson, supra.*

I would affirm the judgment of the district court.

GRANT, J., joins in this dissent.

KATHY JOLENE SHIERS, APPELLANT AND CROSS-APPELLEE, V. BILLY ALLAN SHIERS, APPELLEE AND CROSS-APPELLANT.

485 N.W.2d 574

Filed June 5, 1992. No. S-89-1266.

1. **Divorce: Judgments: Waiver: Appeal and Error.** In a dissolution of marriage action, one who accepts any part of a judgment in her or his favor forfeits the right to challenge by appeal any issue but those affecting the interests and welfare of such children as may be involved.
2. **Child Support: Appeal and Error.** The amount of child support is initially entrusted to the discretion of the trial court, and although on appeal the issue is tried de novo on the record, in the absence of an abuse of that discretion, the trial court's award of child support will be affirmed.
3. **Appeal and Error.** On questions of law, an appellate court has an independent obligation to reach a correct conclusion.
4. **Child Support: Rules of the Supreme Court: Presumptions.** The rebuttable presumption of the Nebraska Child Support Guidelines is refuted when a party's earning capacity exceeds her or his actual earnings; when such a situation exists and application of the guidelines would result in an unfair and inequitable support order, the trial court may and should deviate from the guidelines.

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

Kent A. Schroeder, of Ross, Schroeder & Brauer, for appellant.

Terri S. Harder, of Jacobsen, Orr, Nelson, Wright, Harder & Lindstrom, P.C., for appellee.

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

CAPORALE, J.

In this dissolution of marriage action, the petitioner-appellant wife, Kathy Jolene Shiers, challenges the district court's failure to award her alimony and the amount of child support she has been ordered to pay the respondent-appellee husband, Billy Allan Shiers. The husband has cross-appealed, claiming that as the wife accepted the property distributions awarded her, she has forfeited any right to appeal. We affirm.

The wife, age 31 at the time of trial on March 7, 1989, and the husband, then age 33, were married on June 21, 1975, and produced two children. Custody of the children was given to the husband, and the wife was ordered to pay child support of $260 a month until the first child turned 19 and, thereafter, $175 a month until the youngest child reached 19.

The wife has worked consistently since the marriage. At first, she helped in the farming operations the husband conducted with his father. Sometime between 1977 and mid-1979, she was employed by a retail outlet. In 1979, she began working for an implement dealer; however, because of the slow farm economy, she left that job in 1984 and began working for a beef slaughtering plant. In May 1988, she left that job and returned to the implement dealer, where she was employed at the time of trial. Throughout the marriage and these proceedings, the husband has been a farmer, without additional employment.

The district court allocated certain items of personal property to each of the parties and ordered the husband to pay the wife $56,000 to equalize the allocation. It noted that in

computing the wife's child support obligation, it had calculated the separate incomes of the parties based on their earnings for 1985, 1986, and 1987, and found a 3-year earnings average for the husband of $14,492 and a 3-year earnings average for the wife of $14,463.10, which it then adjusted for taxes. Because of the fluctuations in farm income, the district court settled on averaging and, in order to treat the husband and wife alike, also averaged the wife's salary.

The husband argues that the wife's acceptance of the $56,000 he paid her through the clerk of the district court constitutes a waiver of her right to appeal.

It appears the first application to a divorce action of the rule that a litigant cannot accept payment of that part of a judgment in her or his favor and afterward prosecute an appeal from that part of the judgment against her or him is found in *Larabee v. Larabee*, 128 Neb. 560, 259 N.W. 520 (1935). Therein, the trial court granted the appellant a divorce and denied her alimony, but ordered the appellee to pay her certain sums, including an attorney fee and costs. The appellee paid the sums ordered, and the appellant accepted them. The *Larabee* court ruled that in so doing, the appellant forfeited her right to appeal. Although the opinion does not make it entirely clear that the appellant was challenging the trial court's failure to award her alimony, her brief does.

On the other hand, in *Nuss v. Nuss*, 148 Neb. 417, 27 N.W.2d 624 (1947), the appellee was granted a divorce, custody of the child, part of the parties' savings, household goods, an attorney fee, and child support. The remainder of the savings was ordered paid into court in satisfaction of all costs, the balance to be applied to the appellant's child support obligation. Concluding not only that there had been no judgment in favor of the appellant, but that it could not be said the decree conferred any benefit upon him, the *Nuss* court ruled that the application of sums as ordered by the trial court did not deprive appellant of the right to appeal. Similarly, *Kassebaum v. Kassebaum*, 178 Neb. 812, 135 N.W.2d 704 (1965), held that the payment of costs, attorney fees, and child support did not deprive one of the right to appeal. The *Kassebaum* court reasoned that as no supersedeas bond had been posted, the

payments could not be characterized as voluntary, for not only would the judgment have been subject to execution but the judgment debtor would have been subject to being held in contempt. Although not relied upon by the *Kassebaum* court, the *Nuss* rationale was equally applicable, for there was no judgment in favor of the *Kassebaum* appellant. He had accepted no benefit conferred upon him, but, rather, had merely discharged, pending the outcome of the appeal, the obligations imposed upon him. It would have been for the appellee to account, were she to have been found to have been overpaid.

In *Reynek v. Reynek*, 193 Neb. 404, 227 N.W.2d 578 (1975), the decree awarded the children of the parties to the appellee and required him to make certain monthly property settlement payments to the appellant. The appellant accepted a number of the ordered monthly payments, but nonetheless appealed only to the propriety of placing the children with the appellee. Adopting the view of the Oregon Supreme Court that since a custodial award affects primarily the welfare of the child and not the rights of the parent, the *Reynek* court concluded that appellant had not forfeited her right to appeal on that issue.

Notwithstanding the fact that she had accepted several of the ordered monthly alimony payments, the appellant in *Berigan v. Berigan*, 194 Neb. 185, 231 N.W.2d 131 (1975), questioned the adequacy of both the alimony and the child support awarded her. Although the *Berigan* court considered the child support issue, it refused to consider the alimony issue, writing:

> In Larabee v. Larabee (1935), 128 Neb. 560, 259 N.W. 520, this court established the rule that an appellant who voluntarily accepts payment of a part of a judgment in his or her favor loses the right to prosecute an appeal. The rule that the acceptance of benefits precludes an appeal by the one benefited is one of general application, although there are varying exceptions. . . . While we modified Larabee v. Larabee, *supra*, in Reynek v. Reynek (1975), 193 Neb. 404, 227 N.W.2d 578, we did so only insofar as it affected the interests of minor children. We reaffirm the rule enunciated in Larabee except as it may affect the interests and welfare of minor children. The proper

> procedure where an appeal is contemplated is to apply to the trial court for temporary allowances pending appeal. If the trial court has fully adjusted the property rights of the parties, the court may make the temporary allowances during the pendency of the appeal applicable on the alimony awarded in the decree. [Citation omitted.]

194 Neb. at 187, 231 N.W.2d at 133.

The rule distilled from the foregoing cases is that in a dissolution of marriage action, one who accepts any part of a judgment in her or his favor forfeits the right to challenge by appeal any issue but those affecting the interests and welfare of such children as may be involved. Accordingly, the only issue before us in this case is the amount of child support the wife was ordered to pay.

In that regard, the wife contends the district court abused its discretion when, in determining her support obligation, it averaged 3 years of her earnings instead of looking at the most recent year's earnings. We begin the analysis of the issues this claim presents by recalling that the amount of child support is initially entrusted to the discretion of the trial court and that although on appeal the issue is tried de novo on the record, in the absence of an abuse of that discretion, the trial court's award of child support will be affirmed. *Dabbs v. Dabbs*, 230 Neb. 368, 431 N.W.2d 640 (1988). On questions of law, however, an appellate court has an independent obligation to reach a correct conclusion. See, *Otey v. State, ante* p. 813, 485 N.W.2d 153 (1992); *State v. Melcher, ante* p. 592, 483 N.W.2d 540 (1992); *Huffman v. Huffman*, 232 Neb. 742, 441 N.W.2d 899 (1989), *after remand* 236 Neb. 101, 459 N.W.2d 215 (1990).

The Nebraska Child Support Guidelines do not expressly prohibit averaging several years of earnings to arrive at a figure for determining child support. However, the rules require that the trial court determine the combined annualized income of the parties from which is computed the combined monthly income. Thus, the rules imply that, as a general matter, the parties' current earnings are to be used. See Nebraska Child Support Guidelines paragraph D. Indeed, recent cases have applied that approach. *Knippelmier v. Knippelmier*, 238 Neb.

428, 470 N.W.2d 798 (1991); *Hall v. Hall*, 238 Neb. 686, 472 N.W.2d 217 (1991); *Peterson v. Peterson*, 239 Neb. 113, 474 N.W.2d 862 (1991).

As the wife's salary has not been subject to fluctuation, the district court judge erred in averaging her income. However, it is appropriate to note that her current yearly net income is the result of only 10 months of work. Neb. Rev. Stat. § 42-364.16 (Reissue 1988) provides that the "Supreme Court shall provide by court rule, as a rebuttable presumption, guidelines for the establishment of all child support obligations." This rebuttable presumption is refuted when a party's earning capacity exceeds her or his actual earnings. When such a situation exists and application of the guidelines would result in an unfair and inequitable support order, the trial court may and should deviate from the guidelines. *Knippelmier v. Knippelmier, supra*.

In the instant case the wife has no daily responsibilities for the care of the children, and there is no reason she cannot work a full year. Consequently, her earning capacity is underutilized. She has proven that she has the capacity to earn at least $12,000 a year net, and it is on this figure that the child support payments should have been based. Frankly, we cannot reconcile the district court's computation of the husband's income with the record. It is quite clear that whatever else the district court may have done, it failed, contrary to the requirement of the guidelines, to add to his income the depreciation claimed on his tax returns. See paragraph D. When that is done, the husband's average net income over the relevant period is $19,355.

Thus, the combined net income of the two parties is $31,355 per year, or $2,612.92 per month. The "Income Shares Formula" of the guidelines requires that at that level of combined net income, $738 be allocated to child support. As the wife's income accounts for 38 percent of the income, her share of the support allocation for the two children is $280.44, or $20.44 more than she was ordered to pay. However, as the husband does not challenge the adequacy of the support ordered, we will not disturb the district court's decree.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ROGER D. HANSEN, APPELLANT.

484 N.W.2d 476

Filed June 5, 1992. No. S-90-1109.

Courts: Appeal and Error. The Supreme Court, in reviewing decisions of the district court which affirmed, reversed, or modified decisions of the county court, will consider only those errors specifically assigned in the appeal to the district court and again assigned as error in the appeal to the Supreme Court.

Appeal from the District Court for Hamilton County, WILLIAM H. NORTON, Judge, on appeal thereto from the County Court for Hamilton County, CURTIS H. EVANS, Judge. Judgment of District Court affirmed.

Michael H. Powell, of Powell & Powell, for appellant.

Don Stenberg, Attorney General, and Mark D. Starr for appellee.

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

PER CURIAM.

Defendant-appellant, Roger D. Hansen, pled

> guilty to a complaint in the County Court of Hamilton County, Nebraska . . . to the charge of driving while under the influence of alcoholic liquor (third offense) a Class W misdemeanor. At the enhancement hearing, the charge was found to be a third offense . . . .
>
> On May 15, 1990, the defendant was sentenced . . . to serve four months in the Hamilton County jail . . . fined $500.00 and ordered to pay court costs . . . and his license was revoked for fifteen years.

Brief for appellant at 1.

On June 1, 1990, in the county court, defendant filed a notice of appeal. The notice, in its entirety, provided: "COMES NOW the defendant, Roger D. Hansen, and gives notice to the Court that he is appealing the decision of this Court of April 10, 1990 and the sentence of May 15, 1990 to the District Court of Hamilton County, Nebraska."

The appeal was submitted to the district court on August 20,

1990, and on October 15, the district court entered the following order: "No error appearing, judgment of County Court is affirmed." Defendant then appealed to this court.

In *State v. Erlewine*, 234 Neb. 855, 857, 452 N.W.2d 764, 767 (1990) (filed March 23, 1990), we adopted the following rule of practice:

> The Supreme Court, in reviewing decisions of the district court which affirmed, reversed, or modified decisions of the county court, will consider only those errors specifically assigned in the appeal to the district court and again assigned as error in the appeal to the Supreme Court. This rule shall be effective so as to apply to all county court decisions appealed to the district court after the filing date of this opinion.

The procedural posture of this case is the same as that in *State v. Keller, ante* p. 566, 567, 483 N.W.2d 126, 127 (1992), where we said: "Notwithstanding this [Erlewine] rule, the defendant did not specifically assign any errors in his appeal to the district court. Therefore, absent plain error appearing on the record, there is nothing for this court to review on appeal."

We have examined the record in this case and find no plain error in the actions of the county court or the reviewing district court. Accordingly, the order of the district court for Hamilton County, affirming the order of the county court, is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DONALD R. GRIMM, APPELLANT.

484 N.W.2d 830

Filed June 5, 1992. No. S-91-147.

Appeal from the District Court for Douglas County: J. PATRICK MULLEN, Judge. Affirmed.

Richard J. Epstein for appellant.

Don Stenberg, Attorney General, and Donald A. Kohtz for appellee.

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

PER CURIAM.

Donald R. Grimm appeals the order of the district court denying his plea in bar. We affirm.

The issue presented here is one of law, and "appellate courts are required to review questions of law de novo on the record." *Workman v. Stehlik*, 238 Neb. 666, 668-69, 471 N.W.2d 760, 762 (1991).

On October 7, 1990, Grimm was arrested in Omaha and charged with the subject charge, operating a motor vehicle while his license was suspended, in violation of Neb. Rev. Stat. § 39-669.07 (Cum. Supp. 1990), a Class IV felony. On the same day, Grimm was also charged under § 39-669.07 with third-offense driving while intoxicated, a Class W misdemeanor. On October 30, 1990, Grimm pleaded guilty in county court to the charge of driving while intoxicated.

The felony charge, driving under suspension, was filed in district court. On December 12, 1990, Grimm filed a plea in bar, arguing that the Double Jeopardy Clause of the Fifth Amendment, as interpreted in *Grady v. Corbin*, 495 U.S. 508, 110 S. Ct. 2084, 109 L. Ed. 2d 548 (1990), and as incorporated into this state's jurisprudence in *State v. Harrington*, 236 Neb. 500, 461 N.W.2d 752 (1990), prohibited his prosecution for the driving under suspension charge because it was based upon the same conduct as the driving while intoxicated charge, for which he had already been convicted.

This case is controlled by *State v. Woodfork*, 239 Neb. 720, 478 N.W.2d 248 (1991), which interpreted *Grady v. Corbin, supra*, as prohibiting a subsequent prosecution under the Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution *only* where the State, in securing a conviction for one offense, *necessarily* has proved the conduct comprising *all* of the elements of the subsequent offense not yet prosecuted. *State v. Woodfork, supra*, also disapproved the holding in *State v. Harrington, supra*, to the extent that it was in conflict with

that rule. Like *State v. Woodfork, supra*, the only conduct here common to both offenses was driving an automobile. Each offense, driving under suspension and driving while intoxicated, required conduct additional to and different from the other.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ROY LEE WALLACE, APPELLANT.

484 N.W.2d 477

Filed June 5, 1992. No. S-91-765.

1. **Constitutional Law: Extradition and Detainer.** Extradition is a summary and mandatory executive proceeding derived from the Extradition Clause found in U.S. Const. art. IV, § 2.
2. **Extradition and Detainer: Habeas Corpus.** Once the governor of an asylum state has granted extradition, a court of the asylum state considering release on habeas corpus can do no more than decide (1) whether the extradition documents, on their face, are in order; (2) whether the petitioner has been charged with a crime in the demanding state; (3) whether the petitioner is the person named in the request for extradition; and (4) whether the petitioner is a fugitive.
3. **Extradition and Detainer.** In order for extradition documents to be in order on their face, they must show that the person demanded was substantially charged in that there was a determination of probable cause by a neutral judicial officer of the demanding state.
4. _____. In an extradition proceeding, the requisition may refer to, annex, and authenticate accompanying papers, and if together they meet statutory requirements, that is sufficient.
5. **Extradition and Detainer: Words and Phrases.** The term "authenticate," as used in extradition statutes, simply means a statement that the documents are what they purport to be.
6. **Extradition and Detainer.** The requisition for extradition and the papers supporting it are to be considered together.
7. _____. The illegality of custody in an asylum state prior to issuance of an extradition warrant is immaterial.

Appeal from the District Court for Platte County: JOHN C. WHITEHEAD, Judge. Affirmed.

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

Don Stenberg, Attorney General, and William L. Howland for appellee.

BOSLAUGH, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ., and COLWELL, D.J., Retired.

PER CURIAM.

In this confusingly captioned case, the appellant, Roy Lee Wallace, claims the district court erroneously denied him a writ of habeas corpus directing the sheriff of Platte County, Nebraska, to discharge him from custody because the documents on the basis of which he was arrested and held by said sheriff for extradition are defective. There being no merit to this claim, we affirm.

On July 23, 1991, the Governor of the State of Arkansas requested that Nebraska extradite Wallace to that state for an aggravated robbery therein committed at Crittenden County. The request declares that the "annexed papers" are "authentic and duly authenticated in accordance with the laws" of Arkansas. As contained in the bill of exceptions, the documents supplied in support of the request include, as a separate instrument, the prosecuting attorney's June 25, 1991, application that the Arkansas Governor request extradition. This instrument bears no case identification number, but declares that the crime for which extradition was to be sought took place on December 25, 1990, against one "Lorrie Candler, d/b/a P. J. Country Store." Following the prosecutor's application, as a separate instrument, is a copy of an information charging the crime described in the prosecutor's application. The information bears the number CR-91-62. Following the information, as a separate instrument, is an alias capias bearing number CR-91-62, which commands an Arkansas sheriff to seize Wallace. Following, as a separate instrument, is a "Certificate of Authentication" which bears no case identification number, but in which one represented to be the clerk of the circuit court for Crittenden County certifies that "the attached Information and Capias contain a true,

perfect and complete copy of the Information and Capias on file in" her office. The instrument further contains the certification of one represented to be a judge of that court that the person signing the instrument as clerk is such and the certification of the represented clerk that the person so declaring is a judge of that court. Following this certificate, as still another separate instrument, is an affidavit in which a magistrate on June 25, 1991, declares that after his review "of the file and evidence in State of Arkansas vs. [Wallace]," he finds that there is sufficient probable cause to support "the charges of Aggravated Robbery filed against the said" Wallace.

On July 25, 1991, the Honorable E. Benjamin Nelson, as Governor of this state, issued his warrant authorizing the sheriff of Platte County to arrest Wallace. However, Wallace had been arrested on June 19, 1991, by an officer working for the Platte County sheriff acting on the basis of information supplied by authorities in Crittenden County, Arkansas. This information included a copy of an information charging Wallace with committing an aggravated robbery in that county on January 7, 1991, and a copy of an arrest warrant issued by the municipal court of West Memphis in that same county for felony escape on June 13, 1991.

Neb. Rev. Stat. § 29-731 (Reissue 1989) provides, in relevant part:

> No demand for the extradition of a person charged with crime in another state shall be recognized by the Governor unless in writing alleging . . . that the accused was present in the demanding state at the time of the commission of the alleged crime, and that thereafter he fled from the state, and accompanied by a copy of an indictment found or by information supported by affidavit in the state having jurisdiction of the crime, or by a copy of an affidavit made before a magistrate there, together with a copy of any warrant which was issued thereupon . . . . The indictment, information, or affidavit made before the magistrate must substantially charge the person demanded with having committed a crime under the law of that state; and the copy of indictment, information, affidavit, judgment of conviction or sentence must be

authenticated by the Executive Authority making the demand.

Michigan v. Doran, 439 U.S. 282, 99 S. Ct. 530, 58 L. Ed. 2d 521 (1978), teaches that extradition is a summary and mandatory executive proceeding derived from the Extradition Clause found in U.S. Const. art. IV, § 2. Thus, once the governor of an asylum state, such as Nebraska in this case, has granted extradition, a court of the asylum state considering release on habeas corpus can do no more than decide (1) whether the extradition documents, on their face, are in order; (2) whether the petitioner has been charged with a crime in the demanding state; (3) whether the petitioner is the person named in the request for extradition; and (4) whether the petitioner is a fugitive.

Wallace does not claim that he was not charged with a crime in Arkansas, that he is not the person named in the requisition for extradition, or that he is not a fugitive. He does claim, however, that the extradition documents cannot, on their face, be "in order" unless they show that the person demanded was "substantially charge[d]." According to Wallace, in order to so show, the documents must demonstrate that there existed probable cause for the demanding state to charge the demanded person with the crime for which extradition is sought. He then asserts the documents in this case do not so establish because the Arkansas magistrate's affidavit of probable cause is deficient in that it "is not certified or authenticated in any manner whatsoever" and, in any event, does not identify the aggravated robbery at issue. Brief for appellant at 10.

We agree that in *Michigan v. Doran, supra*, the Supreme Court implied that there must have been such a determination of probable cause by its holding that "when a neutral judicial officer of the demanding state has determined that probable cause exists, the courts of the asylum state are without power to review the determination." 439 U.S. at 290. See, *Rodgers v. Adams*, 212 Neb. 716, 717, 325 N.W.2d 157, 158 (1982) (affidavit of probable cause made by assistant state attorney attached to certificate of judge that " 'probably [sic] cause' " existed held sufficient to comply with requirement that a determination of probable cause be made by neutral judicial

officer); *Ex Parte Rosas*, 810 S.W.2d 315 (Tex. App. 1991).

However, we do not agree with Wallace's claim that the documents in this case are not, on their face, in order. While the documents described earlier are contained in the bill of exceptions as separate instruments, the bill of exceptions also shows that at the trial of this matter Wallace offered, and the court received without objection, an exhibit which Wallace described as consisting of 15 pages and as "essentially [being] the extradition documents offered by the State in support of [its] extradition hearing . . . ." The documents described earlier are bound in the bill of exceptions, and all appear to have been at one time stapled together. While there is nothing in the record to show when the fastening staple was removed or who removed it, Wallace does not claim the documents were not fastened together when they arrived in Nebraska. Under these facts and circumstances, we must conclude that the Arkansas documents were fastened together when they arrived in Nebraska.

Thus, Wallace's claim that the magistrate's affidavit is not certified or authenticated in any manner is clearly wrong. The requisition signed by the Governor of Arkansas certifies that the annexed papers, which would include the subject affidavit, are authentic and authenticated in accordance with the laws of Arkansas. In *Wise v. State*, 197 Neb. 831, 833, 251 N.W.2d 373, 375 (1977), quoting *Austin v. Brumbaugh*, 186 Neb. 815, 186 N.W.2d 723 (1971), we said: " 'In an extradition proceeding the requisition may refer to, annex, and authenticate accompanying papers and if together they meet statutory requirements that is sufficient. . . . The term authenticate, as used in extradition statutes, simply means a statement that the documents are what they purport to be.' "

Wallace's claim that the magistrate's affidavit does not sufficiently identify the crime for which extradition is sought is equally without merit. The petition of the Arkansas prosecutor asking the Arkansas Governor to seek extradition alleges that Wallace was charged with committing aggravated robbery on December 25, 1990, and the alias capias bears the same docket and page numbers as does the information charging that crime. The rule is that the requisition and the papers supporting it are to be considered together. See, *Beauchamp v. Elrod*, 137 Ill.

App. 3d 208, 484 N.E.2d 817 (1985); *Earhart v. Hicks*, 656 S.W.2d 873 (Tenn. Crim. App. 1983); *Martello v. Baker*, 189 Colo. 195, 539 P.2d 1280 (1975). Under the circumstances, the affidavit must be considered as relating to the crime for which the extradition is sought.

Wallace points out, however, that he was arrested by the Platte County sheriff for an entirely different crime. That is unquestionably the case; but that fact is not relevant to whether the extradition warrant is valid. Not only does Wallace not urge that his Nebraska arrest was unlawful, but the legality of that arrest is not material. *Bell v. Janing*, 188 Neb. 690, 199 N.W.2d 24 (1972) (illegality of custody in asylum state prior to issuance of extradition warrant immaterial). See, also, *Whittington, Jr. v. Bray*, 200 Colo. 17, 612 P.2d 72 (1980); *In re Saunders*, 138 Vt. 259, 415 A.2d 199 (1980); *Com. ex rel. Berry v. Aytch*, 253 Pa. Super. 312, 385 A.2d 354 (1978).

As the extradition documents, on their face, were in order, the district court did not err in denying Wallace's application for habeas corpus relief.

AFFIRMED.

WHITE, J., not participating.

CAPORALE, J., dissenting.

I must dissent; the obligation of an appellate court is to resolve the issues presented on appeal on the basis of the record presented to it, not on the basis of a record which could or should have been presented to it. See *Connor v. State*, 175 Neb. 140, 120 N.W.2d 916 (1963), quoting *Phenix Ins. Co. v. Fuller*, 53 Neb. 811, 74 N.W. 269 (1898) (judgment of district court must stand or fall upon statutory record in case).

The majority ties together the various documents bound in the bill of exceptions as separate instruments by concluding from various and sundry holes in the papers that the documents were at one time all fastened together. That may be so, but they are not fastened together now. While the majority notes that there is nothing in the record to show when the assumed fastening staple was removed or who did so, the majority notes that the documents were offered as a single 15-page exhibit. If the now separate documents were indeed a single stapled exhibit

when received by the trial court, it was the trial court's responsibility to see to it that the exhibit found its way into the record in that condition. The sad fact is that the majority has elected to take a view which protects the judicial bureaucracy at the expense of defendant Roy Lee Wallace's rights.

As the documents are presented to us, not only is the Arkansas magistrate's affidavit of probable cause not "annexed" to the Arkansas Governor's certificate or to the court clerk's certificate of authenticity, but as neither certificate makes any particular reference to the affidavit, there is nothing which enables me to determine that the magistrate's after-the-fact affidavit relates to the robbery for which Arkansas has requested extradition. The record does, however, clearly tell us that the robbery for which extradition is sought is not the only robbery which Wallace is claimed to have committed.

Consequently, I would hold that the Arkansas documents are not, on their face, in order and that the extradition warrant issued by Governor Nelson is void and of no force and effect.

While the arresting officer had reasonable information that Wallace stood charged in the courts of Arkansas with crimes punishable by imprisonment for more than a year and thus had a basis for making a lawful warrantless arrest when he did so on June 19, 1991, it does not appear from the record before us that Wallace was thereafter, as required by law, "taken before a judge or magistrate with all practicable speed and complaint" made against him under oath setting forth the ground for the arrest. See Neb. Rev. Stat. § 29-742 (Reissue 1989).

Accordingly, I would reverse the judgment of the district court and remand the cause with the directions that habeas corpus relief issue forthwith and that Wallace be discharged from custody.

SHANAHAN, J., joins in this dissent.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. MILES W. JOHNSTON, JR., RESPONDENT.

485 N.W.2d 577

Filed June 5, 1992. No. S-92-126.

Original action. Judgment of suspension.

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

PER CURIAM.

A disciplinary complaint was filed with the Counsel for Discipline of the Nebraska State Bar Association against Miles W. Johnston, Jr., regarding the mismanagement of three estates.

On November 11, 1991, formal charges were brought against the respondent, setting forth three counts of violating each of the following provisions of the Code of Professional Responsibility: DR 1-102(A)(1) and (5) and DR 6-101(A)(3).

Respondent filed an untimely answer to the formal charges, admitting to the violations enumerated under DR 1-102(A)(1) and (5), but denying the allegations of DR 6-101(A)(3) violations. Pursuant to Neb. Ct. R. of Discipline 10(I) (rev. 1989), we enter our judgment on the pleadings.

Accordingly, the respondent is hereby suspended from the practice of law in the State of Nebraska for a period of 30 days, effective September 1, 1992.

JUDGMENT OF SUSPENSION.

WHITE, J., not participating.

KATHY ANDERSON, APPELLANT, V. SERVICE MERCHANDISE COMPANY, INC., AND SYLVANIA LIGHTING SERVICES CORPORATION, APPELLEES.

485 N.W.2d 170

Filed June 12, 1992. No. S-89-1188.

1. **Summary Judgment: Appeal and Error.** A summary judgment is properly granted when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue concerning any material fact or the ultimate inferences deducible from such fact or facts and that the moving party is entitled to judgment as a matter of law. In appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
2. **Negligence: Evidence.** When an instrumentality under the exclusive control and management of the alleged wrongdoer produces an occurrence which would not, in the ordinary course of things, come to pass in the absence of the negligence of the one having such management and control, the occurrence itself, in the absence of explanation by the alleged wrongdoer, affords evidence that the occurrence arose as the result of the alleged wrongdoer's negligence.
3. **Negligence: Circumstantial Evidence.** Res ipsa loquitur operates as a type of circumstantial evidence.
4. _____: _____. Res ipsa loquitur is not a matter of substantive law, but, as a form of circumstantial evidence, is a procedural matter.
5. **Trial: Negligence.** If res ipsa loquitur applies, an inference of a defendant's negligence exists for submission to the fact finder, which may accept or reject the inference in the factual determination whether the defendant is negligent.
6. **Invitor-Invitee.** A business possessor of real estate has a duty to exercise reasonable care to keep the premises safe for its business invitees.
7. _____. A business possessor's duty to use reasonable care for invitees on the premises is a nondelegable duty.
8. _____. A business possessor of real estate cannot shift the duty of reasonable care for the premises to an agent or independent contractor employed to maintain all or part of the premises under the possessor's control.
9. **Negligence: Liability.** Liability for breach of a nondelegable duty is an exception to the general rule that one who employs an independent contractor is not liable for the independent contractor's negligence.

Appeal from the District Court for Douglas County: DONALD J. HAMILTON, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Thomas M. White, of Fitzgerald, Schorr, Barmettler & Brennan, for appellant.

Thomas D. Wulff, of Kennedy, Holland, DeLacy & Svoboda, for appellee Service Merchandise.

Edward G. Warin and Lynn Ann Killeen, of Gross & Welch, for appellee Sylvania.

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

SHANAHAN, J.

Kathy Anderson appeals from dismissal of her negligence action based on res ipsa loquitur. In granting the summary judgments and dismissing Anderson's action against Service Merchandise Company, Inc. (Service Merchandise), and Sylvania Lighting Services Corporation (Sylvania), the district court for Douglas County concluded that "the subject matter involved in this litigation was not under the exclusive control of each defendant." We affirm in part, and in part reverse and remand for further proceedings.

FACTUAL BACKGROUND

Service Merchandise operates a retail store on premises leased from Jewel Companies, Inc., since June 1, 1978. To maintain the store's overhead lighting system, Service Merchandise in April 1985 entered a service contract with Sylvania, which agreed to change the system's "ballasts" and "sockets" as needed at periodic intervals. The contract stated that "[n]o other scope of work will be performed without prior approval" of the Service Merchandise maintenance department and that "[a]ny and all services performed must be approved" by Service Merchandise. Pursuant to the service contract, Sylvania entered the Service Merchandise store in May and September 1985 and replaced a number of "lamps," in addition to ballasts, which are resistance units used to stabilize the current in a circuit for an arc lamp, a mercury-vapor lamp, or a fluorescent lamp. During that time, Sylvania spent a total of 12 hours over 3 days for work on the lighting system in Service Merchandise's store. Nothing presently indicates that before the accident Sylvania did any additional physical work on Service Merchandise's lighting system after the previously described services in 1985. On May 8, 1986, Sylvania returned to the Service Merchandise store and performed a "lighting inspection." What may have been involved in that inspection is

undisclosed. Notwithstanding the service contract, Service Merchandise's employees "changed elements in the light fixtures in the store" and changed "the lamps when they burn[ed] out."

On June 27, 1986, some 7 weeks after Sylvania's inspection, Anderson was standing in the checkout line of Service Merchandise's store, when an overhead light fixture fell approximately 16 feet from the store's ceiling and struck Anderson on the back of the neck, head, and shoulder, resulting in Anderson's personal injury and medical expenses.

