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BENNY ROWE, APPELLANT, V. JOHN R. ALLELY, APPELLEE.

507 N.W.2d 293

Filed November 5, 1993. No. S-91-767.

1. **Summary Judgment.** Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** On appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom judgment was granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Contracts: Parol Evidence.** When the parties have executed a completely integrated written document purporting to express the terms of their agreement, the parol evidence rule renders ineffective any evidence of a prior or contemporaneous oral agreement which adds to, alters, varies, or contradicts the terms of the written document.
4. **Contracts: Evidence.** Where negotiations between the parties result in an agreement which is reduced to writing, the written agreement is the only competent evidence of the contract in the absence of fraud, mistake, or ambiguity.
5. **Contracts: Parol Evidence.** The parol evidence rule does not affect a prior agreement separate and distinct from the agreement which was reduced to writing.

Appeal from the District Court for Dodge County: MARK J. FUHRMAN, Judge. Reversed and remanded for further proceedings.

William G. Line, of Kerrigan & Line, for appellant.

Frederick D. Stehlik and Thomas W. McPherson, of Schmid, Mooney & Frederick, P.C., for appellee.

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

WHITE, J.

Benny Rowe is appealing an order of the Dodge County District Court granting summary judgment in favor of appellee, John R. Allely, in an action for breach of an oral agreement. We reverse the district court's order and remand the cause for further proceedings.

In July 1987, Allely contacted Rowe regarding the management of an automobile dealership. Allely intended to

open a dealership and wanted Rowe both to serve as general manager and to eventually purchase an interest in the business.

On July 9, Allely handwrote a "Memorandum of Understanding," which included the statement: "Dealership on Day #1 will be in the black" with "a 'reasonable' cushion." On September 11, the parties executed an "Employment Contract" and a "Stock Purchase Agreement." The employment contract addressed Rowe's proposed role in the business, salary, and benefits. That contract also included a provision which stated that the contract represented the "full and complete understanding and agreements of the parties and supersedes all prior understandings and agreements." The stock agreement provided that Rowe would purchase stock in Allely's corporation out of the profits generated by the dealership. The parties also signed a "Dealer Sales and Service Agreement" with General Motors Corporation. That agreement states that the dealer will maintain $215,000 in net working capital.

In December 1987, the dealership commenced business. However, Allely never contributed the working capital. As a result, Rowe contends, the dealership could not continue. Rowe resigned, and the parties signed a termination agreement in February 1988. Although the termination agreement includes a mutual release of obligations between the parties, the effect of the agreement was not the basis for the trial court's summary judgment and is not before this court on appeal.

Rowe filed an action against Allely for the damages arising from Allely's failure to finance the dealership. Rowe contends that he left his other job because Allely promised to provide adequate financing. Rowe also contends that he has been unable to find suitable employment since the failure of the dealership.

Allely filed a motion for summary judgment, and a hearing was held on July 1 and 8, 1991. On July 17, the district court issued its order. The court stated that Rowe was attempting to enforce an oral agreement evidenced by the "Memorandum of Understanding." However, the court held that the parol evidence rule prohibited consideration of this alleged oral agreement. The court reasoned that evidence of prior oral agreements was not admissible to add to, contradict, or vary the

terms of a written contract when the negotiations between the parties have been reduced to writing, unless there is evidence of fraud, mistake, or ambiguity. The court stated that Rowe had not properly alleged fraud, mistake, or ambiguity. Finding no genuine issue as to any material fact, the court ruled that Allely was entitled to judgment as a matter of law.

Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Design Data Corp. v. Maryland Cas. Co.*, 243 Neb. 945, 503 N.W.2d 552 (1993); *Abboud v. Michals*, 241 Neb. 747, 491 N.W.2d 34 (1992); *Murphy v. Spelts-Schultz Lumber Co.*, 240 Neb. 275, 481 N.W.2d 422 (1992). On appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom judgment was granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Design Data Corp., supra.*

Upon our review of the record and in light of the above standard, we believe that there is a factual issue as to Rowe's breach of contract claim and that the parol evidence rule does not apply to exclude evidence of the alleged oral agreement.