PLEADINGS AND SUMMARY JUDGMENTS

Anderson sued Service Merchandise under the doctrine of res ipsa loquitur, alleging in part that "[t]he light fixture was and remained under the exclusive control of the defendant up to the time it fell out of the ceiling and struck Kathy Anderson." In its answer, Service Merchandise denied negligence and specifically denied that the light fixture had been in its exclusive control, because Service Merchandise "was merely a lessee of the premises." With the court's permission, Anderson filed an amended petition, adding Sylvania as a codefendant and alleging that Sylvania had contracted to service and maintain the light fixtures in Service Merchandise's store and that the fixture which struck Anderson had been under the "exclusive control" of both defendants. With its answer to Anderson's amended petition, Service Merchandise filed a "cross claim" against Sylvania, alleging that Sylvania was the last entity to service the particular light fixture before the accident, and claiming that Service Merchandise was "entitled to contribution and/or indemnity" from Sylvania.

Service Merchandise and Sylvania each moved for a summary judgment on the grounds that res ipsa loquitur was inapplicable as a matter of law and that there was no genuine issue of material fact. The district court determined "as a matter of law that the subject matter involved in this litigation was not under the exclusive control of each defendant and therefore the doctrine of res ipsa loquitur does not apply." No information presented in conjunction with the summary judgment motions indicated any specific negligence by Service

Merchandise or Sylvania. For that reason, the court dismissed Anderson's action.

ASSIGNMENTS OF ERROR

Anderson has asserted six assignments of error on appeal, all of which coalesce into one contention: The court erred in concluding that the doctrine of res ipsa loquitur was inapplicable as a matter of law, because the court incorrectly concluded that the defendants were not in exclusive control of the instrumentality which struck Anderson.

STANDARD OF REVIEW

Anderson refers to *Bank of Valley v. Shunk*, 208 Neb. 200, 302 N.W.2d 711 (1981), for the proposition that "[s]ummary judgment is an extreme remedy and should be awarded only when the issue is clear beyond all doubt." Brief for appellant at 8. The "clear beyond all doubt" standard has occasionally found its way into other opinions issued by this court; for example, see, *Nichols v. Ach*, 233 Neb. 634, 447 N.W.2d 220 (1989); *Hanzlik v. Paustian*, 211 Neb. 322, 318 N.W.2d 712 (1982); *Schaffert v. Hartman*, 203 Neb. 271, 278 N.W.2d 343 (1979); *Hollamon v. Eagle Raceway, Inc.*, 187 Neb. 221, 188 N.W.2d 710 (1971); *Storz Brewing Co. v. Kuester*, 178 Neb. 135, 132 N.W.2d 341 (1965).

Neb. Rev. Stat. § 25-1332 (Reissue 1989) provides in part: "The [summary] judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

"[A]s a procedural equivalent to a trial, a summary judgment is an extreme remedy because a summary judgment may dispose of a crucial question in litigation, or the litigation itself, and may thereby deny a trial to the party against whom the motion for summary judgment is directed." *Wachtel v. Beer*, 229 Neb. 392, 399, 427 N.W.2d 56, 61 (1988). Accord *Wiles v. Metzger*, 238 Neb. 943, 473 N.W.2d 113 (1991). A rationale for use of a summary judgment is the disposition and elimination of frivolous or baseless lawsuits that would otherwise necessitate unwarranted trials and consume valuable

time, avoidable expense, and judicial resources better directed toward litigation that resolves real controversies, meritorious claims, and valid issues.

Section 25-1332 is virtually identical to Fed. R. Civ. Prac. 56. See *In re Freeholders Petition*, 210 Neb. 583, 316 N.W.2d 294 (1982). In *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986), the Supreme Court stated that a "summary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party" and indicated a proper standard for granting a summary judgment:

> [T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact.
>
> As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted.

(Emphasis in original.) 477 U.S. at 247-48. See, also, *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); *Matsushita Elec. Industrial Co. v. Zenith Radio*, 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986).

Overly restrictive standards for justification of a summary judgment under Rule 56 have been criticized by Wright, Miller, and Kane:

> [A] few courts have held that a scintilla of evidence is sufficient to preclude summary judgment. This holding is extremely dubious in light of the strong analogy between summary judgment and the . . . motion for a directed verdict and the applicability of the same standard to both motions. A scintilla of evidence will not bar a directed verdict because, by hypothesis, a jury may not rely on it as a basis for reaching a verdict. Thus it has been held that it should not prevent summary judgment. . . . In a similar

> vein a restrictive attitude toward summary judgment also frequently is expressed by invoking the shopworn expression that summary judgment should not be granted when there is the "slightest doubt" as to the facts. This phrase has been characterized as a misleading gloss on the words "genuine issue" in Rule 56(c) and has resulted in a more narrow approach to summary judgment than the rule warrants.

10A Charles A. Wright, Arthur R. Miller, & Mary K. Kane, Federal Practice and Procedure: Civil § 2727 at 175-77 (2d ed. 1983).

The "clear beyond all doubt" standard for a summary judgment presents an elevated or enhanced burden greater than "beyond a reasonable doubt," applicable in the trial of a criminal case. Moreover, the "clear beyond all doubt" standard is inconsistent with the standard expressed in § 25-1332. Accordingly, we now disapprove of "clear beyond all doubt" as a standard for a summary judgment and reaffirm the correct rule:

> "A summary judgment is properly granted when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue concerning any material fact or the ultimate inferences deducible from such fact or facts and that the moving party is entitled to judgment as a matter of law. [Citations omitted.] In appellate review of a summary judgment, the 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. [Citation omitted.]"

Murphy v. Spelts-Schultz Lumber Co., ante p. 275, 277, 481 N.W.2d 422, 425 (1992) (quoting from *Union Pacific RR. Co. v. Kaiser Ag. Chem. Co.*, 229 Neb. 160, 425 N.W.2d 872 (1988)). Accord, *DeCamp v. Lewis*, 231 Neb. 191, 435 N.W.2d 883 (1989); *Wilson v. F & H Constr. Co.*, 229 Neb. 815, 428 N.W.2d 914 (1988); *Wibbels v. Unick*, 229 Neb. 184, 426 N.W.2d 244 (1988).

" 'On a motion for summary judgment, the question is not

how a factual issue is to be decided, but whether any real issue of material fact exists.' " *Murphy v. Spelts-Schultz Lumber Co., ante* at 277-78, 481 N.W.2d at 426 (quoting from *Newman v. Hinky Dinky*, 229 Neb. 382, 427 N.W.2d 50 (1988)).

> "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. [Citations omitted.] After the movant for a summary judgment has shown facts entitling the movant 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."

Murphy v. Spelts-Schultz Lumber Co., ante at 278, 481 N.W.2d at 426 (quoting from *Wilson v. F & H Constr. Co., supra*). Accord *Wiles v. Metzger*, 238 Neb. 943, 473 N.W.2d 113 (1991).

RES IPSA LOQUITUR

As expressed in *Widga v. Sandell*, 236 Neb. 798, 803, 464 N.W.2d 155, 158-59 (1991), concerning the doctrine and elements of res ipsa loquitur:

> [W]hen an instrumentality under the exclusive control and management of the alleged wrongdoer produces an occurrence which would not, in the ordinary course of things, come to pass in the absence of the negligence of the one having such management and control, the occurrence itself, in the absence of explanation by the alleged wrongdoer, affords evidence that the occurrence arose as the result of the alleged wrongdoer's negligence. *Maly v. Arbor Manor, Inc.*, 225 Neb. 276, 404 N.W.2d 419 (1987); *Beatty v. Davis*, 224 Neb. 663, 400 N.W.2d 850 (1987); *Fynbu v. Strain*, 190 Neb. 719, 211 N.W.2d 917 (1973); *McCall v. St. Joseph's Hospital*, 184 Neb. 1, 165 N.W.2d 85 (1969); *Security Ins. Co. v. Omaha Coca-Cola Bottling Co.*, 157 Neb. 923, 62 N.W.2d 127 (1954); *Miratsky v. Beseda*, 139 Neb. 229, 297 N.W. 94 (1941). Literally, the "thing speaks for itself."

Accord *Swierczek v. Lynch*, 237 Neb. 469, 466 N.W.2d 512 (1991).

Res ipsa loquitur operates as a type of circumstantial evidence, that is, "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. Jasper*, 237 Neb. 754, 763, 467 N.W.2d 855, 862 (1991). Accord *State v. Rokus, ante* p. 613, 483 N.W.2d 149 (1992). Regarding res ipsa loquitur,

> [t]he requirement that the occurrence be one which ordinarily does not happen without negligence is of course only another way of stating an obvious principle of circumstantial evidence: that the event must be such that in the light of ordinary experience it gives rise to an inference that someone must have been negligent.

Prosser and Keeton on the Law of Torts, *Circumstantial Evidence—Res Ipsa Loquitur* § 39 at 244 (5th ed. 1984). As further noted by Prosser and Keeton:

> The plaintiff is not required to eliminate with certainty all other possible causes or inferences, which would mean that the plaintiff must prove a civil case beyond a reasonable doubt. All that is needed is evidence from which reasonable persons can say that on the whole it is more likely that there was negligence associated with the cause of the event than that there was not. It is enough that the court cannot say that the jury could not reasonably come to that conclusion. Where no such balance of probabilities in favor of negligence can reasonably be found, res ipsa loquitur does not apply.

Id. at 248.

Thus, res ipsa loquitur is not a matter of substantive law, but, as a form of circumstantial evidence, is a procedural matter. See, *Asher v. Coca Cola Bottling Co.*, 172 Neb. 855, 112 N.W.2d 252 (1961); *Swanson v. Murray*, 172 Neb. 839, 112 N.W.2d 11 (1961); *Security Ins. Co. v. Omaha Coca-Cola Bottling Co.*, 157 Neb. 923, 62 N.W.2d 127 (1954). Consequently, if res ipsa loquitur applies, an inference of a defendant's negligence exists for submission to the fact finder, which may accept or reject the inference in the factual

determination whether the defendant is negligent. See, *Beatty v. Davis*, 224 Neb. 663, 400 N.W.2d 850 (1987); *Asher v. Coca Cola Bottling Company, supra*; *Swanson v. Murray, supra*; *Benedict v. Eppley Hotel Co.*, 161 Neb. 280, 73 N.W.2d 228 (1955); *Security Ins. Co. v. Omaha Coca-Cola Bottling Co., supra*; *Miratsky v. Beseda*, 139 Neb. 229, 297 N.W. 94 (1941). As pointed out in Prosser and Keeton on the Law of Torts, *Res Ipsa Loquitur—Procedural Effect* § 40 at 258 (5th ed. 1984):

> The inference of negligence to be drawn from the circumstances is left to the jury. They are permitted, but not compelled to find it. The plaintiff escapes a nonsuit, or a dismissal of his case, since there is sufficient evidence to go to the jury....
>
> ... As a general proposition, however, the procedural effect of res ipsa may be said to be a matter of the strength of the inference to be drawn, which will vary with the circumstances of the case.

Therefore, in Anderson's case, if res ipsa loquitur is inapplicable as a matter of law, there is no material question of fact regarding actionable negligence, and the summary judgments were proper dispositions. However, if res ipsa loquitur is applicable in light of the presentation at the hearing for summary judgments in Anderson's case, the inference of negligence itself presents a question of material fact, and the summary judgments were improper.

ANDERSON'S RES IPSA CASE

"[I]n the ordinary course of things," part of a light fixture attached to a building's ceiling does not, in the absence of negligence, fall and injure an invitee. Thus, in Anderson's case the focal point is "exclusive control," a requisite element for application of res ipsa loquitur. See, *Widga v. Sandell*, 236 Neb. 798, 464 N.W.2d 155 (1991); *Maly v. Arbor Manor, Inc.*, 225 Neb. 276, 404 N.W.2d 419 (1987).

Sylvania.

What constituted Sylvania's "inspection" of the lighting system in May 1986, some 7 weeks before the light fixture fell on Anderson, is undisclosed. Therefore, Sylvania's last disclosed physical contact with the lighting system was in

September 1985, when Sylvania replaced some lamps and ballasts in the lighting system. Thus, there was a hiatus of approximately 9 months between Sylvania's last physical work on the lighting system and the light fixture's falling on Anderson. Also, independent of Sylvania's involvement with the lighting system, Service Merchandise's employees had unrestricted access to the lighting system and even changed burned-out lamps and elements in the light fixtures. As presented to us, the record fails to indicate Sylvania's control of the lighting system and its fixtures. While Sylvania had a contractual duty to maintain the lighting system in Service Merchandise's store, the record before us shows that Sylvania actually worked on the system a total of only 12 hours over 3 days during the 15-month period before Anderson's accident, with the last occasion being 9 months before the accident. Meanwhile, Service Merchandise and its employees had daily control over the entire premises, including the lighting system. Thus, Sylvania's control of the lighting system in Service Merchandise's store is so attenuated and lacking in continuity that Sylvania's control is nonexistent. Without control, there is no inference of negligence under res ipsa loquitur. Consequently, in the absence of Sylvania's participation in control over the lighting system, res ipsa loquitur was inapplicable as a basis for Anderson's negligence action against Sylvania. Without res ipsa loquitur, Anderson presented no evidence of Sylvania's negligence; therefore, the district court properly granted summary judgment to Sylvania.

However, nothing in this opinion should be construed to preclude possible application of res ipsa loquitur in situations when multiple defendants jointly exercise control of an instrumentality that causes harm to the complaining party. See *Swierczek v. Lynch*, 237 Neb. 469, 466 N.W.2d 512 (1991) (res ipsa loquitur applicable to alleged negligence of hospital, oral surgeon, and nurse anesthetist). Cf. *Asher v. Coca Cola Bottling Co.*, 172 Neb. 855, 112 N.W.2d 252 (1961) (successive control by defendants; res ipsa loquitur applied to beverage manufacturer when a dead mouse was found in an open soft drink bottle served to a restaurant customer). See, also, *Stalter v. Coca-Cola Bottling Co. of Ark.*, 282 Ark. 443, 669 S.W.2d

460 (1984) (grocery store and bottling company properly joined as defendants in res ipsa loquitur case involving falling bottle); *Jackson v. H. H. Robertson Co., Inc.*, 118 Ariz. 29, 574 P.2d 822 (1978) (negligence action based on construction site accident properly maintainable against two subcontractors under res ipsa loquitur); *Ybarra v. Spangard*, 25 Cal. 2d 486, 154 P.2d 687 (1944) (res ipsa loquitur applied to medical malpractice action based on negligence of unidentified members of operating room team); *Whitby v. One-O-One Trailer Rental Co.*, 191 Kan. 653, 383 P.2d 560 (1963) (injured plaintiff, asleep in a towed automobile that overturned when the hitch failed, could maintain res ipsa-based negligence action against both lessor and lessee of towing equipment); *Barb v. Farmers Insurance Exchange*, 281 S.W.2d 297 (Mo. 1955) (res ipsa loquitur applicable to codefendants who shared control of passageway where falling boxes struck and injured plaintiff); *Meny v. Carlson*, 6 N.J. 82, 77 A.2d 245 (1950) (plaintiff injured in a fall could maintain negligence action based on res ipsa loquitur in an action against the partnership which supplied, and the corporation which assembled, a defective scaffold); *Schroeder v. City & County Savings Bank, Albany*, 293 N.Y. 370, 57 N.E.2d 57 (1944) (res ipsa loquitur applied to three defendants who were in joint control of barricade which collapsed); *Bond v. Otis Elevator Company*, 388 S.W.2d 681 (Tex. 1965) (negligence action, based on res ipsa loquitur, was maintainable against codefendants who jointly controlled plummeting elevator). See, also, generally, Annot., Applicability of Res Ipsa Loquitur in Case of Multiple, Nonmedical Defendants—Modern Status, 59 A.L.R.4th 201 (1988).

Service Merchandise.

Service Merchandise contends that it lacked exclusive control because Service Merchandise had contracted with Sylvania for periodic inspection and service of the store's overhead lighting fixtures, Service Merchandise had not occupied the store throughout the building's existence, and Service Merchandise's landlord had a right to show the premises to prospective purchasers.

First, we examine Service Merchandise's relationship to the premises where the accident occurred.

As a business possessor of real estate, Service Merchandise has a duty to exercise reasonable care to keep the premises safe for its business invitees. See, *Havlicek v. Desai*, 225 Neb. 222, 403 N.W.2d 386 (1987); *Lund v. Mangelson*, 183 Neb. 99, 158 N.W.2d 223 (1968). Moreover, a business possessor's duty to use reasonable care for invitees on the premises is a nondelegable duty. See *Simon v. Omaha P. P. Dist.*, 189 Neb. 183, 202 N.W.2d 157 (1972). See, also, *Ft. Lowell-NSS Ltd. Partnership v. Kelly*, 166 Ariz. 96, 800 P.2d 962 (1990); *Bryant v. Sherm's Thunderbird Mkt.*, 268 Or. 591, 522 P.2d 1383 (1974); *Stevens v. Bow Mills Methodist Church*, 111 N.H. 340, 283 A.2d 488 (1971); Restatement (Second) of Torts § 422 (1965). Also, Service Merchandise, a business possessor of real estate, cannot shift the duty of reasonable care for the premises to an agent or independent contractor employed to maintain all or part of the premises under the possessor's control. See *Nownes v. Hillside Lounge, Inc.*, 179 Neb. 157, 137 N.W.2d 361 (1965). See, also, *Colmenares Vivas v. Sun Alliance Ins. Co.*, 807 F.2d 1102 (1st Cir. 1986); *Domany v. Otis Elevator Company*, 369 F.2d 604 (6th Cir. 1966); *Rogers v. Dorchester Assoc.*, 32 N.Y.2d 553, 300 N.E.2d 403, 347 N.Y.S.2d 22 (1973).

As we have stated:

> [O]ne employing an independent contractor may be liable for damages resulting from injury caused by the contractor's negligence, when, by rule of law or statute, the duty to guard against the risk is "nondelegable." A nondelegable duty means that an employer of an independent contractor . . . by assigning work consequent to a duty, is not relieved from liability arising from the delegated duties negligently performed. [Citation omitted.] As a result of a nondelegable duty, the responsibility or ultimate liability for proper performance of a duty cannot be delegated, although actual performance of the task required by a nondelegable duty may be done by another. [Citation omitted.] One on whom a nondelegable duty is enjoined may not, by employing an independent contractor, escape vicarious

> responsibility and liability for proper performance of that nondelegable duty.

Foltz v. Northwestern Bell Tel. Co., 221 Neb. 201, 213, 376 N.W.2d 301, 309 (1985). Liability for breach of a nondelegable duty is an exception to the general rule that one who employs an independent contractor is not liable for the independent contractor's negligence. See *Sullivan v. Geo. A. Hormel and Co.*, 208 Neb. 262, 303 N.W.2d 476 (1981). See, also, Prosser and Keeton on the Law of Torts, *Independent Contractors* § 71 (5th ed. 1984) (employer's vicarious liability for independent contractor's breach of the employer's nondelegable duty). Therefore, even assuming that Sylvania was negligent and that Sylvania's negligence was the proximate cause of Anderson's injuries, "exclusive control" for the purposes of res ipsa loquitur remained with Service Merchandise.

Service Merchandise's "exclusive control" is similarly not defeated by the fact that the building existed before Service Merchandise's occupancy under its lease or by the fact that Service Merchandise's landlord has some limited right to potential entry under the lease. Service Merchandise's nondelegable duty of safe premises exists as the result of Service Merchandise's unquestioned status as a business possessor of land and Anderson's unquestioned status as a business invitee of Service Merchandise. See *Kliewer v. Wall Constr. Co.*, 229 Neb. 867, 429 N.W.2d 373 (1988). See, also, *Galloway v. Bankers Trust Co.*, 420 N.W.2d 437 (Iowa 1988); *Bovis v. 7-Eleven, Inc.*, 505 So. 2d 661 (Fla. App. 1987); *Jarr v. Seeco Construction Co.*, 35 Wash. App. 324, 666 P.2d 392 (1983); *Brookins v. U.S.*, 722 F. Supp. 1214 (E.D. Pa. 1989). See, further, Restatement (Second) of Torts § 328 E (1965).

To summarize, Service Merchandise was in "exclusive control" of the premises for purposes of res ipsa loquitur because Service Merchandise possessed and, therefore, controlled the site of the accident and had a nondelegable duty to exercise reasonable care for the protection of Anderson, a business invitee. Since Anderson has established all the elements of res ipsa loquitur, including Service Merchandise's "exclusive control" as an element of res ipsa loquitur, a genuine issue of material fact existed in Anderson's negligence action

against Service Merchandise. Therefore, the district court erred by granting a summary judgment to Service Merchandise.

CONCLUSION

Our decision in no way affects Service Merchandise's action against Sylvania for "indemnity and/or contribution," a matter which is not before the court in Anderson's appeal. Our opinion today involves only Anderson's negligence actions, based on res ipsa loquitur, against Service Merchandise and Sylvania.

For the foregoing reasons, we affirm the district court's judgment granting summary judgment to Sylvania and dismissing Anderson's action against Sylvania, but we reverse the district court's judgment granting summary judgment to Service Merchandise and dismissing Anderson's action against Service Merchandise and remand Anderson's action against Service Merchandise to the district court for further proceedings.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

WHITE, J., not participating.

VERNE THOMSEN AND TED DABERKOW, DOING BUSINESS AS J & L HAY CO., APPELLANTS, V. FARMERS MUTUAL UNITED INSURANCE CO., INC., FORMERLY KNOWN AS FARMERS NATIONAL INSURANCE ASSOCIATION OF DODGE COUNTY, APPELLEE.

485 N.W.2d 179

Filed June 12, 1992. No. S-89-1381.

Pretrial Procedure: Rules of the Supreme Court: Time. A request for admission under Neb. Ct. R. of Discovery 36 (rev. 1989) is admitted unless within 30 days, or within such shorter or longer time as designated by the court, a written answer or objection is filed by the party to whom the request is directed.

Appeal from the District Court for Saunders County: WILLIAM H. NORTON, Judge. Affirmed.

Michael B. Kratville, of Kratville Law Offices, for appellants.

Donald G. Blankenau, of Edstrom, Bromm, Lindahl & Wagner, for appellee.

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

WHITE, J.

This is an appeal from a summary judgment in favor of appellee, Farmers Mutual United Insurance Company, hereafter Farmers, and against the appellants, Verne Thomsen and Ted Daberkow.

In their petition, appellants alleged that Thomsen was the owner of a certain John Deere combine, serial No. 2633, and that Daberkow, doing business as J & L Hay Company, was the owner and holder of a security interest in the same combine. The appellants also alleged that Thomsen purchased a policy of insurance for the combine on November 7, 1985, from appellee, which policy, among other coverage, provided protection from vandalism and malicious destruction of property.

The appellants further alleged theft of the combine and destruction of it by persons unknown on or about November 29, 1985. A subsequent claim for the loss was denied, and a lawsuit followed. In its answer, Farmers admitted the issuance of the policy, but denied that Thomsen and Daberkow had an insurable interest in the combine and stated that, in any event, the policy afforded no coverage for the claimed loss.

At the hearing on the motion for summary judgment, Farmers introduced a number of exhibits, including the affidavit of Farmers' attorney, which stated that on June 28, 1989, a request for admission was served on the appellants' former attorney, Alan H. Kirshen, pursuant to Neb. Ct. R. of Discovery 36(a) (rev. 1989). A response was not filed within 30 days, and the request was deemed admitted. A request for admission under rule 36 is admitted unless within 30 days, or within such shorter or longer time as designated by the court, a written answer or objection is filed by the party to whom the

request is directed.

The request for admission, as admitted, established that neither Thomsen nor Daberkow was the owner of the combine on November 7, 1985, that they did not have an insurable interest therein, and that they actively misrepresented the true facts to Farmers. Appellants' first assignment of error is that the trial court erred in not allowing Thomsen and Daberkow to file late answers to the request for admission.

The appellants argue in their brief that Kirshen secreted files and mail from his partners and that they, as well as Kirshen's partner Michael B. Kratville, had no knowledge of the request for admission until the date of the hearing on the motion for summary judgment. They argue that Kirshen was ordered disbarred by this court, see *State ex rel. NSBA v. Kirshen*, 232 Neb. 445, 441 N.W.2d 161 (1989), and that to grant a summary judgment penalizes them because of the unethical acts of a former attorney.

As stated, all of the above assertions are raised in appellants' brief. No affidavit setting forth the facts was presented to the trial judge, nor, in fact, was there a motion for leave to file late answers. The assignment is not meritorious.

The second assignment of error, that the court erred in granting Farmers' motion for summary judgment, is frivolous. The failure to answer establishes that the appellants had no ownership or insurable interest in the combine, and thus, no genuine issue of material fact was asserted. The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DAVID L. WALTRIP, APPELLANT.

484 N.W.2d 831

Filed June 12, 1992. No. S-91-010.

1. **Convictions: Appeal and Error.** In a criminal prosecution, it is not the province of an appellate court to resolve conflicts in the evidence, pass on the credibility of the witnesses, determine the plausibility of explanations, or reweigh the

evidence. These are all matters for the trier of fact, and a conviction must be sustained if the evidence, when viewed in the light most favorable to the State, is sufficient to support the conviction.

2. **Assault: Evidence.** Bodily injury may be inferred from evidence that the defendant intentionally struck the victim.

Appeal from the District Court for Sarpy County, RONALD E. REAGAN, Judge, on appeal thereto from the County Court for Sarpy County, JEFFREY L. CAMPBELL, Judge. Judgment of District Court affirmed.

Thomas J. Garvey, Sarpy County Public Defender, and Robert C. Wester for appellant.

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

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

BOSLAUGH, J.

After a trial to the court, the defendant, David L. Waltrip, was convicted of third degree assault and fined $200 plus costs. Upon appeal to the district court, the judgment was affirmed.

The defendant has now appealed to this court and contends that the evidence is insufficient to support the judgment.

When reviewing the sufficiency of the evidence to support a conviction in a criminal prosecution, it is not the province of an appellate court to resolve conflicts in the evidence, pass on the credibility of the witnesses, determine the plausibility of explanations, or reweigh the evidence. These are all matters for the trier of fact, and a conviction must be sustained if the evidence, when viewed in the light most favorable to the State, is sufficient to support the conviction. *State v. Bright*, 238 Neb. 348, 470 N.W.2d 181 (1991).

The record shows that on the night of November 20, 1989, the victim, David R. Tarvin, Sr., was driving home with his son when, while stopped at a traffic light, he heard the defendant pounding on the windshield of the car and yelling something which could not be understood.

Minutes later, after stopping in a parking lot, the victim got out of his car, approached the defendant, and exchanged words

with him. The defendant then grabbed the victim by the lapels of his raincoat and punched him in the face. The two men scuffled for a while, and then the victim's son, David R. Tarvin, Jr., and two other individuals entered into what the victim characterized as "a free for all brawl."

The victim testified that the initial punch by the defendant did not cause him any pain. The defendant argues that because the victim testified that he did not feel any pain at the time the punch was thrown, the evidence is insufficient to establish that the defendant intentionally, knowingly, or recklessly caused bodily injury to the victim, as provided in Neb. Rev. Stat. § 28-310(1)(a) (Reissue 1989), which defines third degree assault.

Section 28-310(1)(a) "does not require serious bodily injury, but only bodily injury." *State v. Goodon*, 219 Neb. 186, 188, 361 N.W.2d 537, 539 (1985). In *Goodon*, the evidence showed that, among other things, the defendant drove his automobile so close to the victim that he barely hit the back of her leg. We stated, "It seems clear beyond question that if one is struck in the leg with an automobile, no matter how minor that may be, that such striking causes some bodily injury." *Id.*

In this case, the testimony of the victim that he did not feel any pain from the defendant's blow to his face is not controlling. It may be inferred from the facts that the defendant's intentional punch to the victim's face caused him bodily injury.

The evidence, when viewed in the light most favorable to the State, is sufficient to support the conviction of the defendant for third degree assault.

The judgment is affirmed.

AFFIRMED.

RONALD M. HASELHORST AND JANET M. HASELHORST, HUSBAND AND WIFE, ET AL., APPELLEES, V. STATE OF NEBRASKA ET AL., APPELLANTS.

485 N.W.2d 180

Filed June 12, 1992. No. S-91-058.

1. **Tort Claims Act: Appeal and Error.** The trial court's findings of fact in a proceeding under the State Tort Claims Act, Neb. Rev. Stat. § 81-8,209 et seq. (Reissue 1987), will not be set aside unless such findings are clearly incorrect.
2. **Trial: Witnesses.** In a bench trial of a law action, the court, as the trier of fact, is the sole judge of the credibility of the witnesses and the weight to be given their testimony.
3. **Judgments: Appeal and Error.** In reviewing a judgment awarded in a bench trial, an appellate court does not reweigh the evidence but considers the judgment in the light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.
4. **Negligence: Proof.** In order to succeed in an action based on negligence, a plaintiff must establish the defendant's duty not to injure the plaintiff, a breach of that duty, proximate causation, and damages.
5. **Negligence: Administrative Law: Expert Witnesses.** Violation of an administrative rule is evidence of negligence, provided an expert witness incorporates the rule in his or her opinion as to an issuable act of negligence and the evidence would probably aid the trier of fact.
6. **Negligence: Proximate Cause.** The defendant's conduct is a cause of the event if the event would not have occurred but for that conduct; conversely, the defendant's conduct is not a cause of the event if the event would have occurred without it.
7. **Negligence: Proximate Cause: Tort-feasors: Liability: Words and Phrases.** An intervening cause is a new and independent act, itself a proximate cause of an injury, which breaks the causal connection between the original wrong and the injury. The doctrine that an intervening act cuts off a tort-feasor's liability comes into play only when the intervening cause is not foreseeable.
8. **Negligence: Proximate Cause: Proof.** In order to prevail on the theory of assumption of risk, the defendant has the burden to establish that the plaintiff (1) knew of the danger, (2) understood the danger, and (3) voluntarily exposed himself or herself to the danger that proximately caused the damage.
9. **Negligence: Words and Phrases.** Contributory negligence is conduct for which plaintiff is responsible, amounting to a breach of the duty which the law imposes upon persons to protect themselves from injury and which, concurring and cooperating with actionable negligence on the part of the defendant, contributes to the injury.
10. **Negligence: Mental Distress: Proof.** A bystander may recover for negligent infliction of emotional distress upon proof of marital or intimate familial relationship with a victim who was seriously injured or killed as a result of the proven negligence of a defendant.

Appeal from the District Court for Madison County: RICHARD P. GARDEN, Judge. Affirmed.

Don Stenberg, Attorney General, Royce N. Harper, and Craig L. Nelson for appellants.

Herbert J. Friedman, of Friedman Law Offices, and W. Travis Burney for appellees.

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

GRANT, J.

This is an action for damages against the State of Nebraska, the Nebraska Department of Social Services (DSS), and DSS Director Daryl Wusk, under the State Tort Claims Act, Neb. Rev. Stat. § 81-8,209 et seq. (Reissue 1987). The petition sought recovery for injuries sustained by the plaintiffs, four children and their parents, arising out of the negligent placement of a foster child in their home and the resulting damage to all the plaintiffs.

Following a trial before the court, judgment was entered on December 13, 1990, in favor of the plaintiffs. The trial court found that the agents of the State were negligent, that the defense of assumption of risk was not applicable, that the plaintiffs were not guilty of contributory negligence sufficient to bar recovery, that the actions of the foster child were not an independent intervening cause, and that the proximate cause of the plaintiffs' damage was the negligence of the State and its agents.

The trial court awarded Ronald M. Haselhorst, the father of the children, special damages in the sum of $97,916.60 and general damages in the sum of $50,000. The court awarded Janet M. Haselhorst, Ronald's wife and the mother of the children, general damages in the sum of $50,000. The court awarded the parents, "as parents and next friends," $100,000 for each of the four minor children, for a total of $400,000. The total judgment for the family was $597,916.60.

The State and its agents have appealed the judgment and assign eight errors, which may be consolidated into six. The State and its agents contend that the trial court erred (1) in

finding the State negligent in three different respects; (2) in holding that the defense of assumption of risk was not applicable; (3) in finding that the plaintiff parents were not guilty of contributory negligence; (4) in finding that the placement of the foster child and the handling of an incident on May 2, 1984, were the proximate causes of plaintiffs' injuries; (5) in failing to find that the criminal acts of the foster child, together with the lack of supervision of the parents, were not an intervening cause; and (6) in awarding excessive damages. We affirm.

The trial court's findings of fact in a proceeding under the State Tort Claims Act, § 81-8,209 et seq., will not be set aside unless such findings are clearly incorrect. *Koncaba v. Scotts Bluff County*, 237 Neb. 37, 464 N.W.2d 764 (1991).

In a bench trial of a law action, the court, as the trier of fact, is the sole judge of the credibility of the witnesses and the weight to be given their testimony. *Zeller v. County of Howard*, 227 Neb. 667, 419 N.W.2d 654 (1988). In reviewing a judgment awarded in a bench trial, an appellate court does not reweigh the evidence but considers the judgment in the light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence. *Id.*

When viewed in that light, the record shows the following facts: In the fall of 1983, Ronald and Janet Haselhorst were licensed by the State of Nebraska as foster parents. They had no prior experience in foster care. On February 26, 1984, the foster child, a 15-year-old boy, was placed in the Haselhorst home. The boy was the Haselhorsts' first foster child.

The DSS administrative rules required DSS to obtain all medical and psychological reports on all of its wards. The placement agreement entered into between the Haselhorsts and DSS required that the information contained in the foster child's records be shared with the Haselhorsts.

Medical records obtained for the purpose of trial showed that the foster child had been admitted to the St. Joseph Center for Mental Health in Omaha, Nebraska, on December 9, 1981, because he had attacked his mother on several occasions. On one occasion when his mother was pregnant, the foster child

threatened to kill his mother's unborn child with a knife. The foster child remained in inpatient treatment until February 22, 1982.

Although DSS was aware of the foster child's treatment at St. Joseph's, DSS never obtained the records from St. Joseph's. DSS informed the Haselhorsts that the foster child had been hospitalized at St. Joseph's. DSS, however, did not tell the Haselhorsts the reason for his hospitalization.

Both parents testified that if they had known of the foster child's violent tendencies prior to his placement in their home, they would not have taken him in as a foster child.

On May 2, 1984, when Ronald and Janet returned from a church seminar, they were informed by the babysitter that she had seen the foster child standing with his back to the door of his room and with his pants loose around his hips. One of the Haselhorsts' sons was sitting on the bed facing the foster child. The Haselhorsts immediately called the foster child's caseworker, Michael G. Puls, and demanded that the foster child be removed from their home.

The initial phone conversation between Ronald and Puls took about an hour. Puls told Ronald he would make a few phone calls and call the Haselhorsts back.

Puls called back in approximately one-half hour and related to Ronald a conversation he purportedly had had with Dr. Barbara Sturgis, a psychiatrist from Monroe Mental Health Center. Puls related that Sturgis had had a case concerning a similar incident between two brothers and that Sturgis thought the incident might have been normal boyish curiosity. Puls felt the case Sturgis had handled was similar to the Haselhorst situation. Ronald testified that this conversation led him to believe that Puls had actually discussed the incident in the Haselhorst home with a health care professional. Puls testified that he did not call or discuss the Haselhorsts' situation with Sturgis or any other doctor.

In the afternoon of May 3, 1984, Puls visited the Haselhorst home. Although the Haselhorsts had packed the foster child's bags in preparation for his removal from their home, Puls convinced the Haselhorsts that they should keep the foster child in their home. Puls did not talk to the foster child, the

Haselhorsts' son, or the babysitter regarding the suspicious incident, nor did he inform the Haselhorsts of the foster child's violent history. Furthermore, Puls never attempted to obtain the foster child's records from St. Joseph's.

Puls' supervisor at the time of the foster child's placement with the Haselhorsts admitted that the failure of DSS to obtain the records from St. Joseph's fell below the department's standards. She also admitted that Puls failed to follow DSS standards regarding the May 2, 1984, incident. The applicable DSS standards required that anyone investigating the possibility of child abuse should have talked to the children involved in the incident. According to the supervisor, following the May 2, 1984, incident, DSS should have gone back to look at the foster child's medical and psychological history, but this was never done.

On July 16, 1984, the Haselhorsts' second-oldest son suffered a serious accidental gunshot wound. He was hospitalized from that date through the end of August. Janet testified that she spent considerable time at the hospital with her son and that this diverted her attention from the foster child and her other children.

In the early morning hours of January 9, 1985, a second foster child living in the Haselhorst home found the foster child in the act of sexually abusing the Haselhorsts' oldest son. The incident was immediately referred to the parents. Ronald immediately notified Puls, who removed the foster child from the Haselhorsts' home the next day. The foster child was placed in a foster home where there were no other children. The foster child was placed under the care of Alfredo Ramirez of the Monroe Mental Health Center. When Ramirez found that the foster child had sexually assaulted one of the Haselhorst children, the child was removed from foster care. Later, Ramirez diagnosed the foster child as a pedophile. The foster child was transferred to the Lincoln Regional Center, where he remained for 2 years.

After the January 9, 1985, incident, it was discovered that the foster child had sexually abused each of the Haselhorst children from the beginning of the foster child's placement in the Haselhorst home in late February 1984, when the children

were ages 8, 7, 5, and 4, and that he had continued to do so through the nearly 11 months of his placement. The children testified they were afraid to report the foster child's abuse to their parents because they had been threatened by the foster child. Janet testified that during this time, none of her children reported to her that the foster child was abusing them.

Ramirez provided the Haselhorsts with extensive psychotherapy following the January 9, 1985, incident. He testified that all of the children were suffering from posttraumatic stress disorder and that Ronald and Janet suffered from adjustment disorders due to the violent and prolonged sexual abuse of their children by the foster child. It was his opinion that further extensive psychotherapy was necessary to help resolve the conditions of all the family members.

Prof. Emily Jean McFadden testified on behalf of the plaintiffs as an expert on foster care and the standards applicable to agencies. She testified that national standards set forth by the American Public Welfare Association required that foster parents be informed of a foster child's background. She testified that DSS regulations conformed to these nationally accepted standards and that there was a duty on the part of DSS to make reasonable inquiry as to the foster child's background.

McFadden noted that the foster child had been placed in St. Joseph's because he had been physically abusive toward his mother and because he was threatening to harm her unborn child. In McFadden's opinion, such a child should never have been placed in a foster home, particularly one having small children. McFadden believed that the foster child needed a structured setting such as a residential or group treatment situation where there would be intensive psychological services.

According to McFadden, whether or not there was an incidence of sexual deviation in the foster child's background made no difference. She stated, "It does not make any sense at all to place an older child with a propensity for violence in a home with younger children. The sexual assault is a sexual behavior, but it is just another form of violence."

McFadden stated that DSS knew enough concerning the foster child's psychiatric history at the time of the intake that

the department should have requested a psychological evaluation. McFadden testified that DSS violated its own placement regulations when it placed the foster child with the Haselhorsts and that its failure to make preplacement visits, as required by the national standards, was negligent.

McFadden had the opinion that the Haselhorsts were loving, caring people who were not well trained in foster parenting and that they came from a background where they had no experience with sexual abuse. She testified they did not understand the risk of the situation and were susceptible to the kind of reassurances they were given.

With regard to the allegations of negligence in failing to fully investigate the incident of May 2, 1984, McFadden testified that Puls should have talked to the foster child and the Haselhorst children. That was not done. In this connection, Ranae L. McNeil, a DSS investigator called to testify by the State, testified on plaintiffs' cross-examination that she agreed that the DSS caseworker's investigation of the incident constituted gross negligence.

The State and its agents contend that the trial court erred in finding that the State was negligent in failing to comply with its own standards when it failed to provide the Haselhorsts all the information it had or could have obtained relating to the psychological profile of the foster child; that the State was negligent in failing to adequately investigate the suspicious incident of May 2, 1984; and that the State was negligent in failing to remove the foster child from the home following the May 2 incident. The State and its agents further contend that the trial court erred in finding that these acts of negligence were the proximate cause of the injuries suffered by the Haselhorst family and that the action of the foster child was not an independent intervening cause.

In order to succeed in an action based on negligence, a plaintiff must establish the defendant's duty not to injure the plaintiff, a breach of that duty, proximate causation, and damages. *Zeller v. County of Howard*, 227 Neb. 667, 419 N.W.2d 654 (1988). These four essential elements are matters to be determined by the trier of fact. *Id.*

When we view the evidence in the light most favorable to the

plaintiffs, who prevailed in the trial court, the record substantiates the findings of the trial court.

The DSS program manual which was in force and effect at the time of the placement of the foster child outlined the department's intake standards. Section 5-021.04 states in part as follows:

> Local or area office staff shall perform the following intake activities for all wards the unit serves, regardless of where the child is placed:
>
> . . . .
>
> 5. Secure all available information such as social history, school, medical, and psychological reports from all available sources;
>
> 6. Obtain a medical and social history on the child as soon as possible;
>
> . . . .
>
> 8. If the child has just been removed from his/her parent's home, obtain a physical examination for the child within two weeks;
>
> 9. Establish a case record containing . . . c. [s]ocial history and summary . . . g. [o]ther applicable information such as - (1) [m]edical records . . . (2) [p]sychological or psychiatric records . . . .

McFadden testified that these standards represent the acceptable national standards for foster care placement and that by failing to obtain the records from St. Joseph's, the department fell below applicable standards. Sharyn Hjorth, a supervisor for DSS, admitted that failure to obtain the St. Joseph's records fell below DSS standards.

Violation of an administrative rule is evidence of negligence, provided an expert witness incorporates the rule in his or her opinion as to an issuable act of negligence and the evidence would probably aid the trier of fact. *Simon v. Omaha P. P. Dist.*, 189 Neb. 183, 202 N.W.2d 157 (1972).

The placement agreement between the plaintiff parents and DSS obligated DSS to share the foster child's medical information with the plaintiffs. McFadden testified that this agreement is consistent with the national standard requiring that foster parents be advised of the foster child's history.

We have said that the proximate cause of an injury is that cause which, in a natural and continuous sequence, without any efficient, intervening cause, produces the injury, and without which the injury would not have occurred. *Zeller v. County of Howard, supra*; *Hegarty v. Campbell Soup Co.*, 214 Neb. 716, 335 N.W.2d 758 (1983).

The defendant's conduct is a cause of the event if the event would not have occurred but for that conduct; conversely, the defendant's conduct is not a cause of the event if the event would have occurred without it. *Greening v. School Dist. of Millard*, 223 Neb. 729, 393 N.W.2d 51 (1986).

Both parents testified that they would not have accepted the foster child in their home if they had been informed about his dangerous propensities. The Haselhorst children would not have been abused by the foster child if DSS had obtained the child's records from St. Joseph's and had shared with the Haselhorsts the information regarding his violent behavior contained therein.

Further, the abuse the Haselhorst children suffered at the hands of the foster child would not have continued past the May 2, 1984, incident if DSS had properly investigated that incident and removed the foster child from the home. The trial court's findings in this regard are supported by the evidence and are not incorrect.

The caseworker, Puls, who visited the Haselhorst home following the suspicious incident of May 2, 1984, admitted that he did not talk to the foster child, the Haselhorst children, or the babysitter about the incident. Instead, he successfully talked Ronald and Janet, who were prepared to have the foster child removed from their home, into allowing the foster child to stay.

Puls' supervisor, Hjorth, admitted that Puls was negligent in his investigation and testified that Puls should have questioned the Haselhorst child and the foster child. Hjorth stated that the standards existing at the time of the May incident required Puls, or anyone investigating the possibility of child abuse, to talk to the children involved. As stated above, McNeil admitted the investigation was done in a grossly negligent manner.

Joan Albin, the district administrator of DSS, admitted that

the foster child should have been referred to psychological counseling following the May incident and that the Haselhorsts should have been informed as to his violent propensity. She also testified that Puls should have questioned the foster child and the affected Haselhorst child.

The State and its agents contend that it was not the negligence of the State that caused the plaintiffs' injuries but, rather, the foster child's abuse of the Haselhorst children which was the intervening cause of their injuries.

This court has defined an efficient intervening cause as " 'a new and independent act, itself a proximate cause of an injury, which breaks the causal connection between the original wrong and the injury. . . . The doctrine that an intervening act cuts off a tort-feasor's liability comes into play only when the intervening cause is not foreseeable.' " (Citation omitted.) *Zeller v. County of Howard*, 227 Neb. at 673, 419 N.W.2d at 658, quoting *Delaware v. Valls*, 226 Neb. 140, 409 N.W.2d 621 (1987).

" 'If the likelihood of the intervening act was one of the hazards that made defendant's conduct negligent—that is, if it was sufficiently foreseeable to have this effect—then defendant will generally be liable for the consequences.' " *Union Pacific RR. Co. v. Kaiser Ag. Chem. Co.*, 229 Neb. 160, 175, 425 N.W.2d 872, 882 (1988), quoting 4 Fowler V. Harper, Fleming James, Jr., & Oscar S. Gray, The Law of Torts § 20.5 (2d ed. 1986).

In this case, the likelihood of the foster child acting out his violent behavior was the hazard that made the department's conduct negligent in failing to obtain the records from St. Joseph's and sharing that information with the Haselhorsts, in failing to properly investigate the incident of May 2, 1984, and in failing to remove the foster child from the plaintiffs' home following the suspicious incident. The trial court was correct in its determination that the abuse by the foster child was not an efficient intervening cause.

The State and its agents next assign as error the trial court's finding that the defense of assumption of risk was not applicable. The State and its agents argue that the plaintiff parents assumed the risk of the foster child's abuse initially by

accepting him into their home and later by permitting him to remain in their home after the May incident.

In order to prevail on the theory of assumption of risk, the defendant has the burden to establish that the plaintiff (1) knew of the danger, (2) understood the danger, and (3) voluntarily exposed himself or herself to the danger that proximately caused the damage. *Trackwell v. Burlington Northern RR. Co.*, 235 Neb. 224, 454 N.W.2d 497 (1990).

The only knowledge or ability to obtain knowledge of the foster child's dangerous propensities prior to his placement with the plaintiffs rested with DSS. DSS failed to obtain the St. Joseph's records, which revealed the foster child's violent tendencies. Furthermore, DSS failed to inform the plaintiffs of the foster child's past violent behavior, as was required by their placement agreement. Both parents testified that they would not have accepted the foster child in their home if they had been told about his history of violence.

The plaintiff parents were talked into keeping the foster child in their home after the May incident by Puls, who did not properly investigate the matter and misled the Haselhorsts into believing the incident was nothing to worry about. According to McFadden, the plaintiffs, being loving, caring people who were not well trained in foster parenting and who came from a background where they had no experience with sexual abuse, did not understand the risk of the situation and were susceptible to the kind of reassurances they were given by Puls.

The trial court properly rejected the defense of assumption of risk.

The State and its agents also contend that the trial court erred in finding that the plaintiffs were not guilty of contributory negligence sufficient to bar recovery. The State and its agents suggest that the plaintiff parents were contributorily negligent in failing to follow through on an alleged agreement with DSS to monitor the foster child's behavior and in occasionally allowing the foster child to babysit their children following the May 2, 1984, incident.

"Contributory negligence is conduct for which plaintiff is responsible, amounting to a breach of the duty which the law imposes upon persons to protect themselves from injury and

which, concurring and cooperating with actionable negligence on the part of the defendant, contributes to the injury." *Koncaba v. Scotts Bluff County*, 237 Neb. at 39, 464 N.W.2d at 766. A plaintiff is contributorily negligent if "(1) he or she fails to protect himself or herself from injury, (2) his or her conduct concurs and cooperates with the defendant's actionable negligence, and (3) his or her conduct contributes to his or her injuries as a proximate cause." *Horst v. Johnson*, 237 Neb. 155, 161, 465 N.W.2d 461, 465 (1991). Whether contributory negligence is present in a particular case is a question for the trier of fact. *Center State Bank v. Dana, Larson, Roubal & Assoc.*, 226 Neb. 408, 411 N.W.2d 635 (1987).

In July 1984, the Haselhorsts' second-oldest son was severely injured by a gunshot wound. This injury required him to be hospitalized from the time of the shooting until the end of August. After the son returned home from the hospital, DSS continually placed more foster children in the Haselhorst home. Under these circumstances and given the fact that the incident of May 2, 1984, had been minimized by DSS, the plaintiff parents were not negligent in their monitoring of the foster child's behavior.

The Haselhorsts did permit the foster child to babysit their children during the late summer and early fall of 1984; however, he babysat only once or twice a week during a few hours in the afternoons, and other foster children were often present. Furthermore, DSS was aware of the foster child's occasional babysitting and did not caution the Haselhorsts against allowing this activity.

When we view the evidence in a light most favorable to the plaintiff parents, the record supports the trial court's finding that the parents were not contributorily negligent.

For its final assignment of error, the State and its agents complain that the trial court erred in awarding excessive damages and that the award to the parents is not in compliance with standards set in *James v. Lieb*, 221 Neb. 47, 375 N.W.2d 109 (1985).

In *James*, this court set forth the criteria to be met to allow recovery for the emotional distress suffered by a bystander who witnesses or gains knowledge of the death or serious injury of

another proximately caused by the negligence of a defendant. The factors to be considered in determining liability for negligent infliction of emotional distress are not intended to be fixed guidelines but, rather, are factors to be taken into account by the court in assessing the degree of foreseeability of emotional injury to the plaintiff. *Id.*

A bystander may recover for negligent infliction of emotional distress upon proof of marital or intimate familial relationship with a victim who was seriously injured or killed as a result of the proven negligence of a defendant. *Id.*

The State and its agents argue that the parents are not entitled to recover for their emotional distress because the children were not seriously injured and because the parents did not observe the abuse of their children. The State and its agents' contention is without merit.

James does not require a contemporaneous observation of death or serious injury of the victim in order for the bystander to recover, and the evidence in this case is undisputed that the children were sexually abused and that because of that abuse they have been permanently scarred in a psychological sense.

The State and its agents' contention that the trial court erred in awarding excessive damages is also without merit. A verdict in a civil case will be sustained if the evidence, when viewed and construed most favorably to the prevailing party, is sufficient to support that verdict. *Williams v. Monarch Transp.*, 238 Neb. 354, 470 N.W.2d 751 (1991). Plaintiffs' expert witness testified that all the plaintiffs had sustained permanent damage and would need psychiatric treatment for 3 to 5 years after the trial of the case, in November 1990. Dr. Klaus Hartmann, the chief of the adolescent program at the Lincoln Regional Center, testified for the State and its agents. Dr. Hartmann testified that the parents and all of the children had sustained some mental "disorder" or had been psychologically affected as a result of the foster child's actions. Dr. Hartmann had the opinion that all of the children had been traumatically abused and that at the time of the trial, they still exhibited effects of the trauma. He also was of the opinion that as of the time of trial, all the members of the family needed at least 4 to 6 months of therapy.

The evidence in this case supports the trial court's award of damages. To contend to the contrary is an attempt to further minimize the flagrant damages that the State and its agents allowed to be inflicted on the plaintiffs.

AFFIRMED.

CAPORALE, J., concurring in part, and in part dissenting.

I concur in the judgments in favor of the children, but must dissent with respect to the judgments in favor of the parents. I do so on two grounds.

First, although the State and its agents' indifference and negligence in this case are unfathomable, the parents were nonetheless themselves guilty of contributory negligence sufficient to bar their recovery as a matter of law. For the parents to have permitted the foster child to care for their children for any period of time, no matter how brief or under what circumstances, within a few weeks after they learned he had sexually assaulted one of their children is as inexplicable as the conduct of the State and its agents.

Second, the majority erroneously and dangerously extends the ill-advised bystander recovery rule adopted in *James v. Lieb*, 221 Neb. 47, 375 N.W.2d 109 (1985). *James* held only that one alleging that he helplessly watched his sister get hit, run over, and killed by a negligently operated truck, as the result of which he became physically ill and suffered, and would continue to suffer, mental anguish and emotional distress, had stated a cause of action in tort, notwithstanding that he had not alleged that he himself had been within the zone of danger.

In so holding, the *James* majority recognized that such bystander recovery depended upon a defendant's adjudicated liability and fault for the injury or death of the victim because without such fault, there would be no foundation for the tort-feasor's duty of care to third parties, a duty depending upon the foreseeability of the risk. However, ignoring the rule that the language of a judicial opinion must be read in the context of the facts under consideration and its meaning limited by those facts, *Abbott v. Gould, Inc.*, 232 Neb. 907, 443 N.W.2d 591 (1989), the *James* majority went on to muse about a number of things ancillary to its holding.

It anticipated that there would be no need for a physical

injury to the plaintiff. It also ruminated about the kind of connection which would be required between the plaintiff and the victim and speculated that the connection was to be measured not by a certain degree of consanguinity but, rather, by whether there existed a marital or some other undefined intimate familial relationship. With scant focus on the requisite nature of the plaintiff's reaction to the victim's hurt, the *James* majority nonetheless pondered the type of hurt which would bring the bystander rule into play and foreshadowed the need for either death or serious injury of an unspecified character. It also acknowledged that how the victim's hurt entered into the consciousness of the plaintiff would be a factor in determining whether the rule applied, but blissfully avoided further meditation on the subject except to quote with approval from *Ferriter v. Daniel O'Connell's Sons, Inc.*, 381 Mass. 507, 518, 413 N.E.2d 690, 697 (1980):

> A plaintiff who rushes onto the accident scene and finds a loved one injured has no greater entitlement to compensation for that shock than a plaintiff who rushes instead to the hospital. So long as the shock follows closely on the heels of the accident, the two types of injury are equally foreseeable.

It is clear that if the bystander rule is to be applied to any familial relationship, it cannot be argued that it should not be applied between a parent and his or her minor children living in the parent's household. However, even assuming that no physical injury is required and that, in this case, the parents' emotional distress was "so severe that no reasonable person could be expected to endure" it, *Dale v. Thomas Funeral Home*, 237 Neb. 528, 532, 466 N.W.2d 805, 808 (1991) (involving the intentional infliction of emotional distress), and further assuming that the harm to the children constitutes a sufficiently severe injury, the bystander recovery rule still does not apply. This is so because the children's hurt did not enter into the parents' consciousness with the sudden and traumatic impact the rule requires.

The court in *Schurk v. Christensen*, 80 Wash. 2d 652, 497 P.2d 937 (1972), denied recovery for the negligent infliction of mental anguish and distress to the parents of a 5-year-old girl,

one of whom was told that the girl had been sexually assaulted several times during the preceding 4 or 5 months by the defendants' 15-year-old son, who served as the girl's babysitter. However, the Supreme Court permitted the cause to proceed against the babysitter on the theory he intentionally inflicted emotional distress upon the girl's parents. In so ruling, the *Schurk* court reasoned that as to the negligent infliction of mental anguish and distress claim, the parents had not met the requirement that their shock resulted from a direct emotional impact upon them from the sensory and contemporaneous perception of the assaults.

For further examples of the application of the requirement that there be a contemporaneous sensory perception of the victim's hurt, see, e.g., *Mazzagatti v. Everingham by Everingham*, 512 Pa. 266, 516 A.2d 672 (1986) (recovery denied where parent, approximately a mile away, arrived at accident scene after child's injury resulting in death); *Nutter v. Frisbie Mem. Hosp.*, 124 N.H. 791, 474 A.2d 584 (1984) (recovery denied where parents claiming child died as result of emergency room malpractice arrived after child's death); *Caparco v. Lambert*, 121 R.I. 710, 402 A.2d 1180 (1979) (recovery denied to parent who did not witness accident in which child injured); *Shelton v. Russell Pipe & Foundry Co.*, 570 S.W.2d 861 (Tenn. 1978) (recovery denied to parents who neither visually nor aurally witnessed accident in which child injured, but learned of it through reports of third parties considerable time afterward); *Baas v. Hoye*, 766 F.2d 1190 (8th Cir. 1985) (applying Iowa law, denied recovery to parent who did not see child ingest improperly bottled medication); *Bloom v. Dubois Regional Medical Ctr.*, ____ Pa. Super. ____, 597 A.2d 671 (1991) (husband who found wife hanging in hospital failed to state a cause of action for negligent infliction of emotional distress, as he had not observed traumatic infliction of injury); *McKethean v. WMATA*, 588 A.2d 708 (D.C. 1991) (denied recovery to plaintiff who was block away when automobile struck his daughter, granddaughter, and friends); *Fife v. Astenius*, 232 Cal. App. 3d 1090, 284 Cal. Rptr. 16 (1991) (denied recovery to automobile accident victim's parents and brothers who, even if were considered to be at scene by

virtue of rushing to street within seconds of hearing impact, did not know at time accident occurred that victim was being injured); *Freeman v. City of Pasadena*, 744 S.W.2d 923 (Tex. 1988) (recovery denied to stepparent who arrived at scene after stepchildren injured and neither saw nor otherwise contemporaneously perceived accident); *Crenshaw v. Sarasota County Public Hosp. Bd.*, 466 So. 2d 427 (Fla. App. 1985) (recovery denied to parent of stillborn child who did not see body which was mutilated after it was inadvertently placed with hospital laundry); and *Perlmutter v Whitney*, 60 Mich. App. 268, 230 N.W.2d 390 (1975) (recovery denied to parents who neither saw nor were near scene of accident where child was injured).

The parents here neither saw nor heard any assault taking place; rather, they acquired their after-the-fact knowledge of the occurrences through the reports of third persons, and their distress was so slow in developing that they permitted the foster child to provide care for all their children over a period of weeks. Under these circumstances, it cannot reasonably be said that they suffered their distress as the result of a direct emotional impact from the sensory and contemporaneous perception of the assaults.

I fear the majority opinion in this case is but another illustration of the observation that hard cases make bad law. *Northern Securities Co. v. United States*, 193 U.S. 197, 24 S. Ct. 436, 48 L. Ed. 679 (1904) (Holmes, J., dissenting).

HASTINGS, C.J., and BOSLAUGH, J., join in this concurrence and dissent.

STATE OF NEBRASKA, APPELLEE, V. DALE W. BUESCHER, APPELLANT.

485 N.W.2d 192

Filed June 12, 1992. No. S-91-285.

1. **Convictions: Sentences: Ordinances: Appeal and Error.** An analysis of assignments of error claiming that the evidence is insufficient to support a conviction under a municipal ordinance and that the sentence is excessive requires an examination of the specific ordinance involved.
2. **Ordinances: Judicial Notice: Appeal and Error.** An appellate court will not take judicial notice of an ordinance not in the record but assumes that a valid ordinance creating the offense charged exists, that the evidence sustains the findings of the trial court, and that the sentence is within the limits set by the ordinance.

Appeal from the District Court for Lancaster County, WILLIAM D. BLUE, Judge, on appeal thereto from the County Court for Lancaster County, RICHARD H. WILLIAMS, Judge. Judgment of District Court affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Kristi Egger-Brown for appellant.

Norman Langemach, Jr., Lincoln City Prosecutor, for appellee.

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

PER CURIAM.

Defendant-appellant, Dale W. Buescher, was charged in the county court with violating various ordinances of the city of Lincoln by operating a motor vehicle while under the influence of alcoholic liquor, by operating a motor vehicle under a suspended license, by driving an improperly registered motor vehicle, and by resisting arrest. Following a bench trial, the trial court dismissed the driving while under the influence and improper registration charges and found Buescher guilty of driving a motor vehicle under a suspended license and of resisting arrest. He was then fined $150 and had his operator's license suspended for a year on the driving conviction, and he was fined $100 and ordered to spend 14 days in jail on the resisting arrest conviction. The district court affirmed,

whereupon the appeal to this court ensued. Buescher asserts that the district court erred in failing to find that the county court erred in (1) denying him a jury trial, (2) finding the evidence sufficient to support the charges, and (3) imposing excessive sentences. We affirm.

No useful purpose would be served by detailing the circumstances leading to Buescher's arrest and convictions, for the ordinances under which he was charged are not in the record. We recently, in *State v. King*, 239 Neb. 853, 479 N.W.2d 125 (1992), reaffirmed that an analysis of assignments of error claiming that the evidence is insufficient to support a conviction under a municipal ordinance and that the sentence is excessive requires an examination of the specific ordinance involved. It is well established that an appellate court will not take judicial notice of an ordinance not in the record but assumes that a valid ordinance creating the offense charged exists, that the evidence sustains the findings of the trial court, and that the sentence is within the limits set by the ordinance. *State v. King, supra*. See, also, *State v. Long*, 206 Neb. 446, 293 N.W.2d 391 (1980); *State v. Korf*, 201 Neb. 64, 266 N.W.2d 86 (1978); *State v. Sator*, 194 Neb. 120, 230 N.W.2d 224 (1975); *Foley v. State*, 42 Neb. 233, 60 N.W. 574 (1894).

Without benefit of the ordinances in question, neither can we determine whether the trial court should have granted a jury trial. As noted in *Hawkins Constr. Co. v. Director, ante* p. 1, 480 N.W.2d 183 (1992), courts are in no better position to declare the rights of the parties under an ordinance not in the record than they would be to declare the rights of parties to a contract not in the record.

What ought to be more than abundantly clear by this time is that a party charged under a municipal ordinance who seriously contemplates an appeal in the event of an adverse result needs to see to it that the trial record properly contains a copy of the ordinance under which the proceedings are conducted. In the absence of such a record, an appeal only wastes time and money—in this instance, as this appeal was taken in forma pauperis, the public's time and money.

AFFIRMED.

CAPORALE, J., dissenting.

I remain of the view expressed in my dissent in *State v. Lewis, ante* p. 642, 483 N.W.2d 742 (1992). Having now twice expressed that view, I shall refrain from future dissent.

BOSLAUGH, J., joins in this dissent.

SHANAHAN, J., dissenting.

Constitutional considerations compel comment on the majority's creation of presumptions to dispose of appeals involving violations of municipal ordinances that are omitted from records presented for appellate review.

As reflected in the majority's opinion, in reviewing convictions for violations of ordinances, this court rejects appellate judicial notice of a subject ordinance which has been omitted from evidence in a trial court, and presumes or "assumes that a valid ordinance creating the offense charged exists [and] that the evidence sustains the findings of the trial court . . . ." Therefore, in a prosecution for violation of an ordinance, this court treats existence of the ordinance as an evidential matter outside judicial notice and requires that a convicted defendant make the subject ordinance part of the record presented for appeal. However, in civil litigation, "a party seeking the benefit of [an ordinance must] plead and prove the existence of the ordinance . . . ." *Nevels v. State*, 205 Neb. 642, 646, 289 N.W.2d 511, 513 (1980). Accord *Zybach v. State*, 226 Neb. 396, 411 N.W.2d 627 (1987). Thus, the evidential rule differs drastically, depending on whether the action is a prosecution for violation of an ordinance or a civil proceeding that implicates an ordinance as a claim or defense.

As an evidential matter in Buescher's case, the State failed to prove existence of the drunk driving ordinance and, consequently, failed to prove Buescher's violation of the ordinance. One does not have to delve into the depths of metaphysics to conclude that a person cannot violate a nonexistent ordinance. Moreover, criminal defendants, even those charged with traffic offenses, are afforded several constitutional and procedural safeguards, including the due process requirement that every factual element of an offense charged must be proved beyond a reasonable doubt. See, *State*

v. Lomack, 239 Neb. 368, 476 N.W.2d 237 (1991); *State v. Harney*, 237 Neb. 512, 466 N.W.2d 540 (1991); *State v. Jasper*, 237 Neb. 754, 467 N.W.2d 855 (1991). See, also, *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).

Since the ordinance under which Buescher was convicted is not established in the record, there is a devastating and destructive deficiency, a fundamental failure of proof, in the State's case against Buescher. As a matter of law, that absence of proof in reference to the drunk driving ordinance prevents a conviction of Buescher, since the State has failed to present any evidence concerning existence of the ordinance or its provisions, proof which is required for a prima facie case against Buescher and, moreover, is required as a basis for finding Buescher's guilt beyond a reasonable doubt.

Courts in several jurisdictions have concluded that the State's failure to establish the ordinance on which a prosecution is based requires reversal of the conviction and dismissal of the proceeding; for instance, see, *State v. Berberian*, 112 R.I. 745, 315 A.2d 743 (1974) (conviction for violation of municipal ordinance reversed because ordinance providing for penalty was not in the record presented to appellate court); *State v. Pallet*, 283 N.C. 705, 198 S.E.2d 433 (1973) (State's failure to establish the municipal ordinance on which the prosecution was based required dismissal of the prosecution); *Sisk v. Town of Shenandoah*, 200 Va. 277, 280, 105 S.E.2d 169, 171 (1958) (conviction based on a municipal ordinance prohibiting drunk driving was, in the absence of the municipal ordinance in the record, reversed because "[f]air trial practice required that the defendant be afforded the opportunity to know the provisions of the ordinance she is charged with violating"); *Hishaw v. City of Oklahoma City*, 822 P.2d 1139 (Okla. Crim. App. 1991) (conviction reversed because municipal ordinance was absent from record presented to appellate court); *Peters v. City of Phenix City*, 589 So. 2d 800 (Ala. Crim. App. 1991) (failure to introduce into evidence the ordinance on which the charge was brought rendered the evidence insufficient to sustain a conviction); *Gonon v. State*, 579 N.E.2d 614 (Ind. App. 1991) (ordinance's absence from the record rendered the evidence insufficient to sustain a defendant's conviction); and *Adams v.*

State, 153 Ga. App. 41, 264 S.E.2d 532 (1980) (probation revocation for possession of drugs, seized as result of search incident to arrest for violation of municipal ordinance, reversed where ordinance was not part of record on appeal because there was no basis to show that arrest was lawful).

Unfortunately for Buescher, this court, by continued application of a unique rule for addressing deficient records in cases involving alleged violations of ordinances, persists in rescuing the State from its manifest failure of proof necessary to sustain a conviction. More unfortunate for Buescher, however, is the affirmance of his conviction without any showing that he has done anything prohibited by law.

Furthermore, by applying dissimilar rules for appellate review of convictions of ordinance violations and review in a civil case involving an ordinance, this court denies equal protection to Buescher and every other criminal defendant convicted of violating a municipal ordinance which is not pleaded and proved by the State. The U.S. Supreme Court has held that equal protection rights attach in proceedings before appellate courts. In *Griffin v. Illinois*, 351 U.S. 12, 18, 76 S. Ct. 585, 100 L. Ed. 891 (1956), the Court stated that at all stages of appellate review "the Due Process and Equal Protection Clauses protect persons . . . from invidious discriminations." In *Griffin*, the Supreme Court held that state courts could not refuse to provide indigent defendants with free trial transcripts when transcripts were required to exercise the right of appeal. See, also, *Dowd v. Cook*, 340 U.S. 206, 71 S. Ct. 262, 95 L. Ed. 215 (1951) (it was a denial of equal protection to disallow prisoner's appeal when a warden prevented a prisoner from filing an appeal in a timely manner). Additionally, in *Jackson v. Indiana*, 406 U.S. 715, 92 S. Ct. 1845, 32 L. Ed. 2d 435 (1972), the Supreme Court held that a state, by subjecting criminal defendants to standards more lenient for commitment through mental health proceedings and more stringent for release from confinement, when such standards were compared with those generally applicable to persons not charged with criminal offenses, denied the criminal defendants equal protection of the laws required by the 14th Amendment.

Nebraska's disparate treatment of litigants in cases involving

municipal ordinances, depending on whether the litigation involves a civil case or a criminal case, results in a violation of equal protection of the law. For this reason and for the reason that Buescher's due process rights under the 14th Amendment have also been violated, Buescher's conviction should have been reversed.

The presumptions used by this court in reviewing convictions of violations of ordinances rank with Nebraska's other pseudo-presumptions noted in an article by Prof. G. Michael Fenner. See G. Michael Fenner, *Presumptions: 350 Years of Confusion and It Has Come to This*, 25 Creighton L. Rev. 383 (1992). In the meantime, the cardinal rule in this court appears to be: If a decision becomes difficult to explain, create a presumption as rationalization for an expedient result.

STATE OF NEBRASKA, APPELLEE, V. RONALD D. RICHTER, APPELLANT.

485 N.W.2d 201

Filed June 19, 1992. No. S-90-1080.

1. **Convictions: Appeal and Error.** In reviewing a criminal conviction, an appellate court does not resolve conflicts of evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence. Such matters are for the finder of fact, and the verdict must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support the conviction.
2. **Police Officers and Sheriffs: Miranda Rights.** In giving a suspect a *Miranda* warning, law enforcement personnel must (1) inform the defendant of the right to remain silent, (2) explain that anything said can and will be used against the defendant in court, and (3) inform the defendant of the right to consult with a lawyer and to have a lawyer present during interrogation.
3. **Criminal Law: Motions for New Trial: Appeal and Error.** In a criminal case, a new trial motion is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed.
4. **Implied Consent: Blood, Breath, and Urine Tests: Miranda Rights.** Unless there has been a commingling of the *Miranda* warning and the implied consent statute, a defendant's lack of understanding of the consequences of a refusal to take a chemical test is not a defense.

5. **Courts: Appeal and Error.** An appellate court, in reviewing decisions of the district court which affirmed, reversed, or modified decisions of the county court, will consider only those errors specifically assigned in the appeal to the district court and again assigned as error in the appeal to the appellate court.
6. **Judges: Recusal: Appeal and Error.** A motion requesting a judge to recuse himself on the grounds of bias or prejudice is addressed to the discretion of the judge, and an order overruling such a motion will be affirmed on appeal unless the record establishes bias or prejudice as a matter of law.
7. **Judges: Recusal: Presumptions.** A defendant seeking to disqualify a judge on the basis of bias or prejudice bears the heavy burden of overcoming the presumption of judicial impartiality.
8. **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 Scotts Bluff County, ALFRED J. KORTUM, Judge, on appeal thereto from the County Court for Scotts Bluff County, JAMES L. MACKEN, Judge. Judgment of District Court affirmed.

Byron M. Johnson, Scotts Bluff County Public Defender, for appellant.

Don Stenberg, Attorney General, and Donald A. Kohtz for appellee.

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

FAHRNBRUCH, J.

Ronald D. Richter appeals his Scotts Bluff County jury convictions and resultant sentences for driving while under the influence of alcohol and refusing to submit to a chemical breath test.

He received a sentence of 30 days in jail, a 6-month driver's license suspension, and a $500 fine on count I and the same on count II, with the jail sentences to run consecutively.

Richter appealed his county court convictions and sentences to the district court for Scotts Bluff County, where they were affirmed. The defendant then appealed to this court.

In his appeal to this court, Richter has assigned, in inverse order, that:

> [1]. The [county court] erred in overruling the Defendant's motion for a new trial for the following

reasons:

a. The Court erred by instructing the jury that the asserting of constitutional rights by the Defendant was irrelevant.

b. The Court erred in admitting and submitting to the jury evidence relating to a refusal of chemical test of the breath without requiring and [sic] advisement by the officers to the Defendant that the constitutional rights asserted by the Defendant did not apply to the demand for a breath test.

c. The Defendant's refusal of the breath test was justifiable or reasonable.

2. The District Court [on appeal] erred in overruling Defendant's motion for recusal.

[3]. The sentence imposed upon the Defendant by the county judge, although within statutory limits was nevertheless excessive.

In reviewing a criminal conviction, an appellate court does not resolve conflicts of evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence. Such matters are for the finder of fact, and the verdict must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Towler, ante* p. 103, 481 N.W.2d 151 (1992).

Taking the view most favorable to the State, the evidence shows that on the evening of February 22, 1990, a Scottsbluff police officer began following a car being driven by Richter in an erratic manner after it left the parking lot of the Lucky Lady Saloon. The defendant's brother Gerald Richter was a passenger in the car. The officer testified that the car was weaving over the centerline and back to the curb. At one point, Richter weaved into another lane of the highway and forced another driver to brake, according to the officer.

After stopping Richter's car, the officer noticed that Richter had difficulty removing his driver's license from his wallet and that he removed a cigarette from his pocket and placed it in his mouth backwards. The officer testified that Richter's eyes were bloodshot, that he had trouble focusing, and that he swayed as he walked. Richter's vehicle contained two open cans of beer

and a pint bottle of schnapps which was one-quarter full. Richter was arrested after he refused to perform field sobriety tests requested by the officer.

The officer testified he drove Richter to the police station, read him an implied consent form, and asked him to take a breath test. The officer testified that Richter initially said he did not understand the implied consent advisement. The officer then reread part of the form, and for 30 to 40 minutes, the two discussed Richter's refusal to take the test. Richter told the officer that the test would be incriminating to him and that it was against his constitutional rights to take a test. Richter was charged with driving while under the influence of alcohol and refusal to submit to a chemical breath test.

The officer testified that Richter was not read his *Miranda* rights because such a procedure is not required under the implied consent rule. In giving a suspect a *Miranda* warning,

> "law enforcement personnel must (1) inform the defendant of the right to remain silent, (2) explain that anything said can and will be used against the defendant in court, and (3) inform the defendant of the right to consult with a lawyer and to have a lawyer present during interrogation. . . ."

State v. Twohig, 238 Neb. 92, 108, 469 N.W.2d 344, 355 (1991) (citing *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)).

After repeated questioning by defense counsel regarding the failure of the officer to advise Richter of his *Miranda* rights, the court sustained the State's objection that defense counsel was being argumentative. The court stated in the presence of the jury that *Miranda* rights do not apply, and were not relevant, to procedures regarding testing for drunk driving. Although a bench conference was had at this time, apparently in regard to the court's ruling, it was not preserved in the record.

Richter and his brother both testified that the only alcoholic beverage consumed by Richter throughout that day was one beer at the Lucky Lady Saloon. Each denied that Richter's driving was erratic. Richter testified that he understood the implied consent law to mean that "if I didn't take a breath test, the State automatically takes your license for six months."

The jury found the defendant guilty on both counts. The trial court overruled Richter's motion for a new trial.

When Richter appealed his convictions and sentences to the district court, he asked that Judge Alfred J. Kortum recuse himself from the case because one of Richter's brothers had accidentally driven his car into the judge's home in July 1989. Judge Kortum overruled the motion for recusal, stating that he did not hold the defendant responsible for the actions of his brother. The district court affirmed the judgment of the county court.

FIRST ASSIGNED ERROR

In his first assignment of error, Richter claims the trial court erred in overruling his motion for a new trial. His argument in that regard is without merit.

In a criminal case, a new trial motion is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed. *State v. Jensen*, 238 Neb. 801, 472 N.W.2d 423 (1991).

Richter first claims that the trial court erred in instructing the jury that his assertion of constitutional (*Miranda*) rights was irrelevant. The defendant also objects to the trial court's permitting evidence to be introduced relating to refusal of a chemical test without requiring an advisement of Richter by a police officer that his asserted constitutional right to a *Miranda* warning was inapplicable to the demand for a breath test.

Our cases have clearly held that unless there has been a commingling of the *Miranda* warning and the implied consent statute, a defendant's lack of understanding of the consequences of a refusal to take a chemical test is not a defense. See, *Wiseman v. Sullivan*, 190 Neb. 724, 211 N.W.2d 906 (1973); *State v. Green*, 238 Neb. 328, 470 N.W.2d 736 (1991). Here, the evidence is uncontroverted that the police did not commingle a *Miranda* warning with an implied consent advisement. As a matter of fact, Richter acknowledges in his brief that no *Miranda* warning was ever given him by the officer, and the officer testified Richter was never given a *Miranda* warning. Parts a. and b. of his first assigned error are meritless.

We need not address Richter's assigned error that his refusal of the breath test was justifiable or reasonable. No such error was assigned in Richter's appeal to the district court. An appellate court, in reviewing decisions of the district court which affirmed, reversed, or modified decisions of the county court, will consider only those errors specifically assigned in the appeal to the district court and again assigned as error in the appeal to the appellate court. *State v. Keller, ante* p. 566, 483 N.W.2d 126 (1992); *State v. Erlewine*, 234 Neb. 855, 452 N.W.2d 764 (1990).

SECOND ASSIGNED ERROR

In his second assigned error, Richter claims the district court erred in overruling his motion for the judge's recusal. He argues that the district judge should have removed himself from the case because Richter's brother negligently drove his car into the judge's home in July 1989 and that under the circumstances, there was created the appearance or possibility of impropriety and that a question was raised as to the ability of the court to remain objective.

A motion requesting a judge to recuse himself on the grounds of bias or prejudice is addressed to the discretion of the judge, and an order overruling such a motion will be affirmed on appeal unless the record establishes bias or prejudice as a matter of law. *State v. Shepard*, 239 Neb. 639, 477 N.W.2d 567 (1991). A defendant seeking to disqualify a judge on the basis of bias or prejudice bears the heavy burden of overcoming the presumption of judicial impartiality. *Id.*

The record reflects that in overruling the motion for recusal, the judge stated, "I don't have any feeling one way or the other for Mr. Ronald Richter. I can't hold him responsible for what his brothers or relatives do and I don't." The defendant has not demonstrated that the record establishes bias or prejudice on the part of the judge as a matter of law. Richter's second assignment of error is without merit.

THIRD ASSIGNED ERROR

In his third and final assignment of error, Richter complains that his sentences are excessive. On count I, Richter was given 30 days in jail, a 6-month license suspension, and a $500 fine,

and on count II the same, with the jail sentences to be served consecutively. This is within the statutory limits. See Neb. Rev. Stat. §§ 28-106(1) (Reissue 1989), 39-669.07 (Reissue 1988), and 39-669.08(4)(a) (Reissue 1988).

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. Tejral, ante* p. 329, 482 N.W.2d 6 (1992). The record reflects that since his December 1987 release from the Wyoming penitentiary, Richter has had two DWI convictions in Arizona. In addition, Richter failed to complete an evaluation process at the Panhandle Mental Health Center which, according to the trial judge, would likely have resulted in a recommendation that Richter go to inpatient treatment and learn to deal with his drinking problem. The judge stated that "my main interest here is not so much punishment as trying to prevent your next drunk driving incident. And from your record, it's very obvious that you have an extremely severe drinking problem."

Richter's sentences are within statutory limits and do not constitute an abuse of discretion by the trial court. His third assigned error also has no merit.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LEONARD J. JORDAN, APPELLANT.

485 N.W.2d 198

Filed June 19, 1992. No. S-91-372.

1. **Sentences.** Credit against the maximum term and any minimum term shall be given to an offender for time spent in custody as a result of the criminal charge for which a prison sentence is imposed or as a result of the conduct on which such a charge is based. Neb. Rev. Stat. § 83-1,106(1) (Cum. Supp. 1990).
2. _____. As a result of Neb. Rev. Stat. § 83-1,106(1) (Cum. Supp. 1990), the "in custody" credit against a sentence eventually imposed on a defendant insures that the defendant is not incarcerated longer than the maximum period of incarceration statutorily prescribed as punishment for a particular offense.
3. **Sentences: Words and Phrases.** For the purpose of Neb. Rev. Stat. § 83-1,106(1)

(Cum. Supp. 1990), "in custody" means judicially imposed physical confinement in a governmental facility authorized for detention, control, or supervision of a defendant before, during, or after a trial on a criminal charge.

Appeal from the District Court for Lancaster County: PAUL D. MERRITT, JR., Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Robert G. Hays for appellant.

Don Stenberg, Attorney General, and Donald A. Kohtz for appellee.

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

SHANAHAN, J.

In his solitary assignment of error, Leonard J. Jordan complains that in the sentence imposed after Jordan's violation of probation, the court failed to credit Jordan with the period of electronic monitoring prescribed as a part of Jordan's previous sentence to probation.

On August 14, 1990, Jordan, on his plea of guilty in the district court for Lancaster County, was convicted of felony theft. See Neb. Rev. Stat. §§ 28-517 and 28-518(2) (Reissue 1989). After a presentence report, the court sentenced Jordan to 3 years' probation involving intensive supervision, see Neb. Rev. Stat. §§ 29-2262.02 to 29-2262.05 (Cum. Supp. 1990), including 90 days of electronic monitoring, see Neb. Rev. Stat. § 29-2262 (Cum. Supp. 1990). Apparently, the electronic monitoring device, installed in Jordan's residence, enabled the probation officer to ascertain whether Jordan was at home at a particular time. Apart from the requirement of electronic monitoring, the probation order for Jordan contained relatively standard provisions, such as Jordan's refraining from unlawful conduct, obtaining employment, residing within Lancaster County, and reporting to his probation officer.

Jordan successfully completed the 90-day period of electronic monitoring.

On December 3, 1990, the State moved for revocation of Jordan's probation and alleged that Jordan violated a condition of his probation by possessing marijuana. Represented by

counsel at the hearing for revocation of probation, Jordan waived an evidentiary hearing and admitted that he violated probation by his possession of marijuana. After accepting Jordan's admission of the probation violation, the court revoked Jordan's probation and ordered a presentence report. At the sentence hearing, the court rejected Jordan's request that he be given credit for the 90 days during which Jordan was subjected to electronic monitoring and sentenced Jordan to imprisonment for 1 to 2 years.

Sentencing credit for a defendant's time in custody is required by Neb. Rev. Stat. § 83-1,106(1) (Cum. Supp. 1990):

> Credit against the maximum term and any minimum term shall be given to an offender for time spent in custody as a result of the criminal charge for which a prison sentence is imposed or as a result of the conduct on which such a charge is based. This shall specifically include, but shall not be limited to, time spent in custody prior to trial, during trial, pending sentence, pending the resolution of an appeal, and prior to delivery of the offender to the custody of the Department of Correctional Services.

As a result of § 83-1,106(1), the "in custody" credit against a sentence eventually imposed on a defendant insures that the defendant is not incarcerated longer than the maximum period of incarceration statutorily prescribed as punishment for a particular offense. See, *State v. Heckman*, 239 Neb. 25, 473 N.W.2d 416 (1991); *State v. Lynch*, 215 Neb. 528, 340 N.W.2d 128 (1983); *People v. Ramos*, 138 Ill. 2d 152, 561 N.E.2d 643 (1990); *Reanier v. Smith*, 83 Wash. 2d 342, 517 P.2d 949 (1974).

Jordan contends that electronic monitoring is equivalent to being "in custody" for purposes of § 83-1,106(1), and therefore, he is entitled to credit for the 90 days of electronic monitoring imposed and completed under the probation order.

In *State v. Muratella, ante* p. 567, 570, 483 N.W.2d 128, 130 (1992), issued on April 23, 1992, we stated that "home detention on probation, subject to electronic monitoring, is insufficiently restrictive to constitute 'custody' for purposes of granting sentencing credit under § 83-1,106(1)." Also in reference to § 83-1,106(1), we have stated that jail time for the purposes of sentencing credit " 'is commonly understood to be

the time an accused spends in detention pending trial and sentencing.' " *State v. Vrtiska*, 227 Neb. 600, 609, 418 N.W.2d 758, 764 (1988). Accord *State v. Heckman, supra*.

Thus, remaining after *Muratella* is the question: What is the meaning of "in custody" for the purpose of § 83-1,106(1)? That question is raised in Jordan's appeal, since the phrase "in custody" is undefined in § 83-1,106(1).

"When statutory language is plain and unambiguous, no judicial interpretation is needed to ascertain the statute's meaning so that, in the absence of a statutory indication to the contrary, words in a statute will be given their ordinary meaning." *State v. Crowdell*, 234 Neb. 469, 473-74, 451 N.W.2d 695, 699 (1990). " '[A] statute should be construed so that an ordinary person reading it would get from it the usual, accepted meaning.' " *State v. Carlson*, 223 Neb. 874, 876, 394 N.W.2d 669, 671 (1986).

"Custody" is defined in Webster's Third New International Dictionary, Unabridged 559 (1981) as: "judicial or penal safekeeping : control of a thing or person with such actual or constructive possession as fulfills the purpose of the law or duty requiring it : imprisonment or durance of persons or charge of things." See, also, *State v. Gilbert*, 115 Wis. 2d 371, 340 N.W.2d 511 (1983). "Custody" in a sentencing credit statute "is limited to confinement in a penal institution." *People v. Ramos*, 138 Ill. 2d at 158, 561 N.E.2d at 646. "[T]he concept of custody generally connotes a facility rather than a home. It includes some aspect of regulation of behavior. It also includes supervision in a structured life style." *People v. Reinertson*, 178 Cal. App. 3d 320, 327, 223 Cal. Rptr. 670, 674 (1986).

Distinguishing "in custody" from "home confinement," the court in *People v. Ramos*, 138 Ill. 2d at 159, 561 N.E.2d at 647, noted:

> Home confinement, though restrictive, differs in several important respects from confinement in a jail or prison. An offender who is detained at home is not subject to the regimentation of penal institutions and, once inside the residence, enjoys unrestricted freedom of activity, movement, and association. Furthermore, a defendant confined to his residence does not suffer the same

surveillance and lack of privacy associated with becoming a member of an incarcerated population.

See, also, *State v. Speaks*, 63 Wash. App. 5, 816 P.2d 95 (1991) (home detention is not equivalent to jail time as a credit against sentence imposed); *People v. Gordon*, 207 Ill. App. 3d 352, 566 N.E.2d 23 (1991) (home detention is not time spent "in custody" relative to sentencing credit); *State v. Pettis*, 149 Wis. 2d 207, 441 N.W.2d 247 (1989) (defendant was not "in custody" during home detention, because there was no judicially imposed physical restraint or control); *People v. Reinertson, supra* (home detention, as a condition of probation, does not constitute "in custody" for sentencing credit). But see, *Grant v. State*, 99 Nev. 149, 659 P.2d 878 (1983) (restraints on liberty in a residential drug treatment program substantially equivalent to incarceration may warrant sentencing credit); *In re McPhee*, 141 Vt. 4, 442 A.2d 1285 (1982) (sentencing credit properly granted for time spent in a residential alcohol treatment facility where supervision and restrictions on defendant's liberty were equivalent to incarceration); *Lock v. State*, 609 P.2d 539 (Alaska 1980) (sentencing credit for time spent in residential rehabilitation program which imposes substantial restrictions on movement and behavior); *Maus v. State*, 311 Md. 85, 532 A.2d 1066 (1987) (sentencing credit for time spent in drug treatment center is within trial court's discretion, but credit should be granted when restrictions imposed on a defendant during confinement are similar to incarceration); *State v. Reyes*, 207 N.J. Super. 126, 504 A.2d 43 (1986) (sentencing credit will be granted when a program is so confining as to be substantially equivalent to custody in jail or in a state hospital).

Consequently, we hold, for the purpose of § 83-1,106(1), "in custody" means judicially imposed physical confinement in a governmental facility authorized for detention, control, or supervision of a defendant before, during, or after a trial on a criminal charge. When the preceding definition for "in custody" is applied in Jordan's case, Jordan was not in custody as a result of the probation imposed, because he was not physically confined in a governmental facility pursuant to court order and, moreover, was at liberty to leave his residence and engage in many unrestricted activities consistent with the terms

of his probation. With the exception of occasional instances when Jordan's residential presence was required for verification by electronic monitoring, Jordan had virtually unrestricted mobility in society. Persons "in custody" usually do not enjoy such mobility and freedom of activity or association. Consequently, the time spent under electronic monitoring conducted through Jordan's residence does not qualify as time "in custody" for the purpose of sentencing credit required under § 83-1,106(1). For that reason, the district court's judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DONNA J. JOHNSON, APPELLANT.

485 N.W.2d 195

Filed June 19, 1992. No. S-91-655.

Appeal from the District Court for Douglas County: JERRY M. GITNICK, Judge. Affirmed.

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

Don Stenberg, Attorney General, and Delores Coe-Barbee for appellee.

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

SHANAHAN, J.

A jury in the district court for Douglas County convicted Donna J. Johnson of first degree assault, see Neb. Rev. Stat. § 28-308 (Reissue 1989), and using a knife to commit a felony, see Neb. Rev. Stat. § 28-1205 (Reissue 1989). Each of the crimes charged against Johnson is a Class III felony, punishable by imprisonment for a minimum of 1 year and a maximum of 20 years, a $25,000 fine, or both imprisonment and a fine. See

Neb. Rev. Stat. § 28-105(1) (Reissue 1989). The court sentenced Johnson to imprisonment for 5 to 7 years on the assault conviction and 1 to 3 years on the conviction of using a knife to commit the felony assault. Johnson's sentences are to be served consecutively. See Neb. Rev. Stat. § 28-1205(3) (Reissue 1989) (mandatory consecutive sentence for felony committed with a deadly weapon).

Johnson assigns two errors: first, insufficiency of evidence to sustain her convictions and, second, judicial abuse of discretion in the sentences imposed, which are claimed to be excessive. We affirm.

STANDARD OF REVIEW

> In determining whether evidence is sufficient to sustain a conviction in a jury trial, an appellate 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. Fleck, 238 Neb. 446, 447, 471 N.W.2d 132, 134 (1991). Accord, *State v. Schumacher, ante* p. 184, 480 N.W.2d 716 (1992); *State v. Zitterkopf*, 236 Neb. 743, 463 N.W.2d 616 (1990); *State v. Reynolds*, 235 Neb. 662, 457 N.W.2d 405 (1990); *State v. Olsan*, 231 Neb. 214, 436 N.W.2d 128 (1989).

> On a claim of insufficiency of the evidence, an appellate court will not set aside a guilty verdict in a criminal case where such verdict is supported by relevant evidence. Only where evidence lacks sufficient probative force as a matter of law may an appellate court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt.

State v. Fleck, 238 Neb. at 447, 471 N.W.2d at 134. Accord, *State v. Schumacher, supra*; *State v. Lonnecker*, 237 Neb. 207, 465 N.W.2d 737 (1991); *State v. Robertson*, 223 Neb. 825, 394 N.W.2d 635 (1986).

FACTUAL BACKGROUND

On a November evening in 1990, Johnson and her fiance, Larry James, were in an Omaha bar. Also in the bar were Tom

Stokke and the bar's owner, who several times asked Johnson to leave because Johnson was loud and generally disruptive. After Johnson refused to leave, the bar owner eventually carried Johnson through the bar's rear door to the outside, but Johnson reentered the bar via the front door and responded to an alleged racial slur by "clobbering" Stokke, who fell over a table, breaking a nearby railing and some glassware. As a result, Johnson was again removed from the bar. Outside, Johnson told witnesses that she was going to "kick somebody's ass" and that "I'm going to fuck that guy up."

When Stokke left the bar, he was attacked by Johnson and James. Eyewitnesses testified that, after a brief verbal exchange, Johnson struck Stokke from behind and then pulled Stokke's jacket upward, immobilizing Stokke with his arms upraised while James stabbed Stokke repeatedly with a knife, slashing Stokke's face, head, and neck, as well as puncturing Stokke's back. A witness rescued Stokke and helped him to a nearby car, which was used to rush Stokke to a hospital, where he was treated for multiple stab wounds, loss of blood, and a broken arm.

SUFFICIENCY OF THE EVIDENCE

Under § 28-308(1), "[a] person commits the offense of assault in the first degree if he intentionally or knowingly causes serious bodily injury to another person." Johnson argues that the evidence against her is insufficient to sustain her conviction because she did not stab Stokke and did not know that James had done so until after the attack. However, Neb. Rev. Stat. § 28-206 (Reissue 1989) provides that "[a] person who aids, abets, procures, or causes another to commit any offense may be prosecuted and punished as if he were the principal offender."

Based on the evidence of Johnson's conduct, including her statements on the evening of the assault, a jury could properly find beyond a reasonable doubt that Johnson intended to cause serious injury to Stokke and that she acted in concert with James or otherwise aided, abetted, caused, or procured the stabbing of Stokke by James. We conclude that the State presented sufficient evidence to sustain both of Johnson's

convictions. Therefore, Johnson's convictions are affirmed.

EXCESSIVE SENTENCES

Johnson also argues that the sentences imposed by the district court are excessive, because (1) a probation officer, who prepared the presentence investigation and report, recommended probation for Johnson and (2) she received a greater sentence than did James, who was the primary actor in the assault on Stokke.

We have consistently held that "[a] sentence imposed within the statutory limits will not be disturbed on appeal unless the sentencing court has abused its discretion in the sentence imposed." *State v. Kitt*, 232 Neb. 237, 240, 440 N.W.2d 234, 236 (1989). Accord, *State v. Witt*, 239 Neb. 400, 476 N.W.2d 556 (1991); *State v. Jameson*, 239 Neb. 109, 474 N.W.2d 475 (1991); *State v. Staten*, 238 Neb. 13, 469 N.W.2d 112 (1991). We have also stated that "the mere fact that a defendant's sentence differs from those which have been imposed on coperpetrators in the same court does not, in and of itself, make the defendant's sentence an abuse of discretion . . . ." *State v. Boppre*, 234 Neb. 922, 965, 453 N.W.2d 406, 435 (1990). Accord, *State v. Nearhood*, 233 Neb. 767, 448 N.W.2d 399 (1989); *State v. Spotted Elk*, 227 Neb. 869, 420 N.W.2d 707 (1988). See, also, *State v. Whitmore*, 221 Neb. 450, 378 N.W.2d 150 (1985). "[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 . . . of the sentencing judge as to the demeanor, attitude, and all facts and circumstances surrounding the life of the defendant." *State v. Stranghoener*, 208 Neb. 598, 603, 304 N.W.2d 679, 682 (1981). Accord, *State v. Schumacher, supra*; *State v. Witt, supra*. Furthermore, "the sentencing judge is not bound by the recommendations of the probation officer in determining the sentence to be imposed." *State v. Stranghoener*, 208 Neb. at 603, 304 N.W.2d at 682. Accord *State v. Steed*, 201 Neb. 120, 266 N.W.2d 240 (1978).

In determining the sentences to be imposed on Johnson, the court was aware of the conduct involved in Johnson's convictions for the vicious attack on Stokke and also had the

reported history of Johnson's criminal convictions, especially those convictions since 1986, which include convictions of receiving stolen property, shoplifting (three convictions), assault and battery (two convictions), forgery, and third degree assault. Consequently, we are unable to conclude that either of the sentences imposed on Johnson is excessive. Therefore, the sentences imposed on Johnson are affirmed.

CONCLUSION

Johnson's assignments of error are without merit. Accordingly, Johnson's convictions and sentences are affirmed.

AFFIRMED.

LELAND PORTER, INDIVIDUALLY AND AS TRUSTEE FOR NICOLE LYNN PORTER, KRISTINE LEE PORTER, AND CYNTHIA ANN PORTER, APPELLANT, V. ROBERT D. SMITH AND SANDRA E. SMITH, HUSBAND AND WIFE, APPELLEES.

486 N.W.2d 846

Filed June 26, 1992. No. S-89-685.

1. **Judgments: Appeal and Error.** In reviewing a judgment in a bench trial of a law action, an appellate court does not reweigh the evidence, but considers the evidence in the light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.
2. _____: _____. In a bench trial of a law action, a trial court's factual findings have the effect of a jury verdict and will not be set aside unless clearly erroneous.
3. _____: _____. Regarding a question of law, an appellate court has an obligation to reach a conclusion independent of that of the trial court in a judgment under review.
4. **Contracts: Damages: Penalties and Forfeitures.** Ordinarily, a sum paid in part performance of a contract, with a provision that it shall be forfeited in the event of a default, if not excessive, and if the actual damages are not calculable in advance, will be regarded as liquidated damages.
5. **Contracts.** A contract must be construed as a whole and, if possible, effect must be given to every part thereof.
6. _____. In interpreting contracts, the court as a matter of law must first determine whether the contract is ambiguous.

7. **Contracts: Words and Phrases.** An instrument is ambiguous if a word, phrase, or provision in the instrument has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings.
8. **Contracts.** The fact that parties to a document have or suggest opposing interpretations of the document does not necessarily, or by itself, compel the conclusion that the document is ambiguous.
9. **Contracts: Intent.** If a contract is unambiguous, the intent of the parties must be determined from the contents of the contract.
10. **Contracts: Real Estate: Sales: Penalties and Forfeitures: Words and Phrases.** In the context of a land sale contract, forfeiture means that if a purchaser defaults on the payments, any sums paid by the purchaser on the contract of sale are not reimbursed to him or her.
11. **Contracts: Real Estate: Vendor and Vendee: Foreclosure.** A vendor in an executory land contract, upon default of payment by the vendee, has the right to foreclose on the executory land contract as if it were a mortgage and obtain a deficiency judgment after such a foreclosure.
12. **Vendor and Vendee: Penalties and Forfeitures: Words and Phrases.** Under the majority rule in the United States, the vendor is typically barred from seeking to recover the mortgage equivalent of a deficiency judgment once forfeiture has been accomplished. This is the so-called election of remedies doctrine.
13. **Words and Phrases.** Election of remedies is an ancient doctrine created by the courts. It requires a plaintiff to choose between inconsistent remedies for redress of a single injury. The doctrine originated as a means to prevent double recovery and to limit potential harassment of defendants.
14. **Vendor and Vendee: Proof: Foreclosure.** The election of remedies doctrine is an affirmative defense placing the burden on the purchasers to plead and prove that the seller has elected the remedy of strict foreclosure.
15. **Contracts: Real Estate: Vendor and Vendee: Penalties and Forfeitures.** A vendor in a real estate installment contract is barred from seeking to recover the mortgage equivalent of a deficiency judgment once forfeiture of the contract has been accomplished and the vendor is in possession of the real estate and has retained the payments made by the vendee. The seller must make an election of the remedy he or she wishes to pursue.
16. _____: _____: _____: _____. Generally, a vendor of a real estate installment sale contract may not recover the underlying unpaid debt owing on the purchase price and also enforce the contract's forfeiture remedy because the two remedies are inconsistent and result in a windfall recovery to the vendor.
17. **Contracts: Real Estate: Vendor and Vendee.** The vendor in a real estate installment contract is bound by the election of remedies doctrine if the action has been pursued to a determinative conclusion, the vendor has procured advantage from his or her actions, or the vendee has been subjected to injury.
18. **Contracts: Real Estate: Vendor and Vendee: Damages: Notice: Penalties and Forfeitures: Foreclosure.** While the vendor in a real estate installment contract may not accept or take possession of the real estate and retain the amounts paid under the contract and still seek money damages, he or she may, even after sending notice of forfeiture, alter his or her choice of remedies and commence an action either for money damages or for foreclosure of the land contract.

Appeal from the District Court for Deuel County: JOHN D. KNAPP, Judge. Reversed and remanded for further proceedings.

Paul E. Hofmeister, of Van Steenberg, Chaloupka, Mullin, Holyoke, Pahlke, Smith, Snyder & Hofmeister, P.C., for appellant.

Robert B. Reynolds and J.A. Lane, of McGinley, Lane, Mueller, O'Donnell & Williams, P.C., for appellees.

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

HASTINGS, C.J.

This case involves the election of remedies. The plaintiff, Leland Porter, individually and as trustee for his children, Nicole Lynn Porter, Kristine Lee Porter, and Cynthia Ann Porter, appeals from an order of the district court which dismissed his petition seeking a deficiency judgment. This action followed the foreclosure of a land contract against the defendants, Robert D. and Sandra E. Smith. The plaintiff assigns as error generally that the trial court held that plaintiff "deliberately invoked" the remedy of liquidated damages and that the contract prohibited plaintiff from recovering a deficiency judgment. We reverse and remand for further proceedings.

In reviewing a judgment in a bench trial of a law action, an appellate court does not reweigh the evidence, but considers the evidence in the light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence. *Nebraska Builders Prod. Co. v. Industrial Erectors*, 239 Neb. 744, 478 N.W.2d 257 (1991).

In a bench trial of a law action, a trial court's factual findings have the effect of a jury verdict and will not be set aside unless clearly erroneous. *Nebraska Builders Prod. Co., supra.*

Regarding a question of law, an appellate court has an obligation to reach a conclusion independent of that of the trial court in a judgment under review. *Nebraska Builders Prod.*

Co., supra.

On February 22, 1982, the plaintiff and his now former wife entered into a land sale contract with the defendants. The property listed in the contract is buildings and a section of wheatland in Deuel County, Nebraska. The contract provided that the defendants would receive the warranty deed, which was placed in escrow, upon compliance with all the terms of the contract.

The contract provided for a purchase price of $586,000, with $10,000 paid down at the date of closing, $50,000 paid on April 1, 1982, and $57,000 paid on July 15, 1982. The contract also provided for the payment of the balance "in the sum of $468,800.00 [sic]," together with interest at 11.5 percent per annum, payable in annual amortized installments of $60,805.60, which included principal and interest, and a balloon payment of $221,933.10 after 15 years. Additionally, the defendants were to receive the wheat crop then growing on the land.

Between the time of the original meeting of the parties and the preparation of the final contract, the two items listed above had been changed somewhat, and the provision as to default set forth in paragraph 10.2 was also modified. The language of paragraph 10.2, with the addition made at the time of the last amendment appearing in parentheses, is as follows:

> 10.2 BUYERS agree that in the event they fail to pay any amounts due under this Contract, including real estate taxes, or within THIRTY DAYS from the date such payments are due, then the entire endebtedness [sic] due under this Contract shall become due and payable immediately, at the option of the SELLERS, and SELLERS may proceed to foreclose this Contract in the manner provided by law, (and the payments made thereon shall be forfeited and held as rent and liguidated [sic] damages.)

Importance was placed by the court and the parties on the question of which party, the plaintiff or the defendants, requested the change in the quoted language. The trial court found that "[t]he provision for liquidated damages was plaintiff's idea," although we fail to see the relevance of that

finding inasmuch as the important consideration is the language of the contract. The court went on to say, "Having deliberately provided for a specific remedy and having deliberately invoked that specific remedy, plaintiff cannot now complain of its application."

Defendants took possession of the land and made the annual payments due on April 1, 1983, 1984, and 1985. No additional payments were made. Plaintiff's lawyer wrote the defendants on May 6, 1986, that

> pursuant to paragraph 10.2 of the contract sellers hereby declare the entire indebtedness due under the contract, due and payable immediately and intend to proceed to foreclose the same forthwith and seek such other relief as the law allows. All payments thus far made under the contract are hereby forfeited and credited to the sellers as rent and liquidated damages.

Plaintiff filed an action for foreclosure in the district court for Deuel County, and pursuant to a motion for summary judgment which was granted, a decree of foreclosure issued. Only the decree, the order confirming the sale, and the order permitting the withdrawal of the contract for the purpose of bringing an action for a deficiency appear in the record.

By the decree, dated October 28, 1986, the court found and ordered that

> there is due and owing to Plaintiff on the Contract For Sale Of Real Estate dated February 22, 1982, set forth in Plaintiff's Petition, the sum of $445,649.74 as of October 28, 1986, [the date of the decree] with interest accruing at the rate of $140.41 per diem from and after April 1, 1985 until paid . . . .

The decree is confusing because the finding of the amount due as of October 28, 1986, together with the further finding of per diem interest from April 1, 1985, makes little sense. The $140.41-per-day interest would be the correct amount of interest on a principal sum of $445,649.74. Our calculation based on interest beginning on the balance due after the final downpayment on July 15, 1982, discloses that as of April 1, 1986, the date that the defendants first defaulted on the $60,805.60 payment of principal and interest, the amount due

and payable on the land contract was $478,519. Applying the 11.5-percent interest rate to that figure, the annual interest would be $55,030, or $150.77 per diem. Therefore, the amount necessary for the defendants to pay to redeem would have been $510,180.70 ($478,519 plus $150.77 per day for 210 days from April 1, 1986, to the date of decree, October 28, 1986), plus unpaid taxes and costs. This figure does not square with the decree.

However, defendants failed to appeal the foreclosure decree, and the figure determined by the court became final. Contrary to the demand made in the May 6, 1986, letter of plaintiff's attorney to defendants, and contrary to the contention of the defendants, the record does not establish that the contract was strictly foreclosed and that there was a forfeiture. We conclude, therefore, that the plaintiff proceeded to a regular foreclosure of the contract, which would require that defendants be given credit for all payments made. The property was sold to the plaintiff at a sheriff's sale for $272,000, and the sale was duly confirmed.

The plaintiff obtained leave of court to withdraw the contract for sale for the purpose of bringing an action at law for a deficiency judgment in the amount of $352,714.46, that being the difference, according to plaintiff's testimony, between the total amount claimed to be due and owing the plaintiff and the net sale price. It was that action which was dismissed at the close of all the evidence and which gives rise to this appeal.

The critical questions which this court must determine are ones of law as to whether the trial court erred in holding that the contract language in paragraph 10.2 prohibits the plaintiff from recovering a deficiency judgment and whether plaintiff elected the remedy of forfeiture.

It is quite apparent that the provision in the contract as to payments made by the buyers was one for liquidated damages and not a penalty. " 'Ordinarily a sum paid in part performance of a contract, with a provision that it shall be forfeited in the event of a default, if not excessive, and if the actual damages are not calculable in advance, will be regarded as liquidated damages.' " *Crowley v. McCoy*, 234 Neb. 88, 91, 449 N.W.2d 221, 224 (1989).

A contract for the transfer of land is the type of agreement open to a stipulation for liquidated damages. *Crowley, supra*. A contract must be construed as a whole and, if possible, effect must be given to every part thereof. *Crowley, supra*.

In interpreting contracts, the court as a matter of law must first determine whether the contract is ambiguous. *Crowley, supra*. Regarding a question of law, an appellate court has an obligation to reach a conclusion independent of that of the trial court in a judgment under review. *Nebraska Builders Prod. Co. v. Industrial Erectors*, 239 Neb. 744, 478 N.W.2d 257 (1991).

An instrument is ambiguous if a word, phrase, or provision in the instrument has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings. *Crowley, supra*. The fact that parties to a document have or suggest opposing interpretations of the document does not necessarily, or by itself, compel the conclusion that the document is ambiguous. *Crowley, supra*. If a contract is unambiguous, the intent of the parties must be determined from the contents of the contract. *Crowley, supra*; *Nogg Bros. Paper Co. v. Bickels*, 233 Neb. 561, 446 N.W.2d 729 (1989).

Applying the foregoing rules of construction or interpretation of a document, the remedy clause is unambiguous. The contract provides the seller with two remedies—foreclosure of the contract and forfeiture of the payments. In the context of a land sale contract, forfeiture means that if a purchaser defaults on the payments, any sums paid by the purchaser on the contract of sale are not reimbursed to him or her. *Crowley, supra*; *Ryan v. Kolterman*, 215 Neb. 355, 338 N.W.2d 747 (1983).

There appears to be no question that a vendor in an executory land contract, upon default of payment by the vendee, has the right to foreclose on the executory land contract as if it were a mortgage and obtain a deficiency judgment after such a foreclosure. *Carman v. Gibbs*, 220 Neb. 603, 371 N.W.2d 283 (1985).

On the other hand, we have held a contract containing the following language unambiguously restricted the sellers' remedy to retention of the payments received and recovery of the property: "Buyer shall assume the responsibility of the

contract and in case of forfeiture shall be willing to lose all monies paid upon the property but Sellers shall not have the right of recourse other than the return of the property conveyed hereunder." (Emphasis omitted.) *Crowley*, 234 Neb. at 91, 449 N.W.2d at 224.

The case at bar falls in between *Carman* and *Crowley* in that the vendee is to lose all payments made in the event of default and forfeiture, but there is no specific provision limiting the vendor to that remedy. Therefore, the issue which we must decide is whether to allow Porter two remedies, i.e., retention of all payments received without credit on the contract balance and a deficiency judgment. To do so would permit a double recovery by the plaintiff. This appears to be an issue of first impression in Nebraska.

Under the majority rule in the United States, the vendor is typically barred from seeking to recover the mortgage equivalent of a deficiency judgment once forfeiture has been accomplished. This is the so-called election of remedies doctrine. Election of remedies is an ancient doctrine created by the courts. It requires a plaintiff to choose between inconsistent remedies for redress of a single injury. The doctrine originated as a means to prevent double recovery and to limit potential harassment of defendants. *Keesee v. Fetzek*, 106 Idaho App. 507, 681 P.2d 600 (1984).

In *Hepperly v. Bosch*, 172 Ill. App. 3d 1017, 527 N.E.2d 533 (1988), the buyers defaulted on an installment land contract. The sellers served the buyers with a document in which the sellers quoted the forfeiture and reentry remedy as set forth in the default section of the real estate contract. The letter stated: "[Sellers] will keep as liquidated damages all payments made on said Contract for Sale of Real Estate made by you to them to date . . . ." (Emphasis omitted.) The court held that under Illinois law a vendor under an installment land contract cannot both forfeit the contract, regaining the real estate, and sue under the contract for actual damages. The seller must make an election of the remedy he or she wishes to pursue.

In *Trans West Co. v. Teuscher*, 27 Wash. App. 404, 618 P.2d 1023 (1980), the buyers defaulted on an installment land contract and consented to a forfeiture of their rights under the

contract. The court held that "[i]t is well established that a vendor of an installment sale contract may not recover the underlying unpaid debt owing on the purchase price and also enforce the contract's forfeiture remedy because the two remedies are inconsistent and result in a windfall recovery to the vendor." *Id.* at 407, 618 P.2d at 1025.

In *Covington v. Pritchett*, 428 N.W.2d 121 (Minn. App. 1988), the court held that a vendor is bound by the election of remedies doctrine if the action has been pursued to a determinative conclusion, the vendor has procured advantage from his or her actions, or the vendee has been subjected to injury.

The Michigan Supreme Court has ameliorated the harshness of the election of remedies rule on the vendor by determining when the election took place. The purchasers in *Gruskin v Fisher*, 405 Mich. 51, 273 N.W.2d 893 (1979), defaulted on their land contract, and the sellers sent the purchasers a notice of intention to forfeit the land contract. The purchasers tried to tender a quitclaim deed in order to give up possession. The sellers refused to accept the quitclaim deed. The sellers decided to bring deficiency judgment proceedings. The court held that "while the seller may not accept or take possession and still seek money damages, he may, even after sending notice of forfeiture, refuse tender of possession and either commence an action for money damages or for foreclosure of the land contract." *Id.* at 57-58, 273 N.W.2d at 896. The court gave the following rationale for this holding:

> Strict adherence to the common-law rule that forfeiture of a land contract is an election of remedies ignores the many changes in the practice since the common-law rule developed and often causes an unjust result.
>
> Sellers no longer are at liberty immediately after forfeiture of a land contract to seize possession of premises and put purchasers out on the street. Forfeiture can be effected only upon observance of procedures which provide land contract purchasers with protections similar to, in many cases equal to or better than, those provided mortgagors.
>
> Mortgagees may obtain a deficiency judgment,

> whether the foreclosure is by action or advertisement. While the statute precludes a land contract seller from seeking a deficiency judgment *if* he obtains a writ of restitution and (by implication) if he otherwise obtains possession of the premises, it does not in terms require that result where he has merely announced a forfeiture of a land contract.
>
> Forfeiture of the contract is a prerequisite to commencement of summary proceedings for possession of the premises. . . . It does not follow that the consequence of sending notice of forfeiture should be an irrevocable election precluding an action for damages for nonperformance or an action to foreclose with a view to obtaining a deficiency judgment.

Id. at 58-59, 273 N.W.2d at 896-97.

In the case at bar, the record does not disclose if defendants surrendered possession of the premises before the completion of the foreclosure proceedings or if the plaintiff did in fact retain the payments made by the defendants as liquidated damages—i.e., whether plaintiff elected the option of forfeiture as he had a right to do under the contract.

However, an election of remedies is an affirmative defense. 28 C.J.S. *Election of Remedies* § 28 (1941); *Vogel Co. v. Original Cabinet Corp.*, 252 Mich. 129, 233 N.W. 200 (1930) (election of remedies is affirmative defense). The party pleading election of remedies as a defense has the burden of proving it. 28 C.J.S. *Election of Remedies* § 29 (1941); *Willard v. Shekell*, 236 Mich. 197, 210 N.W. 260 (1926) (party asserting defense of election of remedies has burden of proof); *Spaulding v. Cahill*, 146 Vt. 386, 505 A.2d 1186 (1985) (election of remedies is an affirmative defense which must be pleaded and proved); *Abbadessa v. Tegu*, 122 Vt. 345, 173 A.2d 581 (1961) (election of remedies is an affirmative defense which must be pleaded and proved); *City Bank of San Diego v. Ramage*, 266 Cal. App. 2d 570, 72 Cal. Rptr. 273 (1968) (doctrine of election of remedies, being a form of estoppel, is an affirmative defense that ordinarily must be specifically pleaded unless it appears on the face of the complaint); *Hanover Estates v. Finkelstein*, 194 Misc. 755, 86 N.Y.S.2d 316 (1949) (doctrine of election of

remedies can be taken advantage of only by pleading the election as an affirmative defense); *State ex rel. Kansas City v. Harris*, 357 Mo. 1166, 212 S.W.2d 733 (1948) (election of remedies is an affirmative defense).

We hold that the election of remedies doctrine is an affirmative defense placing the burden on the purchasers to plead and prove that the seller has elected the remedy of strict foreclosure. The record fails to support a finding that defendants met this burden of proof.

Relying upon the cases previously cited, we arrive at what we believe to be the proper rules relating to election of remedies in land contract cases. A vendor in a real estate installment contract is barred from seeking to recover the mortgage equivalent of a deficiency judgment once forfeiture of the contract has been accomplished and the vendor is in possession of the real estate and has retained the payments made by the vendee. The seller must make an election of the remedy he or she wishes to pursue. See, *Keesee v. Fetzek*, 106 Idaho App. 507, 681 P.2d 600 (1984); *Hepperly v. Bosch*, 172 Ill. App. 3d 1017, 527 N.E.2d 533 (1988). Generally, a vendor of a real estate installment sales contract may not recover the underlying unpaid debt owing on the purchase price and also enforce the contract's forfeiture remedy because the two remedies are inconsistent and result in a windfall recovery to the vendor. *Trans West Co. v. Teuscher*, 27 Wash. App. 404, 618 P.2d 1023 (1980). The vendor in a real estate installment contract is bound by the election of remedies doctrine if the action has been pursued to a determinative conclusion, the vendor has procured advantage from his or her actions, or the vendee has been subjected to injury. *Covington v. Pritchett*, 428 N.W.2d 121 (Minn. App. 1988). While the vendor in a real estate installment contract may not accept or take possession and retain the amounts paid under the contract and still seek money damages, he or she may, even after sending notice of forfeiture, alter his or her choice of remedies and commence an action either for money damages or for foreclosure of the land contract. See *Gruskin v Fisher*, 405 Mich. 51, 273 N.W.2d 893 (1979).

In this case, there is no proof that plaintiff took possession under the contract, but, rather, it is apparent that he proceeded

in foreclosure and obtained possession through a foreclosure sale. Also, the record does not disclose that payments made by buyers were forfeited, i.e., were retained by plaintiff without credit to defendants. Although the seller had the option under the contract to retain all payments as liquidated damages and through his attorney declared a forfeiture, we find that his actions in proceeding in foreclosure amount to an alteration of that choice. He elected to proceed with foreclosure and a deficiency judgment amounting to the difference between the amount due and owing on the contract, with credits for the amounts paid on the contract by defendants, and the proceeds of the sale, which he had a right to do. See *Carman v. Gibbs*, 220 Neb. 603, 371 N.W.2d 283 (1985).

The judgment of the district court is reversed, and the cause is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

SIDNEY R. HENDERSON AND PEGGY S. HENDERSON, HUSBAND AND WIFE, APPELLANTS, V. EDWARD P. FORMAN AND BARBARA J. FORMAN, HUSBAND AND WIFE, APPELLEES.

486 N.W.2d 182

Filed June 26, 1992. No. S-89-1250.

1. **Jurisdiction: Appeal and Error.** An appellate court must raise on its own motion the question of jurisdiction over an appeal when the parties do not present the question.
2. **Judgments: Appeal and Error.** In the absence of a judgment or order finally disposing of a case, an appellate court is without jurisdiction to act and must dismiss the appeal.
3. **Final Orders: Words and Phrases.** Generally, an order is final if it disposes of the whole merits of the case and leaves nothing for further consideration by the court.
4. _____: _____. When an order leaves substantial rights of the parties to an action undetermined and the cause is retained for further action, the order is not final.

5. **Final Orders: Appeal and Error.** An order dismissing one theory of recovery, while a second theory of recovery arising out of the same cause of action remains pending for trial, is not an appealable, final order.
6. **Contracts: Sales: Fraud: Damages: Final Orders: Appeal and Error.** An action for damages arising from a contract of sale allegedly induced by several instances of fraud presents a single cause of action, and an order barring the action as it relates to one such instance only is not an appealable, final order.
7. **Limitations of Actions: Torts: Fraud.** The limitations period applicable to a tort action for fraud is 4 years and is deemed to accrue upon discovery of the fraud.
8. **Limitations of Actions: Words and Phrases.** As used in reference to a statute of limitations, "discovery" occurs when an individual acquires knowledge of a fact which existed but which was previously unknown to the discoverer.
9. **Limitations of Actions: Fraud.** In the context of a fraud action, the limitations period begins to run upon discovery of the facts constituting the fraud, or facts sufficient to put a person of ordinary intelligence and prudence on an inquiry which, if pursued, would lead to such discovery.
10. **Fraud: Proof.** To recover in an action for fraud based upon a misrepresentation of fact, the plaintiff must prove that (1) the defendant made a representation of a material fact; (2) the representation was false; (3) the representation, when made, was known to be false or was made recklessly as a positive assertion without knowledge concerning the truth of the representation; (4) the representation was made with the intention that the plaintiff would rely on it; (5) the plaintiff reasonably relied on the representation; and (6) as the result of such reliance, the plaintiff suffered damage.
11. **Actions.** A cause of action cannot accrue before the occurrence of all the elements which constitute a defendant's violation of a plaintiff's judicially protected right.

Appeal from the District Court for Scotts Bluff County: ROBERT O. HIPPE, Judge. Appeal dismissed.

Dennis L. Arfmann, of Nichols, Douglas, Kelly & Arfmann, P.C., and Francis L. Winner for appellants.

William P. Mueller and J. Blake Edwards, of McGinley, Lane, Mueller, O'Donnell & Reynolds, P.C., for appellees.

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

WHITE, J.

This is a civil suit in which the plaintiffs-appellants, Sidney R. and Peggy S. Henderson, seek damages allegedly resulting from defects in the roof and drainage system of a motel sold to them by the defendants-appellees, Edward P. and Barbara J. Forman. In their petition, the plaintiffs originally asserted

claims based upon breach of express and implied warranties and fraud.

The case was tried in the district court for Scotts Bluff County. The trial court directed a verdict in favor of the defendants at the close of the plaintiffs' evidence. On appeal, this court upheld the trial court's decision as to the breach of warranty claims, but reversed as to the fraud claims, holding that the alleged misrepresentations presented a triable issue for the jury. See *Henderson v. Forman*, 231 Neb. 440, 436 N.W.2d 526 (1989) (*Henderson I*).

Upon remand the defendants moved for a separate hearing on the statute of limitations issue. See Neb. Rev. Stat. § 25-221 (Reissue 1989). The trial court granted the motion and held an evidentiary hearing. Based upon evidence presented at the hearing, the trial court determined that the plaintiffs' claim concerning the roof was barred by the statute of limitations, but that the claim regarding the drainage system was not. After the trial court overruled their motion for a new trial, the plaintiffs perfected an appeal to this court.

FACTUAL BACKGROUND

On June 29, 1980, the Hendersons signed a contract to purchase the Candlelight Inn and Lounge, a motel in Scottsbluff, Nebraska, from the Formans. Prior to signing the contract the Hendersons visited the premises several times. During one such visit in early June 1980, the Formans, the Hendersons, and a Realtor inspected the basement level of the motel. The Hendersons noticed that the wallpaper was wet and coming off the wall and asked the Formans about it. Edward Forman allegedly attributed the problems to a leaky ice machine and the inferior quality of the wallpaper glue, and assured them he solved the problem with the ice machine by attaching an extension hose and would arrange for the replacement of the wallpaper and glue.

Sidney Henderson and Forman also inspected a room containing some of the motel's mechanical equipment. Henderson asked Forman about a sump pump which he noticed was full of water. Forman admitted he did not know exactly how it worked, but told Henderson to be careful when

backflushing the pool or it would overflow. Either that same day or the next, Henderson asked Forman if there were any problems with water in the basement. Forman allegedly stated that a drainage system installed around the perimeter of the motel would keep the basement dry.

Henderson and Forman also ascended the roof of the motel. Henderson testified that when he asked about the condition of the roof, Forman responded that it was "in good shape, there were no problems." Henderson also testified that when Forman mentioned making some minor repairs to the roof, Henderson asked for and received permission to return with the repairman who did the work and make a further inspection. Forman testified that he told Henderson the roof was "marginal" and needed work.

Henderson and the repairman, Forrest Rose, Sr., subsequently examined the roof. Rose told Henderson that the roof was old and probably needed to be replaced. When Henderson reported Rose's comments to Forman, Forman allegedly stated that Rose was just looking for work and again assured Henderson that the roof was in good shape. Still uneasy, Henderson contacted another roofer, Charlie Schank, who looked at the roof and concluded that it was "solid." A friend of Forman's who Forman said "knew something about roofs" also looked at the roof and told Henderson it looked fine. Finally, in response to Henderson's inquiry, the Realtor told Henderson that he assumed the roof was all right.

Following a severe hailstorm in June 1982, the Hendersons noticed some leaks in the hallway and discoloration of the ceilings in some of the rooms. Henderson and Forrest Rose, Jr., went up on the roof to survey the storm damage and noticed that water was "ponding." Rose built up the center of the roof in an attempt to cause the water to run off, but told Henderson that the work was merely a "patch job" and that the roof needed major repairs and possibly replacement. Henderson testified that he did not notice ponding on the roof prior to the hailstorm of June 1982.

Problems associated with the roof became more severe in December 1983. Several of the ceilings began to bow and a few even collapsed under the weight of the water leaking in. Because

repairs were needed, the Hendersons called their insurance company, which in turn hired an engineer to determine the cause of the problems. The engineer examined the interior structures of the roof and concluded that it was defectively designed. He testified that the joists used to support the roof were too small and spaced too far apart, causing the roof to sag. He also noted that the roof was improperly ventilated, resulting in deterioration of the materials used to construct it. Based upon these conclusions, the insurance company denied coverage and informed the Hendersons of its position in early April 1984. Henderson testified that prior to that time he had no idea the roof was defectively designed. The Hendersons filed their petition against the Formans on April 3, 1986.

ASSIGNMENTS OF ERROR

The Hendersons argue that the trial court erred in (1) finding that the limitation period began to run from the time of the alleged misrepresentation rather than from the discovery of the fraud, or, alternatively, (2) finding that the Hendersons should reasonably have discovered the fraud prior to April 2, 1982.

JURISDICTION

Before addressing the merits, this court must raise on its own motion the question of jurisdiction over this appeal. See *Larsen v. Ralston Bank*, 236 Neb. 880, 464 N.W.2d 329 (1991). The jurisdictional question in this case concerns whether the trial court's order barring the Hendersons' action regarding the roof, but not regarding the drainage system, constitutes an appealable, final order.

In the absence of a judgment or order finally disposing of a case, an appellate court is without jurisdiction to act and therefore must dismiss the purported appeal. Neb. Rev. Stat. § 25-1911 (Reissue 1989); *Wicker v. Waldemath*, 238 Neb. 515, 471 N.W.2d 731 (1991). Generally, an order is final if it disposes of the whole merits of the case and leaves nothing for further consideration by the court. *Id.* When substantial rights of the parties to an action remain undetermined and the cause is retained for further action, the order is not final. *Lewis v. Craig*, 236 Neb. 602, 463 N.W.2d 318 (1990).

In *P. R. Halligan Post 163 v. Schultz*, 212 Neb. 329, 322

N.W.2d 657 (1982), this court held that an order dismissing one theory of recovery, while a second theory arising out of the same cause of action remains pending for trial, is not an appealable, final order. A single cause of action is presented in this case. The Hendersons seek to recover damages arising from a contract of sale on the grounds of fraud. Two separate instances of alleged fraud are pled, one involving Forman's statements concerning the condition of the roof and the other involving his representation as to the effectiveness of the underground drainage system. It is difficult to conceive of any theory that would allow separate or successive actions to recover based on each single act. Under any reasonable construction only one cause of action is pled. Therefore, the trial court's order barring the Hendersons' action as it relates to the roof only is not a final order, and this court must dismiss the appeal.

However, because this case will have to be retried, we observe that the limitations period applicable to a tort action for fraud is 4 years. Neb. Rev. Stat. § 25-207(4) (Reissue 1989). The 4-year period is deemed to accrue upon discovery of the fraud. *Id.* As used in reference to a statute of limitations, "discovery" occurs when an individual acquires knowledge of a fact which existed but which was previously unknown to the discoverer. *Broekemeier Ford v. Clatanoff, ante* p. 265, 481 N.W.2d 416 (1992). In the context of a fraud action, the limitations period begins to run upon

> "discovery of the facts constituting the fraud, or facts sufficient to put a person of ordinary intelligence and prudence on an inquiry which, if pursued, would lead to such discovery. If the fraud or mistake ought to have been discovered, the statute will run from the time such discovery ought to have been made. . . ."

Id. at 273, 481 N.W.2d at 421, quoting *Lee v. Brodbeck*, 196 Neb. 393, 243 N.W.2d 331 (1976).

Here, the trial court held that the Hendersons should have discovered the facts supporting their claim regarding the roof prior to April 2, 1982. The court reasoned that "[d]iscussions with roofers, [Henderson's] personal inspections of the roof, experience with leaks, and ready access to discover the

structural support for the roof, (either from physical examinations, or from the plans for the building), all lead to that conclusion."

The trial court obviously found that Henderson's conversation with Forrest Rose, Sr., in June 1980 should have put the Hendersons on inquiry notice of the roof's defects. This is the position taken by the Formans in their brief as well. Such an approach represents a misapplication of the discovery rule relating to fraud actions.

To recover in an action for fraud based upon a misrepresentation of fact, the plaintiff must prove that

> "(1) the defendant made a representation of a material fact; (2) the representation was false; (3) the representation, when made, was known to be false or was made recklessly as a positive assertion without knowledge concerning the truth of the representation; (4) the representation was made with the intention that the plaintiff would rely on it; (5) the plaintiff reasonably relied on the representation; and (6) as the result of such reliance, the plaintiff suffered damage."

Broekemeier Ford, ante at 271, 481 N.W.2d at 420, quoting *Edwin Bender & Sons v. Ericson Livestock Comm. Co.*, 228 Neb. 157, 421 N.W.2d 766 (1988). In this case, Henderson testified that he would not have entered into the contract as written had he known of the roof's defects. In other words, had they known the true nature of the roof, the Hendersons would have either not entered the contract at all or done so on terms reflecting the true condition of the premises. Thus, the act which the Hendersons performed in reliance on the alleged misrepresentations was entering into the contract, and the damage caused was payment of an inflated price.

With this background in mind, it becomes apparent that the cause of action relating to the roof did not "accrue" at the time of Henderson's conversation with Rose. This conversation occurred approximately 2 weeks prior to the signing of the contract on June 29, 1980. A cause of action cannot "accrue" before occurrence of all the elements which constitute a defendant's violation of a plaintiff's judicially protected right. See *Givens v. Anchor Packing*, 237 Neb. 565, 466 N.W.2d 771

(1991) (Shanahan, J., dissenting). Reliance on the alleged misrepresentations and damage resulting therefrom are necessary elements of a cause of action for fraud. *Broekemeier Ford, supra*. At the time of Henderson's conversation with Rose, the Hendersons had not yet decided whether to enter into the contract and thus lacked any reason to sue the Formans. It cannot be said that their cause of action for fraud accrued at that point.

As we noted in *Henderson I*, Henderson's conversation with Rose is relevant to the issue of whether the Hendersons *reasonably relied* on Forman's assurances in entering into the contract. Whether the Hendersons relied upon these assurances at all, and if they did whether such reliance was reasonable in the face of Rose's warning, are questions of fact. Resolution of these questions does not relate to the statute of limitations, but to whether the fraud occurred in the first place.

APPEAL DISMISSED.

BOSLAUGH, J., concurs in the result.

WARREN DREW AND DEBBIE DREW, APPELLANTS, V. WILMA WALKUP, PERSONAL REPRESENTATIVE OF THE ESTATE OF DONALD WALKUP, DECEASED, JACKIE ROHDE, TAFT LARSEN, AND RODNEY LARSEN, APPELLEES.

482 N.W.2d 187

Filed June 26, 1992. No. S-91-666.

1. **Contracts: Statute of Frauds.** The statute of frauds provides that an agreement for the sale of land is void in the absence of a written memorandum signed by the vendor.
2. **Contracts: Evidence: Proof.** A party seeking to recover upon a lost instrument has the burden of proving the former existence, execution, delivery, theft or loss, and contents of the instrument by clear and convincing evidence.
3. **Evidence.** Secondary evidence of the contents of a writing is generally admissible where it is shown that the original writing has been lost or destroyed.
4. **Declaratory Judgments.** An action for declaratory judgment under the provisions of Neb. Rev. Stat. § 25-21,149 et seq. (Reissue 1989 & Supp. 1991) is sui generis; whether such action is to be treated as one at law or one in equity is to

be determined by the nature of the dispute. The test is whether, in the absence of a prayer for declaratory judgment, the issues presented should be properly disposed of in an equitable as opposed to a legal action.

5. **Equity: Injunction: Quiet Title.** Injunctive and quiet title lawsuits are both equity actions.
6. **Equity: Appeal and Error.** In an equity action, an appellate court reviews the record de novo. In such review, the appellate court reaches a conclusion independent of the factual findings of the trial court; however, where the credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the circumstance that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. As to questions of law, an appellate court has the obligation to reach its own independent conclusions.
7. **Rules of Evidence: Hearsay: Notice.** It is not enough that the adverse party is aware of an unavailable declarant's statement; the proponent of the evidence must provide notice to the adverse party of his intention to use the statement in order to take advantage of the hearsay exception.
8. **Rules of Evidence: Words and Phrases.** Evidence is relevant if it has any tendency to make the existence of any fact of consequence to the determination of the action more probable or less probable than it would be without the evidence, or the evidence tends to establish a fact from which the existence or nonexistence of a fact in issue can be directly inferred.

Appeal from the District Court for Douglas County: JOHN E. CLARK, Judge. Affirmed.

James D. Sherrets and Karl D. Vogt, of Sherrets, Smith & Gardner, for appellants.

Joseph C. Byam, of Byam & Byam, for appellees Walkup and Larsen.

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

FAHRNBRUCH, J.

Warren and Debbie Drew appeal a district court order finding that they acquired no ownership interest in real estate which they claim to have purchased under a written "rent-to-own" contract. We affirm the findings and order of the district court for Douglas County.

The Drews testified that the alleged written agreement was lost in a fire that partially destroyed the residence located at 834 North 78th Street in Omaha.

The appellants set forth as error the trial court's rulings that

(1) hearsay testimony of an unavailable witness was inadmissible, (2) certain testimony of two witnesses was irrelevant, (3) no contract for the sale of the property existed, and (4) appellants were not entitled to damages.

The statute of frauds provides that an agreement for the sale of land is void in the absence of a written memorandum signed by the vendor. *Krueger v. Callies*, 190 Neb. 376, 208 N.W.2d 685 (1973). A party seeking to recover upon a lost instrument has the burden of proving the former existence, execution, delivery, theft or loss, and contents of the instrument by clear and convincing evidence. *In re Estate of Miller*, 231 Neb. 723, 437 N.W.2d 793 (1989). Secondary evidence of the contents of a writing is generally admissible where it is shown that the original writing has been lost or destroyed. *State ex rel. Mercurio v. Board of Regents*, 213 Neb. 251, 329 N.W.2d 87 (1983).

The Drews were the occupants of a residence at 834 North 78th Street from 1983 until the house was damaged by fire on December 28, 1990. Following the fire and after being told to vacate the residence, the Drews filed a petition in the district court for Douglas County, seeking a declaratory judgment, or a determination of their legal rights to the property, injunctive relief prohibiting the transfer or encumbrance of the property, and an order quieting title in them. The Drews named as defendants Wilma Walkup, personal representative of the estate of Donald Walkup, Royal Insurance Service Corp., Jackie Rohde, Taft Larsen, and Rodney Larsen. The court dismissed the action against Royal Insurance Service Corp. before trial. Rohde neither answered the petition nor made an appearance.

An action for declaratory judgment under the provisions of Neb. Rev. Stat. § 25-21,149 et seq. (Reissue 1989 & Supp. 1991) is sui generis; whether such action is to be treated as one at law or one in equity is to be determined by the nature of the dispute. *Union Ins. Co. v. Bailey*, 234 Neb. 257, 450 N.W.2d 661 (1990). The test is whether, in the absence of a prayer for declaratory judgment, the issues presented should be properly disposed of in an equitable as opposed to a legal action. See *Chadron Energy Corp. v. First Nat. Bank*, 221 Neb. 590, 379 N.W.2d 742

(1986). The Drews also requested injunctive relief and quiet title relief. Injunctive and quiet title lawsuits are both equity actions. See, *State v. Melcher, ante* p. 592, 483 N.W.2d 540 (1992); *Mack v. Luebben*, 215 Neb. 832, 341 N.W.2d 335 (1983). In an equity action, an appellate court reviews the record de novo. See *State v. Melcher, supra*.

In such review, the appellate court reaches a conclusion independent of the factual findings of the trial court; however, where the credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the circumstance that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Id.*

As to questions of law, an appellate court has the obligation to reach its own independent conclusions. *Id.*

The evidence shows that the North 78th Street residence was purchased by Donald Walkup in 1966 from the defendant Jackie Rohde. In May 1989, Rohde executed and delivered a warranty deed conveying the property to Donald Walkup.

Donald Walkup died in November 1990, a few weeks before fire partially destroyed the residence in question. After the fire, counsel for the personal representative of Walkup's estate notified the Drews that they were tenants who occupied the house pursuant to an oral month-to-month lease. The Drews were directed to vacate the residence so the estate could repair and sell it. Defendant Taft Larsen was hired as a general contractor to secure the house after the fire. The defendant Rodney Larsen had agreed to purchase the property.

The Drews testified that they were not mere tenants but, rather, purchasers of the property pursuant to a "rent-to-own contract" or a "land contract" entered into in 1983 by them and Donald Walkup. They testified their only copy of the written document was destroyed in the fire. In support of their claim that the alleged written contract existed, both of the Drews testified that they had contacted Donald Walkup initially about occupying the house when he indicated an interest in selling it. The Drews said they made it clear that they were in no financial position to buy a house, whereupon Walkup offered them a "deal." They testified that they were to live in the house for at

least 5 years and that they were to pay Walkup monthly on a rent-to-own basis. The Drews testified the purchase price was $18,000, with monthly payments of $225, of which $150 would be applied to principal and $75 to taxes and insurance. There was no testimony that the Drews would pay interest on the principal from time to time remaining unpaid. The Drews testified that the downpayment would be in the form of "sweat equity," or $4,000 worth of repairs and improvements the Drews would make to the residence. There appears to be no explanation as to how the $4,000 in sweat equity would benefit Walkup if the Drews were purchasing the property. They said Walkup was to purchase the insurance, but it would be "for [their] mutual protection."

The Drews testified that the alleged agreement between them and Walkup was reduced to writing, dated, and executed by Warren Drew, Debbie Drew, and Donald Walkup. Warren Drew, Sr., Warren's father, signed the agreement as a witness, according to the Drews. Walkup kept the original document, and Warren and Debbie Drew received a copy, the Drews testified.

Other than the Drews' testimony, there was no testimony from any witness who claimed to have seen the alleged written agreement. Of the four people the Drews claim took part in the execution of the alleged agreement, two, Donald Walkup and Warren Drew, Sr., were deceased at the time of the trial.

The Drews testified that they made their monthly payments for 7 years either in cash or money order paid directly to Walkup, or in work done at the Walkup personal residence in lieu of payments. Warren testified that Debbie kept track of all the payments made. Debbie offered no testimony regarding any records of monthly payments.

The defendants offered into evidence a receipt for payment which had been filled in and signed by Donald Walkup. It was dated "10-4 1990" and showed that a payment of $225 had been made. It was marked "For *Rent* of *September*." (Emphasis supplied.) Warren Drew testified that *after* he received the receipt from Walkup, he gave it to Debbie Drew, *who, sometime thereafter*, marked the receipt "For Cash for House Payment." After the Drews' petition was filed in the district

court, Debbie Drew put her initials, "D.D.," on the payment receipt where she had earlier altered it. A photocopy of the receipt attached to the petition does not carry the initials "D.D.," although it does reflect the alterations.

To explain why Debbie Drew would write on the receipt after obtaining it from Walkup, Warren Drew testified that "[o]rdinarily she made marks like that on the receipts for her own records because she kept track of all those things." No explanation was offered as to why this document was not with any other alleged documents regarding the house when the house burned down, or why the September 1990 receipt was the only such house document to survive the fire. The Drews offered into evidence a bag of ashes they claimed came from that area of the house where the alleged land contract was stored. Warren Drew admitted that he could not say that the ashes contained the remains of the alleged written agreement between the Drews and Donald Walkup.

The defendants offered into evidence Donald Walkup's federal tax returns for the years 1984 through 1990. His 1985 and 1987 through 1990 tax returns all reflect that Walkup reported rental income from the North 78th Street residence. From the rental income, Walkup deducted expenses, and he calculated depreciation on the residence. Walkup's 1984 and 1986 tax returns also show such rental income and deductions, although the address of the rental property is not specifically entered on the returns. There is no address other than 834 North 78th Street indicated as rental property on any of Walkup's tax returns.

The defendants also introduced into evidence several insurance documents showing that Walkup had purchased insurance for a non-owner-occupied rental property at the North 78th Street address. The insurance coverage was for fire, liability, and loss of rent. Donald Walkup is the only named insured on the policy. No secondary insured or lienholder is named on the policy.

At the close of evidence, the Drews moved for a directed verdict, which was overruled. The court found for the defendants and dismissed the Drews' petition.

The appellants' first three assignments of error are

concerned with the admissibility of evidence at the trial.

FIRST ASSIGNED ERROR

In their first assignment of error, the Drews claim that the trial court erred in failing to admit the testimony of Mary Rodgers, Warren Drew's mother. Rodgers was asked what her deceased husband, Warren Drew, Sr., had told her about the rent-to-own contract. This hearsay evidence was offered in an effort to establish that Warren Drew, Sr., signed the alleged agreement and that a contract had existed. The Drews argue that even though the testimony was hearsay it was admissible under the exceptions to the hearsay rule. See, Neb. Rev. Stat. §§ 27-803(22) and 27-804(2)(e) (Reissue 1989). However, under both sections of the statutes, such statement may not be admitted under these exceptions unless the proponent of it makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant. See §§ 27-803(22) and 27-804(2)(e).

The Drews contend that their deposition testimony was sufficient to put the defendants on notice of their intention to offer Warren Drew, Sr.'s hearsay statement into evidence at the trial. The Drews' depositions are not in the record. It is not enough that the adverse party is aware of an unavailable declarant's statement; *the proponent of the evidence must provide notice* to the adverse party of his intention to use the statement in order to take advantage of the hearsay exception in § 27-804(2)(e). *State v. Boppre*, 234 Neb. 922, 453 N.W.2d 406 (1990). Because the Drews failed to give notice of their intention to introduce an unavailable declarant's hearsay statement into evidence, they were precluded from taking advantage at trial of the hearsay exception. The Drews' first assignment of error is without merit.

SECOND ASSIGNED ERROR

For their second assignment of error, the Drews claim the trial court abused its discretion when it found that the testimony of two witnesses was irrelevant.

Warren Drew testified that he had received a letter after the

fire from Joseph C. Byam, attorney of Walkup's personal representative, in which Byam told the Drews that they were month-to-month tenants. Drew also testified that before filing the Drews' petition in the district court, the Drews had not contacted either Wilma Walkup or Byam to assert their alleged ownership rights.

Drews' counsel asked the following of Warren Drew during redirect examination: "Receiving this letter, did you have any reason to doubt Mr. Byam's authority or knowledge on the topic?" Defense counsel objected to the question as leading. The court ruled the evidence to be irrelevant. The Drews offered to prove that they relied upon Byam's expertise and knowledge of their rights regarding the property. The court again ruled the testimony to be irrelevant.

Evidence is relevant if it has any tendency to make the existence of any fact of consequence to the determination of the action more probable or less probable than it would be without the evidence, or the evidence tends to establish a fact from which the existence or nonexistence of a fact in issue can be directly inferred. *Blanchette v. Keith Cty. Bank & Trust Co.*, 231 Neb. 628, 437 N.W.2d 488 (1989).

As the trial court pointed out, Byam was not the Drews' attorney. The fact that they may have relied upon anything he may have told them does not make it more or less probable that a contract for the sale of the house existed. The offered testimony of Warren Drew was properly excluded as irrelevant.

The testimony of the second witness in question was that of Wilma Walkup, personal representative of Donald Walkup's estate. She was called by the Drews to testify on rebuttal at the close of the defendants' case. She was asked: "And at the time you knew Mr. Walkup approximately six years, he never talked to you *about raising the rent* at the Drew house?" (Emphasis supplied.) The court ruled that this potential evidence was not proper rebuttal evidence and was irrelevant. The Drews offered to prove that Wilma Walkup would testify that she and Donald Walkup had never talked about raising the rent. Evidence of whether Donald Walkup ever discussed with Wilma Walkup the possibility of raising the Drews' rent does not make it more or less probable that a written contract for the sale of the house

existed. The offered testimony of Wilma Walkup was properly excluded. The appellants' second assignment of error is without merit.

THIRD ASSIGNED ERROR

For their third assignment of error, the Drews claim the trial court erred in concluding that the plaintiffs failed to meet their burden of proving by clear and convincing evidence that a written agreement for the sale of the house existed between the Drews and Donald Walkup.

The defendants offered into evidence tax returns for the entire period of time the Drews occupied the house. Those tax returns reported the North 78th Street residence as rental property solely owned by Donald Walkup. Insurance forms also designated the house as rental property and named Donald Walkup as the sole insured. The payment receipt, although altered by Debbie Drew, reflects that Walkup considered that the monthly payment for September 1990 was rent and not a house payment. In our de novo review, we find Donald Walkup's actions and documents refute the Drews' claim that the North 78th Street residence was sold to the Drews by written contract in 1983.

The only evidence offered by the Drews to support their assertions that a written agreement existed was their own testimony and a bag of ashes. Because the trial court held against the Drews, it is obvious that the trial court did not find the Drews' testimony to be credible. The trial court saw the Drews while they testified and was in the best position to determine their credibility. When the evidence is in conflict, an appellate court may give weight to the circumstance that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. Upon our de novo review of the record, we conclude that the Drews failed to prove by clear and convincing evidence that they have any ownership interest in the real estate located at 834 North 78th Street in Omaha or that there ever was a written agreement between them and Donald Walkup for the sale and purchase of the property.

The Drews' third assignment of error is without merit.

Because of our findings herein, the Drews' fourth assignment of error, regarding damages, is moot.

Dismissal of the Drews' petition by the district court for Douglas County is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. KIRK R. MAEDER, APPELLANT.

486 N.W.2d 193

Filed June 26, 1992. No. S-91-694.

1. **Postconviction.** An evidentiary hearing may properly be denied on a motion for postconviction relief when the records and files of the case affirmatively establish that the defendant is entitled to no relief.
2. _____. When there has been no prior evidentiary hearing on a motion for postconviction relief and the records and files of the case do not affirmatively show that the defendant is entitled to no relief, an evidentiary hearing should be held to determine whether there is merit in the allegations made in the motion.

Appeal from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Reversed and remanded with directions.

Kirk R. Maeder, pro se.

Don Stenberg, Attorney General, and Donald A. Kohtz for appellee.

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

BOSLAUGH, J.

The defendant was charged with kidnapping, first degree sexual assault, and use of a firearm in the commission of a felony in connection with an incident in Sarpy County, Nebraska. Pursuant to a plea agreement, the defendant pled guilty to kidnapping and first degree sexual assault, and the firearm charge was dismissed.

The defendant was sentenced to 15 to 25 years' imprisonment on each count, with the sentences to run consecutively. The judgment was affirmed in *State v. Maeder*,

229 Neb. 568, 428 N.W.2d 180 (1988).

On June 11, 1991, the defendant, acting pro se, filed a motion for postconviction relief. He requested an evidentiary hearing and the appointment of counsel.

In his motion for postconviction relief, the defendant alleged ineffective assistance of counsel in the following particulars: (1) that his counsel, from the Sarpy County public defender's office, threatened that if defendant did not plead guilty, the trial court would add an extra 25 years to his sentence; (2) that his counsel guaranteed that if defendant pled guilty, he would receive sentences of 5 to 10 years on each charge, which sentences would run concurrently; (3) that his counsel told defendant that he had to respond yes to formal questions asked by the court at the time the plea was entered, so that the plea would be accepted; (4) that his counsel spent less than one-half hour of time with defendant during pretrial detention; (5) that his counsel denied defendant an opportunity to call witnesses, prior to sentencing, to establish his background and character; (6) that his counsel guaranteed defendant that the sentences imposed would run concurrently and that future charges from Douglas County would also run concurrently; and (7) that his counsel failed to advise defendant that he had the right to a trial.

The district court denied the defendant's request for an evidentiary hearing and the motion for postconviction relief in all respects. The district court found that all of the allegations except Nos. 4 and 7 were effectively contradicted by the trial court's questioning of the defendant with regard to his guilty plea at the time of his arraignment and with regard to his understanding of pleading guilty and the plea agreement. As to allegations Nos. 4 and 7, the district court found that the allegation regarding time spent in conference between counsel and the defendant was insufficient as a matter of law, standing alone, to raise an issue of ineffective assistance of counsel and that whether or not counsel advised the defendant of his right to trial was of no consequence because the record from the arraignment proceedings reflected that the trial court had advised the defendant of his right to trial, including advisement of how a jury is selected, impaneled, and required to decide a

case.

The defendant has assigned as error the district court's failure to grant an evidentiary hearing on the motion and the district court's denial of his motion for postconviction relief.

The defendant's third allegation, that he answered affirmatively to questions by the trial court concerning the voluntariness of his plea of guilty because he was instructed to do so by his attorney, is not effectively contradicted by the trial court's questioning of the defendant regarding the voluntariness of his guilty plea at the arraignment.

"The applicable rule is that an evidentiary hearing may properly be denied on a motion for postconviction relief when the records and files of the case affirmatively establish that the defendant is entitled to no relief." *State v. Keithley*, 238 Neb. 966, 970, 473 N.W.2d 129, 132 (1991). In this case, if the third allegation is true, the record does not conclusively establish that the defendant's guilty plea was made knowingly and voluntarily. An evidentiary hearing is required to determine the validity of the third allegation. See *State v. Ford*, 198 Neb. 376, 252 N.W.2d 643 (1977).

In *Ford*, the defendant had been convicted of sexual assault on a plea of guilty, but the record failed to show affirmatively that promises or threats had not been used to obtain the plea and failed to establish affirmatively that defendant's allegations as to promises and threats did not entitle him to postconviction relief. We held that the defendant was entitled to an evidentiary hearing for the purpose of determining whether his allegations were supported by any evidence that his plea was not understandingly and voluntarily entered and that he did not have effective assistance of counsel.

It is unnecessary to consider the defendant's other assignment of error.

The judgment is reversed, and the cause is remanded with directions to grant an evidentiary hearing on the defendant's motion for postconviction relief.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. LESLI M. WALZAK, RESPONDENT.

485 N.W.2d 578

Filed June 26, 1992. No. S-92-046.

Original action. Judgment of disbarment.

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

PER CURIAM.

A disciplinary complaint was filed with the Counsel for Discipline of the Nebraska State Bar Association against Lesli M. Walzak on December 9, 1991.

Pursuant to Neb. Ct. R. of Discipline 15 (rev. 1989), respondent filed a voluntary surrender of license with this court. Respondent freely and voluntarily waived all proceedings against her in connection with the pending disciplinary complaint. Respondent knowingly admitted that she had violated DR 1-102(A)(1) and (4) of the Code of Professional Responsibility. She also freely and voluntarily consented to an order of disbarment and waived her right to notice, appearance, or hearing prior to entry of the order.

Accordingly, the respondent is hereby disbarred from the practice of law in the State of Nebraska, effective immediately.

JUDGMENT OF DISBARMENT.

WHITE, J., not participating.

KIRBY (JOE) GROTE AND CONNIE GROTE, HUSBAND AND WIFE, AS PARENTS AND NATURAL GUARDIANS OF CORY GROTE, A MINOR, APPELLEES AND CROSS-APPELLANTS, V. MEYERS LAND AND CATTLE CO., A CORPORATION, APPELLANT AND CROSS-APPELLEE.

485 N.W.2d 748

Filed July 2, 1992. No. S-89-766.

1. **Appeal and Error.** In an appeal of an action at law, an appellate court does not reweigh the evidence; rather, the court 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. **Actions: Negligence: Proximate Cause: Damages.** The elements of a negligence action are duty, breach, proximate cause, and damages.
3. **Employer and Employee: Negligence: Liability.** A duty rests on an employer to warn his employees of dangers not apparent which may arise in the course of the employment, which the employer knows or ought to know about, and which he has reason to believe the employee does not know and will not discover in time to protect himself.
4. **Invitor-Invitee: Negligence: Liability.** A possessor of land may be subject to liability for physical harm caused to invitees on its land if the possessor knows that a condition involves an unreasonable risk of harm, the possessor should expect that the invitees will not discover the danger or protect themselves against it, and the possessor fails to exercise reasonable care to protect against such danger.
5. **Directed Verdict: Evidence.** In order to sustain a motion for directed verdict, the court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion. In considering the evidence for the purpose of a motion for directed verdict, the party against whom a motion is made is entitled to have the benefit of every inference which can reasonably be drawn from the evidence. If there is any evidence in favor of the party against whom the motion is made, the case may not be decided as a matter of law.
6. **Directed Verdict: Evidence: Negligence.** In a negligence case, a trial court should sustain a motion for directed verdict only when the evidence, viewed in the light most favorable to the party against whom the motion is directed, fails to establish actionable negligence.
7. **Principal and Agent: Master and Servant: Negligence: Liability.** The law imputes to the principal or master responsibility for the negligent acts of his or her agent or servant done in obedience to the express order or directions of the master, or within the scope of the employee's authority or employment in the master's business, and if those acts cause injury to third persons, the law holds the principal or master liable therefor.
8. **Proximate Cause: Negligence: Words and Phrases.** Contributory negligence is conduct on the part of the plaintiff amounting to a breach of the duty which the

law imposes upon persons to protect themselves from injury and which, concurring and cooperating with actionable negligence on the part of the defendant, contributes to the injury complained of as a proximate cause.

9. **Negligence: Evidence: Trial: Appeal and Error.** When contributory negligence is pleaded as a defense, and there is no competent evidence to support it, it is prejudicial error to submit to the jury issues involving contributory and comparative negligence.
10. **Negligence: Evidence: Trial.** Before the defense of assumption of risk is submissible to a jury, evidence must show that the plaintiff (1) knew of the danger, (2) understood the danger, and (3) voluntarily exposed himself or herself to the danger which proximately caused the plaintiff's damage. Except where he expressly so agrees, a plaintiff does not assume a risk of harm arising from the defendant's conduct unless he then knows of the existence of the risk and appreciates its unreasonable character, or the danger involved, including the magnitude thereof, and voluntarily accepts the risk.
11. **Employer and Employee: Principal and Agent: Corporations.** A defendant corporation, as an employer and principal, is bound by the knowledge possessed by its employees.
12. **Jury Instructions: Appeal and Error.** It is not error for a trial court to refuse a requested instruction if the legal principles therein announced are either incorrectly stated or are inapplicable to the issues involved.
13. **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.
14. **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 the evidence, there is no prejudicial error necessitating a reversal.
15. **Trial: Time.** Ordinarily, an objection must be made as soon as the applicability of it is known, or could reasonably have been known, to the opponent.
16. **Appeal and Error.** Errors which are assigned but not argued will not be considered by an appellate court.
17. **Trial: Appeal and Error.** If it clearly appears that prejudice did not and could not flow from a communication between the court and the jury outside of the presence of counsel, it is error without prejudice and not ground for reversal.
18. **Judgments: Appeal and Error.** Regarding a question of law, an appellate court has an obligation to reach a conclusion independent of that of the trial court in a judgment under review.

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

Thomas J. Culhane and Gary L. Hoffman, of Erickson & Sederstrom, P.C., and Marvin O. Kieckhafer, of Kay & Kay, for appellant.

Robert G. Pahlke, of Van Steenberg, Chaloupka, Mullin, Holyoke, Pahlke, Smith, Snyder & Hofmeister, P.C., for appellees.

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

FAHRNBRUCH, J.

Meyers Land and Cattle Co. (Meyers), a Nebraska corporation doing business in Sheridan County, Nebraska, appeals a $250,000 jury verdict in favor of 16-year-old Cory Grote and his parents as a result of Cory's receiving head injuries when a weanling colt owned by Meyers kicked him.

I. CLAIMED ERRORS

On appeal, Meyers claims the trial court erred in (1) refusing to grant its motion for a directed verdict, (2) refusing to instruct the jury on Meyers' affirmative defenses of contributory negligence and assumption of the risk, (3) giving a certain instruction to the jury, (4) refusing to grant Meyers a new trial, and (5) responding to a question of the jury's during its deliberation in the absence of counsel, and Meyers also claims that (6) the verdict and judgment are not supported by the evidence and are contrary to law.

There being no merit to any of the cattle company's assignments of error, we affirm the judgment of the district court for Dawes County.

In an appeal of an action at law, an appellate court does not reweigh the evidence; rather, the court 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. *Plock v. Crossroads Joint Venture*, 239 Neb. 211, 475 N.W.2d 105 (1991).

II. THE FACTS

Considering the evidence in the light most favorable to the plaintiffs, the evidence reflects that in December 1987, Cory, who was 16 years old, was visiting his brother, Brad Grote, who was employed as a ranch hand at the Joy Ranch, a division of Meyers. Both Cory and Brad had considerable experience with

horses and had participated in local and national rodeo competitions. At Cory's request, Brad had sought and received permission from Bruce Bushnell, Meyers' ranch foreman, for Cory to visit Brad at the ranch. Bushnell was aware that Cory planned to work while at the ranch to earn money during his Christmas vacation.

On December 23, the day after Cory's arrival at the ranch, the two brothers spent the day in the ranch shop building gates, cutting metal, and welding. Late in the afternoon, Brad requested Cory's assistance in releasing 12 weanling colts from a barn into an adjacent corral. A weanling colt is a colt that has recently been weaned from its mother. See Webster's Third New International Dictionary, Unabridged 2589 (1981).

Cory testified that in handling the colts he followed Brad's instructions to "just lead them out of the barn door a little ways, stop them, make them face you, pet them a little bit and drop the lead rope and turn and walk away." No difficulty was encountered in releasing 11 of the colts. As the brothers were preparing to release the last weanling colt, a buckskin colt, Brad stopped to speak to another ranch employee, Maggie Soester, who had arrived at the barn. Cory testified that as he approached the 12th colt's stall, the colt was "prancy in his stall. He was stomping and stepping." Cory untied the colt. It began tugging on the lead rope as it started out of its stall. Cory testified:

> Brad said, "don't let him get away. . . ."
>
> . . . .
>
> . . . And [the colt] was jerking me down the alleyway. I was on my feet, I didn't feel like I was in any trouble. Near the barn door . . . Brad said, "Now, don't let him get away." And I don't really know what happened after that until Brad asked me if I was kicked, or if he got me, or something like that.

Cory testified that while he was alongside the colt and as long as he could remember he did not think he was in any danger of getting kicked.

Soester testified that Cory had good control of the colt until he got outside the barn. She said that Cory was on his feet at all times, although he was sliding in the snow as he was heading

into the corral while trying to hang onto the colt. She said that the only sudden movement the colt made was a turn at the end of the corral and that the colt's kick came a "scant second" after the turn. Soester testified that there was no opportunity for Cory to react and that before the colt's sudden movement she saw no risk of Cory's being kicked because he had control of the horse.

Brad testified that he was not looking at Cory at the instant Cory was kicked. Brad heard a "crack," and he then saw Cory on his knees. Cory suffered a depressed skull fracture and nearly complete loss of vision in his left eye. He suffered permanent brain damage. A "plate" was surgically inserted on the left side of Cory's skull to protect his brain where a portion of his skull had been removed.

III. THE PLEADINGS

In their petition and amendments thereto, Kirby (Joe) and Connie Grote, as parents and natural guardians of Cory, alleged that Meyers and its employees were negligent in one or more of the following particulars: (1) failing to provide a reasonably safe place in which to work, (2) failing to warn of the horse's dangerous habits, (3) failing to properly supervise and instruct Cory, (4) failing to assist and aid Cory in handling the horse when defendant knew or should have known of the horse's dangerous habits, (5) failing to provide adequate instruction and supervision for defendant's employee who had the responsibility of supervising Cory, (6) allowing Cory to handle a horse with known dangerous tendencies and/or habits, and (7) failing to use or instruct in the use of reasonable alternatives in releasing the dangerous horse from the stall. The Grotes allege that as a result of that negligence Cory was injured.

In its answer, Meyers admitted that Cory was injured in an accident involving a horse on or about December 23, 1987. Meyers alleged that Cory was contributorily negligent in failing to (1) maintain a proper lookout and (2) take proper precautions for his own safety when he knew or should have known that he was in a position of peril. The cattle company also alleged that (1) if it was negligent, Cory was contributorily

negligent in a degree more than slight as a matter of law, and that (2) Cory had assumed the risk of his injury.

IV. ADDITIONAL FACTS

Although not allowed to testify whether Cory was hired as an employee, Bushnell did testify that he knew Cory wanted to earn money at the ranch and that he had had no objection to Cory's working with Brad in the shop and helping with the horses.

According to Bushnell, all the hired hands who worked with the weanling colts were instructed in the importance of thwarting escape of those animals. He explained that weanling colts, when separated from their mothers, become nervous and try to get back to their mothers and that it is important to prevent escape attempts from becoming a habit. Bushnell stated that Brad had been instructed two or three times to not let the horses get away.

Bushnell testified the colt that kicked Cory had attempted to escape from Bushnell on other occasions and succeeded in escaping once or twice. The offending colt had previously escaped one time from Brad and had attempted to escape from him on several other occasions. Bushnell testified that it was "predictable" that the colt that injured Cory would try to escape. He testified that, nonetheless, no warning was given to Cory about the history of the colt that injured Cory. Bushnell said that Brad should have warned Cory about the colt, and, given that Brad was bigger, more experienced, and had superior knowledge of the colt's habits, Brad, rather than Cory, should have taken the colt out of the barn. Bushnell at one point testified that he had not taken any precautions to protect those working with the colts, but that he should have done so.

Brad testified that Cory had no experience with weanling colts. He also testified that the colt that injured Cory had escaped from Brad previously and that he had forgotten to warn Cory. Brad said that there were reasonable steps which he could have taken to prevent the accident, including taking the horse out himself or helping Cory to do so. Cory and his mother also testified that Cory had no experience with weanling colts.

It was the uncontroverted testimony of Charlie Hill, Jr., a

professional horse trainer experienced in dealing with problem horses, that "this horse [the colt that injured Cory] was a hazard and dangerous horse" because of its prior attempts at escape. He declared that "[t]his horse is a horse of flight, so it would be flight or fight." He explained that

> [t]he horse's first natural instincts are to flee, that is what they are born with, and if that doesn't work, if he doesn't think he has time to flee, if he doesn't think he has room to flee, or if it is hard for him to flee, then he prepares to kick, strike, bite, or attack.

It was Hill's opinion, based on reasonable probability within his field of expertise, that there were "several options that should have been available that would have offered reasonable and prudent care on the part of the Defendant that would have, in fact, eliminated that accident." Among the available options cited by Hill were to have (1) had Brad release the colt himself, (2) warned Cory of the dangers of the colt and its habits, (3) had Brad assist Cory in releasing the colt, (4) used the chain attached to the barn door to better control the horse, or (5) used a 50- or 60-foot rope so that the horse could be controlled from a safe distance. According to Hill, the cost to the ranch of these available options was "[t]he price of a 60 foot rope."

Hill, who had 35 years' experience in instructing youngsters in handling problem horses, testified that Cory's action was reasonable because

> [t]he first thing that he did was follow the instructions of his superiors, and at that time that he was following the instructions of his supervisors he felt no immediate hazard. There might have been a little hazard, but there was no immediate hazard. At the moment that the hazard became immediate after the instructions were given, and after Cory had gone that far, then whatever situation he got in from there was a fight for survival on his part.

Hill also testified that had Cory not hung onto the rope as he did, the buckskin colt could have kicked with its full strength, which could have resulted in Cory's death. On appeal, there is no assignment of error regarding this testimony.

V. RULINGS ON MOTIONS

At the close of the plaintiffs' evidence, the trial court denied Meyers' motion for a directed verdict in its favor. This motion was renewed at the close of the cattle company's evidence, and was again denied. At the conclusion of Meyers' evidence, the Grotes moved for a directed verdict in the Grotes' favor on the issues of liability, contributory negligence, and assumption of the risk. The court refused to grant the Grotes' motion for directed verdict in their favor on the issue of liability, but granted the Grotes' motion and, thus, removed from the jury Meyers' claims that Cory was guilty of contributory negligence and assumption of the risk of injury.

VI. THE JURY'S QUESTION

When the jury asked the trial judge during its deliberations whether it had been established that the colt that injured Cory had dangerous propensities, the trial judge responded in writing that that was for the jury to decide. Counsel for both parties had waived the right to be present during jury deliberations.

VII. THE VERDICT

Upon completion of its deliberations, the jury returned a verdict against Meyers and in favor of the plaintiffs for $250,000. The cattle company's motion for a new trial was overruled.

VIII. ANALYSIS OF CLAIMED ERRORS

In analyzing Meyers' assignments of error, we start with the premise that the elements of a negligence action are duty, breach, proximate cause, and damages. See *McVaney v. Baird, Holm, McEachen*, 237 Neb. 451, 466 N.W.2d 499 (1991). In their petition, the Grotes alleged that Cory was injured while acting in the scope of his employment with Meyers. Meyers denied the employment allegation, and that issue was not submitted to the jury. Ranch hands are not covered under Nebraska's Workers' Compensation Act. Neb. Rev. Stat. § 48-106 (Reissue 1988). In any event, the duty of care owed to Cory by Meyers at the time Cory was injured was essentially the same whether he is deemed to have been an employee or an invitee of Meyers. This court has held that a duty rests on an

employer to warn his employees of dangers not apparent which may arise in the course of the employment, which the employer knows or ought to know about, and which he has reason to believe the employee does not know and will not discover in time to protect himself. *Stevens v. Kasik*, 201 Neb. 338, 267 N.W.2d 533 (1978). Similarly, a possessor of land may be subject to liability for physical harm caused to invitees on its land if the possessor knows that a condition involves an unreasonable risk of harm, the possessor should expect that the invitees will not discover the danger or protect themselves against it, and the possessor fails to exercise reasonable care to protect against such danger. *Plock v. Crossroads Joint Venture*, 239 Neb. 211, 475 N.W.2d 105 (1991).

The evidence in the present case reflects that at the time Cory was injured, there was a risk involved in his handling weanling colts of which the defendant cattle company knew or should have known. At least one of Meyers' employees knew that Cory had no experience, training, or knowledge of how to handle the colts. This knowledge is imputable to Meyers. There was sufficient evidence for a jury to conclude that Meyers failed to exercise reasonable care to protect Cory against the dangerousness of weanling colts, whatever Cory's capacity while he was on Meyers' ranch.

1. Directed Verdict Motion

Despite uncontroverted evidence that Cory had no experience with weanling colts, which, according to the evidence, are by nature more temperamental than horses generally, Meyers argues that it was unnecessary to instruct, warn, or supervise one with Cory's background with horses. Meyers, therefore, assigns as error the failure of the trial court to grant its motion for a directed verdict.

> "In order to sustain a motion for directed verdict, the court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion. . . . In considering the evidence for the purpose of a motion for directed verdict, the party against whom a motion is made is entitled to have the benefit of every inference which can reasonably

> be drawn from the evidence. If there is any evidence in favor of the party against whom the motion is made, the case may not be decided as a matter of law. . . ."

Baker v. St. Paul Fire & Marine Ins. Co., ante p. 14, 17, 480 N.W.2d 192, 196 (1992). In a negligence case, a trial court should sustain a motion for directed verdict only when the evidence, viewed in the light most favorable to the party against whom the motion is directed, fails to establish actionable negligence. *Patterson v. Swarr, May, Smith & Anderson*, 238 Neb. 911, 473 N.W.2d 94 (1991).

The evidence reflects that Meyers, through its employees Bushnell and Brad Grote, knew of the habits and propensities of weanling colts in general, and of the buckskin weanling colt in particular. All Meyers' hired hands were instructed by Bushnell concerning prevention of escapes by the weanling colts. The colt that kicked Cory had attempted to escape several times and had been successful in escaping on at least one occasion each from both Bushnell and Brad.

Cory was never given any of this information. Brad testified that he simply forgot to warn Cory of the colt's propensity to escape. As an employee of Meyers', Brad knew that Cory was not aware of the danger posed by weanling colts. Bushnell testified that Brad should have warned Cory of the colt's proclivity toward escaping. Bushnell also stated that under the circumstances, Brad, not Cory, should have released the colt. Instead of releasing the colt himself, Brad merely instructed Cory to release it.

> The law imputes to the principal or master responsibility for the negligent acts of his or her agent or servant done in obedience to the express order or directions of the master, or within the scope of the employee's authority or employment in the master's business, and if those acts cause injury to third persons, the law holds the principal or master liable therefor.

Plock v. Crossroads Joint Venture, 239 Neb. 211, 219, 475 N.W.2d 105, 112 (1991). The trial court committed no error in refusing to direct a verdict in Meyers' favor (1) because the Grotes adduced evidence from which a jury could conclude that the weanling colt that injured Cory had dangerous propensities,

that Meyers' employees, and therefore Meyers, knew of these dangerous propensities, and that Meyers, through its employee, knew that Cory had no knowledge of the dangerousness of weanling colts or experience with them; (2) because there was sufficient evidence from which a jury could conclude that Meyers and its employees were negligent in one or more of the particulars alleged in the plaintiff's petition, as amended; (3) because there was no competent evidence of any contributory negligence on Cory's part; and (4) because, as will be discussed later, the doctrine of assumption of risk could not apply under the facts of this case.

2. Affirmative Defenses

(a) Contributory Negligence

Meyers also objects to the refusal of the trial court to instruct the jury on the affirmative defenses of contributory negligence and assumption of the risk.

> Contributory negligence is conduct on the part of the plaintiff amounting to a breach of the duty which the law imposes upon persons to protect themselves from injury and which, concurring and cooperating with actionable negligence on the part of the defendant, contributes to the injury complained of as a proximate cause.

City of LaVista v. Andersen, ante p. 3, 7-8, 480 N.W.2d 185, 189 (1992).

Meyers' claim of affirmative defenses is based upon the testimony of both Cory and Brad that the offending colt was acting skittish and frightened when Cory first approached it. However, both Cory and Soester testified that Cory was in no apparent danger until he was actually kicked. Soester testified that Cory had the colt under control at all times and that it was just a "scant second" between the time the colt made a sudden movement and its kick that injured Cory. Hill testified that Cory's action was reasonable and that from the moment Cory realized that he was in danger, he was in a fight for survival. None of this testimony was disputed by the defendant cattle company.

The evidence reflects that Cory confined his conduct in regard to the colt that injured him strictly in accordance with

instructions given him by Meyers' employee. Because of his lack of knowledge and experience with weanling colts, it cannot be said that Cory should have disregarded those instructions. Meyers, through its employee, having instructed Cory how to handle weanling colts, and Cory having followed those instructions, is in no position to argue that Cory was contributorily negligent in handling the colt that injured him.

When contributory negligence is pleaded as a defense, and there is no competent evidence to support it, it is prejudicial error to submit to the jury issues involving contributory and comparative negligence. *Center State Bank v. Dana, Larson, Roubal & Assoc.*, 226 Neb. 408, 411 N.W.2d 635 (1987). Because there was no competent evidence that Cory breached his duty to protect himself from injury, the trial court was correct in refusing to instruct the jury on the issue of contributory negligence.

(b) Assumption of Risk

> "Before the defense of assumption of risk is submissible to a jury, evidence must show that the plaintiff (1) knew of the danger, (2) understood the danger, and (3) voluntarily exposed himself or herself to the danger which proximately caused the plaintiff's damage. [Citations omitted.] '[E]xcept where he expressly so agrees, a plaintiff does not assume a risk of harm arising from the defendant's conduct unless he then knows of the existence of the risk and appreciates its unreasonable character, or the danger involved, including the magnitude thereof, and voluntarily accepts the risk.' [Citation omitted.]"

Sikyta v. Arrow Stage Lines, 238 Neb. 289, 302, 470 N.W.2d 724, 732 (1991).

Meyers claims that because Cory was an experienced horseman and high school rodeo champion who had been raised around horses, he must be deemed to know that horses will bolt and sometimes kick unpredictably. In addition, Meyers argues that Cory was aware the colt was acting skittish and that, thus, he appreciated the danger that he might be kicked by the colt.

The record is clear, however, that Cory's background with

horses did not include experience with weanling colts. The evidence is overwhelming that Cory was not warned of the offending colt's proclivity to escape. As explained by Hill, the colt was a "horse of flight" which would "kick, strike, bite, or attack" if there was an attempt to curb its natural instinct to flee. Unaware and unwarned of these traits in the colt that injured him, Cory cannot be said to have known of, nor understood, the danger in handling the buckskin colt. Nor can it be said that Cory voluntarily exposed himself to a danger of which he was not aware and of which he was not informed.

The trial court was correct in directing a verdict against Meyers on its affirmative defenses.

3. Jury Instructions

In its second assignment of error, Meyers claims the trial court erred in failing to give its proposed instructions Nos. 13 and 14 to the jury. Proposed instruction No. 13 provided:

> There are many characteristics common to all horses, even the most gentle. One such characteristic is their propensity to rear or bolt when frightened. It is one of the situations that one handling a horse must expect to encounter and one handling a horse must take the risks incident to such pursuit. [Citations omitted.]

Proposed instruction No. 14 provided: "A domesticated animal, such as a horse, is presumed not to be dangerous or vicious. In order to hold the owner of the horse liable for negligence, it must be shown that the horse was dangerous or vicious and that the owner knew it. [Citations omitted.]"

In substance, the defendant's proposed instruction No. 13 would have told the jury that Cory had assumed the risk of his injury. The evidence does not justify such an instruction. As stated in *Sikyta v. Arrow Stage Lines, supra*, before the defense of assumption of risk is submissible to a jury, the evidence must show, among other things, that the plaintiff (1) knew of the danger and (2) understood it. Evidence that Cory knew of the danger is totally lacking from both the plaintiffs' and the defendant's evidence. Nor is there any evidence that Cory understood that there was a danger in releasing a weanling colt. As a matter of fact, although the defendant's employees were

aware of the dangerous propensities of the buckskin weanling colt that injured Cory, they did not advise him of that danger. In handling the colt, Cory did precisely what the defendant's employee instructed him to do. There was no warning of any danger to Cory. Moreover, Cory had never had any experience with weanling colts or their propensities.

Through its proposed instruction No. 14, Meyers basically is claiming that it should be presumed that its weanling buckskin colt that injured Cory was not dangerous or vicious and, inferentially, that if it was dangerous or vicious, Meyers had no knowledge of either of these propensities. The testimony of the Grotes' expert witness and of Meyers' ranch foreman render the proposed instruction inapplicable to the facts in this case. The testimony of plaintiffs' expert witness that the weanling colt that injured Cory was "a hazard and dangerous horse" was uncontroverted. Moreover, Meyers' ranch foreman, who had 30 to 40 years of experience with horses, testified that weanling colts, when separated from their mothers, become nervous and try to get back to their mothers. The ranch foreman testified that it is important to prevent weanling colts from making a habit of attempting to escape. The weanling colt that injured Cory had succeeded in escaping once or twice from the ranch foreman and had attempted to escape on other occasions. The foreman testified that the colt had also escaped from Brad Grote on one occasion. Meyers' foreman further testified that he knew that a horse that tries to escape can injure someone by kicking. This testimony was also uncontroverted. A defendant corporation, as an employer and principal, is bound by the knowledge possessed by its employees, in this case, its ranch foreman and Brad Grote. See *Nichols v. Ach*, 233 Neb. 634, 447 N.W.2d 220 (1989). Even though the defendant knew that its colt could injure its handler, it never informed Cory of the colt's propensities. Thus, the defendant's proposed instruction No. 14 is not applicable to the facts in this case. It is not error for a trial court to refuse a requested instruction if the legal principles therein announced are either incorrectly stated *or are inapplicable* to the issues involved.

> 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.

McClymont v. Morgan, 238 Neb. 390, 393, 470 N.W.2d 768, 771 (1991).

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 the evidence, there is no prejudicial error necessitating a reversal. *Id.*

Because the jury instructions as a whole correctly stated the law, adequately covered the submissible issues, and were not misleading, there was no prejudicial error on the part of the trial court in refusing to give Meyers' proposed instructions Nos. 13 and 14.

In its third assignment of error, Meyers objects to the court's instruction No. 2, claiming that the court simply copied the allegations of negligence contained in plaintiffs' amended petition. The record does not reflect that any such objection was raised at trial. Ordinarily, an objection must be made as soon as the applicability of it is known, or could reasonably have been known, to the opponent. *Bloomquist v. ConAgra, Inc., ante* p. 135, 481 N.W.2d 156 (1992). Thus, Meyers' objection to the trial court's instruction No. 2 is not before us.

4. Motion for New Trial

In its fourth assigned error, Meyers claims the trial court erred in failing to grant it a new trial. This issue was not discussed in Meyers' brief on appeal. Errors which are assigned but not argued will not be considered by an appellate court. *In re Interest of A.C.*, 239 Neb. 734, 478 N.W.2d 1 (1991).

5. Jury's Question

In its fifth assigned error, Meyers claims the trial court erred in receiving and answering, outside the presence of counsel, a question from the jury. The record demonstrates that immediately after the jury retired to deliberate, the following exchange took place between the court and counsel for the parties:

> THE COURT: . . . If you want to be present during the time that the jury is out or when the verdict comes in you will have to leave a phone number of where you will be, and where the Bailiff or clerk can call you. Does anybody want to waive being here?
>
> [Meyers' counsel]: Yes.
>
> . . . .
>
> THE COURT: You have a right to have input into any further instructions that I might give them.
>
> [Meyers' counsel]: Well, I am going home.

Having waived the right to be present during jury deliberations, Meyers cannot be heard on appeal to complain of the consequences of its action. More importantly, there has been no showing that the communication between the court and the jury was prejudicial. If it clearly appears that prejudice did not and could not flow from such a communication outside the presence of counsel, it is error without prejudice and not ground for reversal. *In re Estate of Corbett*, 211 Neb. 335, 318 N.W.2d 720 (1982). There is no merit to this assignment of error.

6. Sufficiency of Evidence

Finally, Meyers claims that the verdict and judgment are not supported by the evidence and are contrary to law. This claimed error is without merit. There was substantial evidence from which a jury could find that Cory's injuries were directly and proximately caused by the negligence of the cattle company. Regarding a question of law, an appellate court has an obligation to reach a conclusion independent of that of the trial court in a judgment under review. *Baker v. St. Paul Fire & Marine Ins. Co., ante* p. 14, 480 N.W.2d 192 (1992). In our independent judgment, as a matter of law, there was sufficient evidence to support the jury's verdict.

Because we affirm the judgment of the trial court, the Grotes' assignments of error on their cross-appeal need not be addressed.

Affirmed.

RICHARD A. WHORLEY ET AL., DOING BUSINESS AS GREENWOOD TRUCK PLAZA & COPPER PLATE RESTAURANT, APPELLANTS, V. FIRST WESTSIDE BANK, A NEBRASKA CORPORATION, APPELLEE.

485 N.W.2d 578

Filed July 2, 1992. No. S-89-1389.

1. **Demurrer: Pleadings.** When ruling on a demurrer, a court must assume that the pleaded facts, as distinguished from any pleaded 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: Parol Agreement: Consideration.** The terms of a written executory contract may be orally modified by the parties thereto at any time after its execution and before a breach has occurred, without any new consideration.
3. **Contracts: Liability.** Where the modification of a contract substantially changes the liability of the parties, mutual assent is required.
4. **Contracts.** The silence of a contracting party to a proposed modification leaves the contract unmodified.
5. _____. A contract made for the benefit of a third party with the third party's knowledge ordinarily cannot be changed without the third party's approval.
6. **Breach of Contract: Forbearance: Estoppel.** A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.
7. **Actions: Estoppel.** There is no requirement of definiteness in an action based upon promissory estoppel, only that the reliance be reasonable and foreseeable.

Appeal from the District Court for Douglas County: JOHN E. CLARK, Judge. Reversed and remanded for further proceedings.

Victor J. Lich, Jr., of Lich, Herold & Mackiewicz, for appellants.

William E. Morrow and Mark J. Peterson, of Erickson & Sederstrom, P.C., for appellee.

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

CAPORALE, J.

The district court sustained the demurrer of the defendant-appellee, First Westside Bank, to the third amended petition filed against it by the plaintiffs-appellants, Richard A.

and Rita A. Whorley and R.A.W., Inc., doing business as Greenwood Truck Plaza & Copper Plate Restaurant, and thereafter dismissed the plaintiffs' action. Plaintiffs assign the dismissal as error. We reverse and remand for further proceedings consistent with this opinion.

The petition asserts three separate theories under which the plaintiffs claim to be entitled to recovery as the result of the damages they sustained as the proximate result of the bank's failure to lend them $65,000: (1) breach of contract, (2) promissory estoppel, and (3) breach of the bank's obligation to deal in good faith.

Resolution of this appeal is controlled by the axiom that when ruling on a demurrer, a court must assume that the pleaded facts, as distinguished from any pleaded legal conclusions, are true as alleged and must give the pleading the benefit of any reasonable inference from the facts alleged, but cannot assume the existence of a fact not alleged, make factual findings to aid the pleading, or consider evidence which might be adduced at trial. See *Pappas v. Sommer, ante* p. 609, 483 N.W.2d 146 (1992).

The allegations of fact are that the plaintiffs consulted with the bank regarding a loan to enable them to purchase the truck plaza and restaurant and to finance improvements to the property. The bank agreed to provide financing in the amount of $575,000, provided the Small Business Administration would guarantee the loan. The business administration guaranteed 86 percent of the loan on April 18, 1985, and required that in "the event of a cost overrun on construction," either the plaintiffs or the bank would "provide additional funds, as needed, to complete construction on a lien subordinate to the collateral required by this Loan."

On May 1, 1985, the plaintiffs executed a promissory note in favor of the bank in the principal amount of $575,000, payable in monthly installments over a 20-year period. The plaintiffs also executed deeds of trust on the real estate on which the business improvements were located, as well as on the Whorleys' home, and a security agreement granting the bank a security interest in various items of tangible and intangible personal property. The bank thereupon made the first

disbursement on the loan in the amount of $305,000.

In early September 1985, when $220,000 remained undisbursed on the loan and major remodeling construction had not yet commenced, the plaintiffs determined that the construction costs for remodeling were going to exceed the original projections and that, therefore, the original loan amount of $575,000 would be insufficient to complete the project.

Richard Whorley then met with one of the bank's vice presidents and told him of the overrun. As a result, "[t]he original loan agreement was modified by [the vice president] orally representing and agreeing that the bank would increase the loan amount and loan the additional $65,000.00 to cover the cost overrun." The vice president then advised Whorley to proceed with the project because the business administration was "pressuring the [bank] to complete the loan." The plaintiffs confirmed the $65,000 cost overrun in a September 25, 1985, letter to the bank, and remodeling work commenced in October.

On November 1, 1985, the vice president spoke with Whorley and again advised that construction should proceed, but informed Whorley that the bank would not increase the original $575,000 loan by more than $45,000. Ultimately, the bank refused to loan any "additional funds" to the plaintiffs.

First, the plaintiffs urge that the bank breached the modified contract by refusing to increase the loan to $640,000. In response, the bank argues that as the plaintiffs failed to allege that the third-party guarantor to the original loan agreement, the business administration, agreed to the modification, the plaintiffs have failed to state a breach of contract action.

It is clear that the terms of a written executory contract may be orally modified by the parties thereto at any time after its execution and before a breach has occurred, without any new consideration. *Frenzen v. Taylor*, 232 Neb. 41, 439 N.W.2d 473 (1989); *Cole v. Hickey*, 215 Neb. 728, 340 N.W.2d 418 (1983); *Havelock Bank of Lincoln v. Bargen*, 212 Neb. 70, 321 N.W.2d 432 (1982); *W. Wright, Inc. v. Korshoj Corp.*, 197 Neb. 692, 250 N.W.2d 894 (1977). We have also ruled that where the modification of a contract substantially changes the liability of

the parties, mutual assent is required. *Grand Island Prod. Credit Assn. v. Humphrey*, 223 Neb. 135, 388 N.W.2d 807 (1986); *Havelock Bank of Lincoln v. Bargen, supra*. See, also, *Westbrook v. Masonic Manor*, 185 Neb. 660, 178 N.W.2d 280 (1970). The silence of a contracting party to a proposed modification leaves the contract unmodified. See *Elgin Mills, Inc. v. Melcher*, 181 Neb. 17, 146 N.W.2d 573 (1966). We have also declared that a contract made for the benefit of a third party with the third party's knowledge ordinarily cannot be changed without the third party's approval. *Richards v. Estate of Gilmore*, 140 Neb. 165, 299 N.W. 365 (1941).

It is true that the business administration's guaranty contemplated the possibility of cost overruns and obligated either the bank or the plaintiffs to provide the necessary funds to cover the overruns, should they occur. However, the business administration's requirement that any liens arising from such a loan be subordinated to those arising under the guaranteed loan necessarily implies that any cost overrun loan be the subject of a separate agreement. Were the overrun provision of the guaranty to be read as a before-the-fact consent to a modification, questions would arise as to whether only the amount of the loan could be modified or whether its other terms, such as its duration and the interest rate, could be modified as well. The requirement of a separate arrangement, on the other hand, obviates any confusion as to what might be modified and as to how the monthly payments were to be applied to the sums borrowed.

Thus, since the plaintiffs alleged that the bank agreed to modify the guaranteed loan, without alleging that the business administration consented to the modification, the district court properly determined that the plaintiffs failed to state a breach of contract action.

The plaintiffs next assert that the bank is, in any event, estopped from refusing to loan them the additional $65,000 by its promise to do so, which promise "was intended to be relied upon and was relied upon [by them] to their prejudice and such reliance should reasonably have been expected by the [bank]." The bank counters with the argument that promissory estoppel is merely a substitute for consideration and that as the plaintiffs

failed to allege the duration of the additional loan, the interest rate, the method of payment, or the additional collateral, the promise was not specific and definite enough to form a contract.

Contrary to the bank's view, the applicable rule is that " '[a] promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. . . .' " *Rosnick v. Dinsmore*, 235 Neb. 738, 748, 457 N.W.2d 793, 799 (1990), quoting from the Restatement (Second) of Contracts § 90 (1981). See, also, *Gilbert Central Corp. v. Overland Nat. Bank*, 232 Neb. 778, 442 N.W.2d 372 (1989); *Yankton Prod. Credit Assn. v. Larsen*, 219 Neb. 610, 365 N.W.2d 430 (1985); *Farmland Service Coop, Inc. v. Klein*, 196 Neb. 538, 244 N.W.2d 86 (1976).

As does the bank in this case, the defendant in *Rosnick* argued that promissory estoppel only provided a substitute for consideration and could not be used as the basis for an independent cause of action and that to recover under the Restatement, *supra*, all elements to contract formation, apart from consideration, had to be present, including an offer with reasonably definite terms. We, however, held that "there is no requirement of 'definiteness' in an action based upon promissory estoppel," only that the "reliance be reasonable and foreseeable." *Rosnick*, 235 Neb. at 749, 457 N.W.2d at 800. See, also, *Kiely v. St. Germain*, 670 P.2d 764 (Colo. 1983) (promissory estoppel is not defined totally in terms of contract principles and is often appropriate when the parties have not mutually agreed on all the essential terms of a proposed transaction); *Hoffman v. Red Owl Stores, Inc.*, 26 Wis. 2d 683, 133 N.W.2d 267 (1965) (it would be a mistake to regard an action grounded on promissory estoppel as the equivalent of a breach of contract action). But cf., *Neeley v. Bankers Trust Co. of Texas*, 757 F.2d 621 (5th Cir. 1985) (under Texas law, the indefiniteness of essential element of putative contract precluded application of promissory estoppel theory to enforce the contract); *Jungmann v. St. Regis Paper Co.*, 682 F.2d 195 (8th Cir. 1982) (in Iowa the elements of promissory estoppel

require a clear and definite agreement); *Keil v. Glacier Park, Inc.*, 188 Mont. 455, 462, 614 P.2d 502, 506 (1980) (under Montana law, promissory estoppel requires a "promise clear and unambiguous in its terms," and while parties had agreed that plaintiffs would provide an emergency water pump for defendant's use, there was no agreement as to what accessories would be provided, who would provide the maintenance, or what specific price would be paid other than reference to a reasonable rate, which were circumstances that disclosed a classic case of a promise that was not sufficiently clear to establish a contract by promissory estoppel); *Weitzman v. Steinberg*, 638 S.W.2d 171 (Tex. App. 1982) (doctrine of promissory estoppel enforces obligations which would otherwise be barred at law, for example an oral contract for the sale of real property, and does not create the essential contractual elements where none existed before).

The *Rosnick* court opined that "the doctrine of promissory estoppel 'does not impose the requirement that the promise giving rise to the cause of action . . . be so comprehensive in scope as to meet the requirements of an offer that would ripen into a contract if accepted by the promisee.' " *Rosnick*, 235 Neb. at 749, 457 N.W.2d at 800, quoting *Hoffman v. Red Owl Stores, Inc., supra*.

Thus, the district court erred in finding that the plaintiffs failed to state a cause of action for promissory estoppel.

Lastly, the plaintiffs claim that the bank also breached its obligation of dealing in good faith as required by Neb. U.C.C. § 1-203 (Reissue 1980), which provides: "Every contract or duty within this act imposes an obligation of good faith in its performance or enforcement."

Having failed to plead facts establishing that the bank was contractually or otherwise bound to them under the code, it follows that the plaintiffs failed to state a cause of action under § 1-203 and that the district court correctly so ruled.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

WHITE, J., not participating in the decision.

STATE OF NEBRASKA, APPELLEE, V. RANDALL UTTERBACK, APPELLANT.

485 N.W.2d 760

Filed July 2, 1992. No. S-90-905.

1. **Motions to Suppress: Appeal and Error.** In determining the correctness of a trial court's ruling on a motion to suppress, an appellate court will uphold a trial court's findings of fact unless those findings are clearly wrong.
2. _____: _____. In deciding whether the trial court's findings on a motion to suppress are clearly erroneous, the reviewing court recognizes the trial court as the trier of fact and takes into consideration that the trial court has observed the witnesses testifying regarding the motion.
3. **Search Warrants: Affidavits: Probable Cause.** A search warrant, to be valid, must be supported by an affidavit establishing probable cause, or reasonable suspicion founded on articulable facts.
4. **Search Warrants: Evidence: Motions to Suppress.** A motion to suppress is the appropriate remedy to exclude evidence which has been obtained through an invalid search warrant.
5. **Search Warrants: Affidavits.** When a search warrant is obtained on the strength of an informant's information, the affidavit in support of the issuance of the search warrant must (1) set forth facts demonstrating the basis of the informant's knowledge of criminal activity and (2) establish the informant's credibility, or the informant's credibility must be established in the affidavit through a police officer's independent investigation. The affidavit must affirmatively set forth the circumstances from which the status of the informant can reasonably be inferred.
6. **Search Warrants: Affidavits: Probable Cause.** To determine the sufficiency of an affidavit used to obtain a search warrant, this jurisdiction has adopted the "totality of the circumstances" test. The issuing magistrate must make a practical, commonsense decision whether, given the totality of the circumstances set forth in the affidavit before him, including the veracity and basis of knowledge of the persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.
7. **Search Warrants: Probable Cause: Appeal and Error.** The duty of an appellate court in determining whether probable cause existed at the time a search warrant was issued is to ensure that the magistrate had a substantial basis for concluding that probable cause did in fact exist.
8. **Search Warrants: Affidavits: Evidence: Appeal and Error.** An appellate court is restricted to consideration of the information and circumstances contained within the four corners of the affidavit underlying a search warrant. Evidence which emerges after the warrant is issued has no bearing on whether a warrant was validly issued.
9. **Search Warrants: Affidavits: Probable Cause.** To credit a confidential source's information in making a probable cause determination, the affidavit should support an inference that the source was trustworthy and that the source's

accusation of criminal activity was made on the basis of information obtained in a reliable way.

10. **Criminal Law: Words and Phrases.** A citizen informant is defined as a citizen who purports to be the victim of or to have been the witness of a crime who is motivated by good citizenship and acts openly in aid of law enforcement.
11. _____: _____. A citizen informant is distinguished from a mere informer who gives a tip to law enforcement officers that a person is engaged in the course of criminal conduct.
12. _____: _____. Experienced "stool pigeons" or persons criminally involved or disposed are not regarded as citizen informants because they are generally motivated by something other than good citizenship.
13. **Search Warrants: Affidavits.** The status of a citizen informant cannot attach unless the affidavit used to obtain a search warrant affirmatively sets forth the circumstances from which the existence of the status can reasonably be inferred.
14. **Criminal Law: Probable Cause.** An admission by an informant that he or she participated in the crime about which the informant is informing carries its own indicia of reliability, since people do not lightly admit a crime and place critical evidence in the hands of police.
15. **Controlled Substances.** The act of purchasing marijuana is not a statutorily proscribed act in Nebraska.
16. **Criminal Law: Words and Phrases.** An accessory to a felony is one who, with the intent to interfere with, hinder, delay, or prevent the discovery, apprehension, prosecution, conviction, or punishment of another for an offense, (1) harbors or conceals the other; (2) provides or aids in providing a weapon, transportation, disguise, or other means of effecting escape or avoiding discovery or apprehension; (3) conceals or destroys evidence of the crime or tampers with a witness, informant, document, or other source of information, regardless of its admissibility in evidence; (4) warns the other of impending discovery or apprehension other than in connection with an effort to bring another into compliance with the law; (5) volunteers false information to a peace officer; or (6) by force, intimidation, or deception obstructs anyone in the performance of any act which might aid in the discovery, detection, apprehension, prosecution, conviction, or punishment of such person.
17. **Conspiracy: Words and Phrases.** A conspirator is one who, with the intent to promote or facilitate the commission of a felony, agrees with one or more persons that they will engage in or solicit the conduct of a felony.
18. **Aiding and Abetting: Words and Phrases.** An aider and abettor is a person who aids, abets, procures, or causes another to commit any offense and may be prosecuted and punished as if such person were the principal offender.
19. **Aiding and Abetting.** When the guilt of one party is excluded by the terms of the statute, it follows that such a participant cannot be held punishable as being an aider or abettor of the offense.
20. **Search Warrants: Probable Cause: Evidence: Motions to Suppress: Police Officers and Sheriffs.** In the absence of probable cause to support a search warrant, the evidence seized need not be suppressed where the police acted in objectively reasonable good faith reliance upon the warrant.

21. **Search Warrants: Affidavits.** For an affidavit based on a tip from an informant to be sufficient to support the issuance of a search warrant, the affidavit must set out some of the underlying circumstances from which the affiant concluded that the informant was credible or his information was reliable.
22. **Search Warrants: Affidavits: Probable Cause: Judges: Appeal and Error.** The deference accorded to a magistrate's finding of probable cause neither precludes inquiry into the knowing or reckless falsity of the affidavit on which that determination was based nor precludes inquiry as to whether the issuing magistrate or judge was misled by omissions from the affidavit.
23. **Search Warrants: Affidavits: Judges: Motions to Suppress.** Suppression is an appropriate remedy if the magistrate or judge issuing the search warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth, *or* if the magistrate or judge was misled by omissions in the affidavit.
24. **Search Warrants: Affidavits: Probable Cause: Judges: Appeal and Error.** The role of the reviewing court is to determine whether the affidavit used to obtain a search warrant, when corrected and supplemented by the omitted material, would provide a magistrate or judge with a substantial basis for concluding that probable cause existed for the issuance of the warrant.
25. **Search Warrants: Affidavits.** Omissions in an affidavit used to obtain a search warrant are considered to be misleading when the facts contained in the omitted material tend to weaken or damage the inferences which can logically be drawn from the facts as stated in the affidavit.
26. **Search Warrants: Affidavits: Police Officers and Sheriffs: Prisoners: Plea Bargains.** The fact that a police officer affiant seeking a search warrant fails to disclose to a magistrate or county judge that an informant is incarcerated at the time he makes statements incriminating another person does not alone automatically vitiate the search warrant, nor does the failure to disclose that the informant was cooperating under a plea agreement.

Appeal from the District Court for Dodge County: MARK J. FUHRMAN, Judge. Reversed and remanded with directions to dismiss.

Vard R. Johnson, of Broom, Johnson, Fahey & Clarkson, for appellant.

Don Stenberg, Attorney General, and Barry Waid for appellee.

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

PER CURIAM.

Arguing that the evidence used to convict him was obtained from his home pursuant to an invalid search warrant, Randall

Utterback appeals his conviction and 2- to 4-year prison sentence for possession with intent to manufacture, distribute, deliver, or dispense marijuana.

Utterback assigns as error the failure of the trial court (1) to suppress physical and visual evidence obtained at the defendant's home pursuant to an invalid search warrant, and (2) to place the defendant on probation.

We reverse Utterback's conviction and direct the district court for Dodge County to dismiss the charges against the defendant.

STANDARD OF REVIEW REGARDING SUPPRESSION RULINGS

In determining the correctness of a trial court's ruling on a motion to suppress, an appellate court will uphold a trial court's findings of fact unless those findings are clearly wrong. *State v. Groves*, 239 Neb. 660, 477 N.W.2d 789 (1991). In deciding whether the trial court's findings on a motion to suppress are clearly erroneous, the reviewing court recognizes the trial court as the trier of fact and takes into consideration that the trial court has observed the witnesses testifying regarding the motion. *Id.*

A search warrant, to be valid, must be supported by an affidavit establishing probable cause, or reasonable suspicion founded on articulable facts. See *State v. Armendariz*, 234 Neb. 170, 449 N.W.2d 555 (1989).

It is beyond question that a motion to suppress is the appropriate remedy to exclude evidence which has been obtained through an invalid search warrant. See *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984).

When a search warrant is obtained on the strength of an informant's information, the affidavit in support of the issuance of the search warrant must (1) set forth facts demonstrating the basis of the informant's knowledge of criminal activity and (2) establish the informant's credibility, or the informant's credibility must be established in the affidavit through a police officer's independent investigation. See *United States v. Leon, supra*. The affidavit must affirmatively set forth the circumstances from which the status of the informant

can reasonably be inferred. See *State v. Payne*, 201 Neb. 665, 271 N.W.2d 350 (1978).

To determine the sufficiency of an affidavit used to obtain a search warrant, this jurisdiction has adopted the "totality of the circumstances" test set forth by the U.S. Supreme Court in *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983). See *State v. Groves, supra*. The issuing magistrate must make a practical, commonsense decision whether, given the totality of the circumstances set forth in the affidavit before him, including the veracity and basis of knowledge of the persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. See *id*.

The duty of an appellate court in determining whether probable cause existed at the time a search warrant was issued is to ensure that the magistrate had a substantial basis for concluding that probable cause did in fact exist. See *State v. Cortis*, 237 Neb. 97, 465 N.W.2d 132 (1991). Moreover, an appellate court is restricted to consideration of the information and circumstances contained within the four corners of the underlying affidavit. See *United States v. Stanert*, 762 F.2d 775 (9th Cir. 1985). Evidence which emerges after the warrant is issued has no bearing on whether a warrant was validly issued. *State v. Groves, supra*.

THE FACTS

At approximately 7 a.m. on March 1, 1990, a Fremont police detective and six or seven fellow law enforcement officers executed a no-knock search warrant at Utterback's home. Utterback shared his home with his wife and infant child. In various containers discovered at various locales in the Utterback house, police found 25 separate plastic bags which contained a total of 570 grams of marijuana. The police also found a postage scale and various items of drug paraphernalia.

The warrant which the officers executed authorized a search for automatic weapons, drug paraphernalia, and various controlled substances. The police detective obtained the warrant on the previous day from a Dodge County judge. The sworn affidavit executed by the police detective to obtain the

search warrant states in pertinent part:

> The complaint and affidavit of [the police detective], Fremont Police Dept., Fremont, Dodge County, Nebraska, who, being first duly sworn upon his oath says:
>
> That [the detective] has just and reasonable grounds to believe, and does believe, upon information, that there is concealed or kept as hereinafter described, the following property, to-wit: Marijuana, Cocaine, LSD (Lysergic Acid Diethlamide [sic]), PCP (Phencyclidine) Peyote and other controlled substances, together with the paraphernalia for using and distributing the same; Cash and records of transactions involving controlled substances; and automatic and semi-automatic weapons.
>
> That said property is concealed or kept in, on, or about the following described place or person, to wit: A yellow single story, single family residence located at 321 North "K" St., Fremont, Dodge County, Nebraska.
>
> That said property is under the control or custody of Randall and Marla Utterback.
>
> That the following are grounds for issuance of a search warrant for said property and the reasons for his belief, to-wit: On February 28, 1990, your affiant was advised by an *individual who is neither a paid nor habitual informant* that a second individual named "Randy" was engaged in the distribution and sale of controlled substances at the residence described above. The informant advised that "Randy" lived at the above described residence with his wife. The informant gave a physical description of "Randy" which matches the physical description of Randy Utterback contained in Fremont Police Dept. files. *The informant advised your affiant that in the past six months (the informant) had purchased marijuana from "Randy" at the residence described above*, and had observed other sales of illegal drugs at said residence. The informant further advised your affiant that (the informant) had been inside said residence within the last five days, and had seen a large quantity of marijuana, and lesser quantities of hashish, cocaine, LSD, and PCP. The informant indicated to your affiant that (the informant)

> was very familiar with illegal drugs, and the information furnished to your affiant indicated such knowledge.
>
> The informant further indicated to your affiant that (the informant) had observed what (the informant) believed to be an AK 47 assault rifle and an Uzi submachine gun in said residence, together with other weapons. The informant advised your affiant that (the informant) had personally inspected these weapons, and that they were loaded with ammunition. The informant gave a description of these weapons to your affiant, and that description is consistent with an AK 47 assault rifle and an Uzi submachine gun.
>
> Your affiant personally drove by the above described residence and observed an older model blue station wagon parked in the driveway of said residence bearing Nebraska license plate No. 5-B8618. According to records of the Dodge County Treasurer said vehicle is registered to Randy and/or Marla Utterback. Your affiant personally checked the records of the Fremont Department of Utilities and determined that the utilities were registered to Marla Utterback.

(Emphasis supplied.)

Throughout these proceedings, Utterback has (1) challenged the sufficiency of the police detective's affidavit to show the reliability of the informant who supplied information that contraband or evidence of a crime would be found at Utterback's home and (2) argued that with the knowledge the detective had of the circumstances under which the informant gave information concerning the defendant, the detective could not execute the search warrant in good faith.

SUFFICIENCY OF THE AFFIDAVIT

Utterback argues that the search warrant was invalid in that the affidavit failed to establish the veracity of the confidential informant. To credit a confidential source's information in making a probable cause determination, the affidavit should support an inference that the source was trustworthy and that the source's accusation of criminal activity was made on the basis of information obtained in a reliable way. *United States v.*

Stanert, 762 F.2d 775 (9th Cir. 1985).

Among the ways in which the reliability of an informant may be established are by showing in the affidavit to obtain a search warrant that (1) the informant has given reliable information to police officers in the past, see *State v. Hoxworth*, 218 Neb. 647, 358 N.W.2d 208 (1984); (2) the informant is a citizen informant, see *State v. Duff*, 226 Neb. 567, 412 N.W.2d 843 (1987); (3) the informant has made a statement that is against his or her penal interest, see *State v. Sneed and Smith*, 231 Neb. 424, 436 N.W.2d 211 (1989); and (4) a police officer's independent investigation establishes the informant's reliability or the reliability of the information the informant has given, see *United States v. Stanert, supra*.

Nowhere in the detective's affidavit to obtain the search warrant in this case is there an averment that the detective's informant had given reliable information in the past, nor is there an averment that the informant was a "citizen informant." A citizen informant is defined as

> " 'a citizen who purports to be the victim of or to have been the witness of a crime who is motivated by good citizenship and acts openly in aid of law enforcement. . . . A "citizen-informant" is distinguished from a mere informer who gives a tip to law enforcement officers that a person is engaged in the course of criminal conduct. . . . Thus, experienced stool pigeons or persons criminally involved or disposed are not regarded as "citizen-informants" because they are generally motivated by something other than good citizenship. . . .' "

State v. Duff, 226 Neb. at 571, 412 N.W.2d at 846. The status of a citizen informant cannot attach unless the affidavit used to obtain a search warrant affirmatively sets forth the circumstances from which the existence of the status can reasonably be inferred. See *State v. Payne*, 201 Neb. 665, 271 N.W.2d 350 (1978). Here, there is nothing in the detective's affidavit used to obtain a search warrant even hinting that the informant was "motivated by good citizenship."

STATEMENT AGAINST PENAL INTEREST

The State argues that the assertion in the detective's affidavit

that "[t]he informant advised your affiant that in the past six months (the informant) had purchased marijuana from 'Randy' at the residence described above" was a statement against the penal interest of the informant. An admission by an informant that he or she participated in the crime about which the informant is informing carries its own indicia of reliability, since people do not lightly admit a crime and place critical evidence of that crime in the hands of police. See *State v. Sneed and Smith, supra.*

The act of *purchasing* marijuana is not a statutorily proscribed act in Nebraska. Neb. Rev. Stat. § 28-416(6), (7), and (8) (Reissue 1989) prohibit the possession of marijuana, and Neb. Rev. Stat. § 28-417(1)(g) (Reissue 1989) prohibits being under its influence, but nowhere in the statutes of the State of Nebraska is the *purchase* of marijuana expressly prohibited. There is nothing in the affidavit used to obtain the search warrant in this case that would establish, unequivocally, that the informant could be prosecuted for the crimes of possession or being under the influence of marijuana.

The U.S. Supreme Court, in *United States v. Farrar*, 281 U.S. 624, 50 S. Ct. 425, 74 L. Ed. 1078 (1930), offered an explanation as to why legislatures would choose to punish the seller, but not the buyer, of an illegal substance. In concluding that "*in the absence of an express statutory provision to the contrary, the purchaser of intoxicating liquor, the sale of which was prohibited, was guilty of no offense*" (emphasis supplied), the court opined that it probably was

> thought more important to preserve the complete freedom of the purchaser to testify against the seller than to punish him for making the purchase. [Citation omitted.] However that may be, it is fair to assume that Congress, when it came to pass the Prohibition Act, knew this history and, acting in the light of it, deliberately and designedly omitted to impose upon the purchaser of liquor for beverage purposes any criminal liability.

281 U.S. at 634. The Nebraska Legislature seems to have followed the same philosophy.

Other possible theories of criminal liability for the purchase of marijuana are the inchoate offenses of being an accessory, a

conspirator, or an aider and abettor to the crime of distribution or delivery of marijuana. Distribution is defined as the delivery of a controlled substance other than by administration or dispensation; delivery is the actual, constructive, or attempted transfer *from one person to another* of a controlled substance. Neb. Rev. Stat. § 28-401(10) and (13) (Reissue 1989). A distributor is a person who distributes a controlled substance. § 28-401(10).

Accessory Liability.

An accessory to a felony is one who, with the intent to interfere with, hinder, delay, or prevent the discovery, apprehension, prosecution, conviction, or punishment of another for an offense, (1) harbors or conceals the other; (2) provides or aids in providing a weapon, transportation, disguise, or other means of effecting escape or avoiding discovery or apprehension; (3) conceals or destroys evidence of the crime or tampers with a witness, informant, document, or other source of information, regardless of its admissibility in evidence; (4) warns the other of impending discovery or apprehension other than in connection with an effort to bring another into compliance with the law; (5) volunteers false information to a peace officer; or (6) by force, intimidation, or deception obstructs anyone in the performance of any act which might aid in the discovery, detection, apprehension, prosecution, conviction, or punishment of such person. Neb. Rev. Stat. § 28-204 (Reissue 1989). The act of purchasing marijuana does not make the informant an accessory to the crime of distribution or delivery of a controlled substance under this statute.

Conspiracy Liability.

A conspirator is one who, with the intent to promote or facilitate the commission of a felony, agrees with one or more persons that they will engage in or solicit the conduct of a felony. See Neb. Rev. Stat. § 28-202 (Reissue 1989). The U.S. Supreme Court has adopted Wharton's Rule, an exception to the rules of conspirator liability: " 'An agreement by two persons to commit a particular crime cannot be prosecuted as a conspiracy when the crime is of such a nature as to necessarily

require the participation of two persons for its commission.' " *Iannelli v. United States*, 420 U.S. 770, 773-74 n.5, 95 S. Ct. 1284, 43 L. Ed. 2d 616 (1975). In such a case, the conspiracy is deemed to have merged into the completed offense. See *Iannelli, supra*. Wharton's Rule crimes are characterized by the general congruence of the agreement and the completed substantive offense. The rule applies only to offenses that *require* concerted criminal activity, such as incest, bigamy, adultery, and dueling, *id.*, and does not apply where the substantive offense that is the object of the alleged conspiracy can be committed by a single person, such as receiving, concealing, and converting stolen property, see *Baker v. United States*, 393 F.2d 604 (9th Cir. 1968), or possession of a controlled substance with the intent to distribute, *United States v. Rueter*, 536 F.2d 296 (9th Cir. 1976).

By statutory definition, the delivery or distribution of a controlled substance requires the concerted action of two persons, the transfer of a controlled substance *from one person to another*. § 28-401(10) and (13). Wharton's Rule therefore exempts from prosecution for conspiracy to commit delivery or distribution either of the participants in the transfer of a controlled substance.

Aiding and Abetting.

An aider and abettor is a person who aids, abets, procures, or causes another to commit any offense and may be prosecuted and punished as if such person were the principal offender. See Neb. Rev. Stat. § 28-206 (Reissue 1989). However, again because of the unique nature of the crime involved herein, there is an exception to this liability for the participant whose acts are not specifically deemed to be criminal.

> The final exception to accomplice liability . . . occurs when the crime is so defined that participation by another is necessary to its commission. The rationale is that the legislature, by specifying the kind of individual who is to be found guilty when participating in a transaction necessarily involving one or more other persons, must not have intended to include the participation by others in the offense as a crime. This exception applies even though the

> statute was not intended to protect the other participants. Thus, one having intercourse with a prostitute is not liable for aiding and abetting prostitution, *and a purchaser is not an accomplice to an illegal sale.*

(Emphasis supplied.) *United States v. Southard*, 700 F.2d 1, 20 (1st Cir. 1983). *U.S. v. Farrar*, 281 U.S. 624, 50 S. Ct. 425, 74 L. Ed. 1078 (1930), states that absent statutory provisions expressly prohibiting the purchase of intoxicating liquors, a purchaser who participates in the sales transaction of illegal intoxicating liquor is guilty of *no* offense. *Tyler v. State*, 587 So. 2d 1238 (Ala. App. 1991), citing *Farrar*, acknowledged that Alabama statutes did not prohibit the *purchase* of a controlled substance and that the acts of the purchaser are prohibited only by the statutes regarding possession and receipt.

> Thus, where an illegal drug sale is consummated there are two separate statutory offenses committed, one by the seller, the other by the buyer. . . . In this case, had the sale been consummated and the appellant had received the pills, the appellant would have been guilty of possession. *However, he would not have been guilty as an accomplice of the distribution of the pills.*

(Emphasis supplied.) *Tyler*, 587 So. 2d at 1242.

When the guilt of one party is excluded by the terms of the statute, it follows that such a participant cannot be held punishable as being an aider or abettor of the offense. See, *United States v. Southard, supra*; *Gebardi v. United States*, 287 U.S. 112, 53 S. Ct. 35, 77 L. Ed. 206 (1932). Twenty-five states have codified this exception to accomplice liability. See 2 Wayne R. LaFave and Austin W. Scott, Jr., Substantive Criminal Law § 6.8 (1986). We conclude that a purchaser of a controlled substance is not an aider and abettor in the controlled substance's delivery or distribution.

Since Nebraska has not included the purchase of marijuana in its statutory prohibitions, and because no other theory of criminal liability applies, when the informant in this case admitted to purchasing marijuana he did not make a statement against his penal interest.

CORROBORATION

The fourth method of determining the veracity of a confidential informant is through corroboration. Here, the affidavit reveals only that the police corroborated that Utterback lived at the described address, that the car in the driveway was registered to him, that the utilities at the house were registered to Utterback's wife, and that Utterback's physical description matched that given by the informant. If the police had chosen to corroborate the information regarding any criminal activities of Utterback's rather than merely corroborating these innocent details of his life, see *U.S. v. Gibson*, 928 F.2d 250 (8th Cir. 1991), or had the affidavit contained other corroborative sources of information about the same alleged criminal activity of Utterback's, see *United States v. Stanert*, 762 F.2d 775 (9th Cir. 1985), the veracity of the informant might have been established in the affidavit. However, no such corroboration is reflected in the detective's affidavit used to obtain the search warrant in this case.

We conclude that the affidavit in support of obtaining the search warrant herein fails to establish the veracity and reliability of the confidential informant and that the county judge was clearly wrong in determining that it supported a finding of probable cause to issue a search warrant.

GOOD FAITH RELIANCE

Even in the absence of a valid affidavit to support a search warrant, evidence seized pursuant to the warrant need not be suppressed where police act in objectively reasonable good faith reliance upon the warrant. See *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984). For an affidavit based on a tip from an informant to be sufficient to support the issuance of a search warrant, the affidavit must set out some of the underlying circumstances from which the affiant concluded that the informant was credible or his information was reliable. See *State v. Hinchion, DiBiase, Olsen, and Cullen*, 207 Neb. 478, 299 N.W.2d 748 (1980).

In this case, the detective who signed the affidavit for the search warrant and who executed the warrant after it was issued

could not have relied upon the warrant in good faith. The deference accorded to a county judge's finding of probable cause neither precludes inquiry into the knowing or reckless falsity of the affidavit on which the determination was based, see *United States v. Leon, supra*, nor precludes inquiry as to whether the issuing magistrate or judge was misled by omissions from the affidavit, see *United States v. Stanert, supra*. Suppression is an appropriate remedy if the magistrate or judge issuing the warrant was misled by information in an affidavit that the affiant knew was false *or* would have known was false except for the affiant's reckless disregard of the truth, *United States v. Leon, supra, or* if the magistrate or judge was misled by omissions in the affidavit, see *United States v. Stanert, supra*. The role of the reviewing court is to determine whether the affidavit used to obtain a search warrant, when supplemented by the omitted material, would provide a magistrate or judge with a substantial basis for concluding that probable cause existed for the issuance of the warrant. See *United States v. Stanert, supra*.

Although the detective seeking the search warrant in this case had knowledge of certain relevant and important facts, he nevertheless consciously omitted those facts from his affidavit used to obtain a search warrant. The detective knew when he first met the informant that the informant was 16 years old, under arrest, in jail, and being investigated for involvement in a felony forgery. When the detective signed the affidavit for the search warrant and presented it to the county judge, he also knew that the informant had lied to him regarding the forgery complaint and that the informant had admitted to being a liar. The detective also knew that after confessing to being involved in committing forgery, the informant, in an effort to effectuate a plea bargain, made statements incriminating Utterback. No one else was with the 16-year-old informant when he was questioned by the detective in a police interrogation room, at which time the youth volunteered the information concerning Utterback.

At the suppression hearing, the informant testified under oath that the following statements he made to the police detective regarding Utterback were false: (1) that he knew Utterback, (2) that he had bought drugs from Utterback, (3)

that he had seen the drugs and guns he had described seeing in Utterback's house, and (4) that he had been inside Utterback's house. The informant testified he had once driven a friend to Utterback's home and waited outside while the friend obtained some marijuana from inside the house. The informant further testified that he had never personally bought drugs from Utterback or anyone else at Utterback's address.

Without comment, the district court overruled the defendant's motion to suppress the evidence seized from Utterback's home. In denying Utterback's motion for a new trial because of the alleged invalidity of the search warrant, the district judge stated he was not concerned with what the detective had left out of the affidavit, but, rather, with the fact that the informant had lied to the detective. The court was clearly wrong in failing to consider what had been omitted from the detective's affidavit used to obtain a search warrant. It was on the basis of the detective's affidavit that the county judge issued the search warrant.

The questions are whether the omissions from the detective's affidavit misled the county judge and whether the omitted information was material to a determination of probable cause. Omissions in an affidavit used to obtain a search warrant are considered to be misleading when the facts contained in the omitted material tend to weaken or damage the inferences which can logically be drawn from the facts as stated in the affidavit. See *United States v. Stanert, supra*. The inference to be drawn from the detective's affidavit in this case is that the informant came forward of his own accord to tell the police about the activities of Utterback. (He was neither a paid nor a habitual informant, so, without more information, the inference is that the informant was a citizen informant.) The fact that a police officer affiant seeking a search warrant fails to disclose to a magistrate or county judge that an informant is incarcerated at the time he makes statements incriminating another person does not alone automatically vitiate the search warrant, see *United States v. Ellison*, 793 F.2d 942 (8th Cir. 1986), nor does the failure to disclose that the informant was cooperating under a plea agreement, see *U.S. v. Flagg*, 919 F.2d 499 (8th Cir. 1990).

In this case, had the county judge been told that the

informant was an admitted liar, the inference that the informant was a believable citizen informant would have been substantially weakened, if not totally destroyed. It is widely held that an affidavit reciting that an undisclosed informant had given reliable information to the police in the past is sufficient to establish reliability for the purposes of issuing a search warrant. See, *United States v. Hunley*, 567 F.2d 822 (8th Cir. 1977); *United States v. Stanert, supra*; *State v. Hoxworth*, 218 Neb. 647, 358 N.W.2d 208 (1984). It logically follows that information from a known liar will not support an inference of trustworthiness. Had the county judge also been told that the informant had confessed to being involved in a forgery, a crime of moral turpitude, the judge's view of the informant's believability would have substantially diminished. Had the omitted facts been included in the detective's affidavit for the search warrant, the county judge undoubtedly would not have issued the warrant to search Utterback's home.

CONCLUSION

Had relevant omitted facts been included in the police detective's affidavit used to obtain the search warrant involved here, the county judge could not have found that the informant in this case was reliable, and therefore, the warrant to search Utterback's home would not have been issued, since probable cause to issue it would have been lacking. When it is not established that an informant is reliable, a search warrant issued upon information supplied by such unreliable source is invalid. In this case, in executing the search warrant at the home of Utterback, the police did not act in objectively reasonable good faith reliance upon the warrant. Therefore, the trial court erred when it did not suppress all of the evidence seized at Utterback's home.

Because he was convicted upon illegally obtained evidence, Utterback's conviction is reversed. There being no evidence of Utterback's guilt other than that which was seized from the defendant's home, this cause is remanded to the district court with instructions to vacate Utterback's conviction and dismiss the charges against him.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. EUGENE L. PIEPER, RESPONDENT.

485 N.W.2d 583

Filed July 2, 1992. No. S-90-1112.

Original action. Judgment of disbarment.

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

PER CURIAM.

The Counsel for Discipline of the Nebraska State Bar Association received a disciplinary complaint against Eugene L. Pieper on November 7, 1990. Respondent was temporarily suspended from the practice of law in the State of Nebraska by this court on November 19, 1990.

Pursuant to Neb. Ct. R. of Discipline 15 (rev. 1989), respondent has filed a voluntary surrender of license with this court. The respondent freely and voluntarily waives all proceedings against him in connection with the pending disciplinary complaint. Respondent knowingly admits that he has violated DR 9-102(A) of the Code of Professional Responsibility. He also freely and voluntarily consents to an order of disbarment and waives any right to notice, appearance, or hearing prior to entry of the order.

Accordingly, the respondent is hereby disbarred from the practice of law in the State of Nebraska, effective immediately.

JUDGMENT OF DISBARMENT.

WHITE, J., not participating.

CONNIE DAY ET AL., APPELLANTS, V. E. BENJAMIN NELSON, GOVERNOR OF NEBRASKA, ET AL., APPELLEES.

485 N.W.2d 583

Filed July 2, 1992. No. S-92-229.

1. **Constitutional Law.** It is a fundamental principle of constitutional interpretation that each and every clause within a constitution has been inserted

for a useful purpose.

2. **Constitutional Law: Legislature: Governmental Subdivisions: Counties: Boundaries.** When the population of a county is such that it can legally constitute a legislative district and it is practicable to do so, the Legislature must establish a district which follows that county's boundaries. Neb. Const. art. III, § 5.
3. _____: _____: _____: _____: _____. When only two counties in the state possess populations such that they can each legally constitute a legislative district and reapportionment plans are offered in the Legislature which leave those counties intact as legislative districts, it is "practicable" to follow the boundaries of those counties in reapportioning the state. Neb. Const. art. III, § 5.

Appeal from the District Court for Lancaster County: EARL J. WITTHOFF, Judge. Reversed and remanded with directions.

Robert F. Bartle and K. Kristen Newcomb, of Healey & Wieland, and John M. Gerrard, of Gerrard, Stratton & Mapes, P.C., for appellants.

Don Stenberg, Attorney General, Charles E. Lowe, and Dale A. Comer for appellees.

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

PER CURIAM.

The plaintiffs-appellants, Connie Day, John Day, Maynard Ohl, James Scheer, and Roger Shaffer, citizens of Nebraska residing in Madison County, initiated this action in the district court for Lancaster County. In their petition, the plaintiffs challenge the constitutionality of 1991 Neb. Laws, L.B. 614, which reapportions the state's legislative districts in light of the 1990 federal census. The plaintiffs allege that L.B. 614, insofar as it abolishes Madison County as a unitary district and instead divides the county between two preexisting districts, violates Neb. Const. art. III, § 5, and art. I, §§ 1 and 3, as well as the 14th Amendment to the U.S. Constitution. The plaintiffs prayed for a declaratory judgment determining that L.B. 614 is unconstitutional and permanently enjoining defendants, Governor E. Benjamin Nelson, Secretary of State Allen J. Beermann, and the State of Nebraska, from enforcing the provisions of L.B. 614. The district court, determining that L.B. 614 was not constitutionally deficient, dismissed the

plaintiffs' petition. This appeal followed.

An action to declare a statute unconstitutional "is more akin to relief through an equity action than relief through a law action." *State v. Nebraska Assn. of Pub. Employees*, 239 Neb. 653, 657, 477 N.W.2d 577, 581 (1991). On appeal from an equity action, this court tries factual questions de novo on the record and, as to both questions of fact and of law, is obligated to reach a conclusion independent from the conclusion reached by the trial court. *Id.*

Article III, § 5, of the Nebraska Constitution requires the Legislature to redistrict the state after each federal decennial census. The 1990 federal census declared the population of the state to be 1,578,385, which we judicially notice is slightly less than after the 1980 census. Given that there are 49 legislative districts, the optimum number of persons in each legislative district is 32,212 (1,578,385 divided by 49).

Early in the process, the Committee on Government, Military, and Veterans' Affairs determined that it would apportion all districts such that they did not deviate more than 2 percent from the ideal population figure. In other words, each district would contain between 31,568 and 32,856 persons. This population range appears to satisfy *Baker v. Carr*, 369 U.S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962), and *Reynolds v. Sims*, 377 U.S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964) (one person, one vote rule), and will not be considered further. Only two Nebraska counties, Lincoln and Madison, possess populations falling within the range established by the committee.

In the decade since the last census, 83 of the state's 93 counties did not experience a population increase. Of the 10 counties showing a population increase, the largest increases occurred in the state's most populous areas—Douglas, Lancaster, and Sarpy Counties. Madison County was also one of the 10 counties enjoying a population increase during the preceding decade. The population shift to the state's urban centers impressed upon the committee, as well as upon the entire Legislature, the need to create two additional legislative seats in the Douglas, Lancaster, and Sarpy County areas. Correspondingly, two outstate districts would have to be

eliminated, and their territory and populace assigned to other districts destined to survive.

According to the L.B. 614 apportionment, Lincoln County remains as Legislative District 42. However, District 21, the district formerly composed of Madison County, is moved to the Douglas, Saunders, and Lancaster County area and the territory and population of Madison County are assigned to Districts 18 and 40. At least one alternative plan considered and rejected by the committee and the full Legislature retained both Lincoln and Madison Counties as unitary legislative districts.

Article III, § 5, provides as follows:

> At the regular session of the Legislature held in the year nineteen hundred and thirty-five the Legislature shall by law determine the number of members to be elected and divide the state into legislative districts. In the creation of such districts, any county that contains population sufficient to entitle it to two or more members of the Legislature shall be divided into separate and distinct legislative districts, as nearly equal in population as may be and composed of contiguous and compact territory. One member of the Legislature shall be elected from each such district. The basis of apportionment shall be the population excluding aliens, as shown by the next preceding federal census. The Legislature shall redistrict the state after each federal decennial census. *In any such redistricting, county lines shall be followed whenever practicable, but other established lines may be followed at the discretion of the Legislature.*

(Emphasis supplied.) See, also, *Carpenter v. State*, 179 Neb. 628, 139 N.W.2d 541 (1966).

It is a fundamental principle of constitutional interpretation that each and every clause within a constitution has been inserted for a useful purpose. *Anderson v. Tiemann*, 182 Neb. 393, 155 N.W.2d 322 (1967).

As stated above, the only counties in this state where a single legislative district could lawfully follow the entire county boundaries are Lincoln County and Madison County. It is obvious that according to the plain language of article III, § 5, Madison County must constitute a single district unless not

"practicable." It is also obvious that the presence of a number of proposed plans that apportion the state leaving District 21 substantially intact makes following that county's boundaries "practicable."

The suggestion by the State in its brief that the process is entirely political ignores the mandatory "shall" in the constitutional section and would equate it with the permissive "may."

Since it was practicable to follow the county lines of Madison County and the Legislature failed to do so, it follows that §§ 5-219 and 5-241 of L.B. 614 violate article III, § 5, and the appellees should be enjoined.

The judgment is reversed and the cause remanded to the district court for Lancaster County with directions to enter judgment for the appellants.

REVERSED AND REMANDED WITH DIRECTIONS.

FAHRNBRUCH, J., not participating.

COLWELL, D.J., Retired, dissents.

HEADNOTES TO VOLUME 240

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