When the parties have executed a completely integrated written document purporting to express the terms of their agreement, the parol evidence rule renders ineffective any evidence of a prior or contemporaneous oral agreement which adds to, alters, varies, or contradicts the terms of the written document. *Five Points Bank v. White*, 231 Neb. 568, 437 N.W.2d 460 (1989); *Traudt v. Nebraska P. P. Dist.*, 197 Neb. 765, 251 N.W.2d 148 (1977); *Perry v. Gross*, 155 Neb. 662, 53 N.W.2d 73 (1952); *Arman v. Structiform Engineering Co.*, 147 Neb. 658, 24 N.W.2d 723 (1946). Where negotiations between the parties result in an agreement which is reduced to writing, the written agreement is the only competent evidence of the contract in the absence of fraud, mistake, or ambiguity. *Silverman v. Arbor Street Partnership*, 213 Neb. 628, 330 N.W.2d 904 (1983); *Frank McGill, Inc. v. Nucor Corp.*, 195 Neb. 448, 238 N.W.2d 894 (1976). However, the parol evidence rule does not affect a prior agreement separate and distinct

from the agreement which was reduced to writing. *Traudt, supra*; *Arman, supra*; Restatement of Contracts § 240 (1932). According to the Restatement, *supra* at 335:

> (1) An oral agreement is not superseded or invalidated by a subsequent or contemporaneous integration, nor a written agreement by a subsequent integration relating to the same subject-matter, if the agreement is not inconsistent with the integrated contract, and
>
> (a) is made for separate consideration, or
>
> (b) is such an agreement as might naturally be made as a separate agreement by parties situated as were the parties to the written contract.

In this court's opinions, we have often intertwined the Restatement rule with our integration analysis. Nevertheless, we recognize that the parol evidence rule does not apply to a separate and distinct agreement supported by separate consideration. See, 3 Arthur L. Corbin, Corbin on Contracts §§ 584 and 594 (1960); E. Allan Farnsworth, Contracts § 7.3 (1982). The Restatement (Second) adopts the factors in § 240 of the first Restatement to determine whether a writing is completely integrated, but the Restatement (Second) also acknowledges that separate agreements are not affected by the parol evidence rule. See, Restatement (Second) of Contracts § 213(2), comment *c.*, and § 216(2), comment *c.* (1981); John E. Murray, Jr., Murray on Contracts § 107 (1974) (discussing the Restatement (Second)).

In *Traudt v. Nebraska P. P. Dist.*, 197 Neb. 765, 251 N.W.2d 148 (1977), the plaintiffs, landowners, conveyed an easement across their land to the Nebraska Public Power District. The conveyance stated that the landowners conveyed the easement in exchange for a total payment of $1,000 and an allowance for damages that might arise from future use of the easement. The landowners also claimed that the power district promised to pay them additional money for the easement if the power district eventually paid a higher price to other landowners for similar easements. *Id.*

On an appeal from a demurrer, the court stated that if the subsequent written conveyance embodied the completely integrated agreement between the plaintiffs and the power district, then evidence of the prior oral agreement was not

admissible. The court then outlined three tests that may be applied to determine whether a writing is completely integrated: first, whether the writing is complete on its face; second, whether the proffered evidence varies or contradicts the writing; and third, whether the parties intended the writing to cover a certain subject of their negotiations. Additionally, the court applied the Restatement rule. *Id.* See, also, *Cleasby v. Leo A. Daly Co.*, 221 Neb. 254, 376 N.W.2d 312 (1985) (restating the three tests).

The court stated that under any of the three tests, the written conveyance constituted a complete integration of the parties' agreement. Finally, the court applied the Restatement rule and found that the power district's alleged agreement to give the plaintiffs more money was not made for separate consideration; rather, it rested on the same easement that was conveyed in the writing. Furthermore, the court stated that an agreement to pay an unspecified additional amount of money at some time in the future is not an agreement that similarly situated parties would have kept separate from the written conveyance. *Traudt, supra.*

On the contrary, in *Arman v. Structiform Engineering Co.*, 147 Neb. 658, 24 N.W.2d 723 (1946), the court found that an alleged prior agreement was supported by separate consideration and was such an agreement that similarly situated parties would have kept separate from the writing. The plaintiff, Arman, had signed an employment contract which stated that Structiform would pay Arman $25 per each housing unit for which he performed general manager services. *Id.*

Arman brought suit against Structiform for wages he earned under the written contract and under an additional oral agreement. According to Arman, Structiform orally agreed to pay Arman $25 per housing unit for which he performed expediter services. Structiform contended, in part, that because the alleged expediter services were within the scope of the general manager duties, there was no separate consideration for the alleged oral agreement to pay an additional $25 per housing unit. *Id.*

After outlining the general rules regarding parol evidence and integrated writings, as well as the Restatement rule, this court held that the trial court's admission of evidence tending to

prove the prior oral agreement was proper because the prior oral agreement did not vary or contradict the terms of the subsequent writing, was supported by separate consideration, and was an agreement that similarly situated parties would naturally keep separate from the writing. The court found that the duties of general manager did not include those required of Arman as an expediter. Thus, the agreement to pay Arman $25 per unit for expediter services was supported by consideration separate from that supporting the written contract which covered Arman's general manager duties. *Arman, supra.*

In the instant case, the alleged oral agreement addresses a different subject matter than that addressed in either of the two writings, it is not inconsistent with the writings, and it is supported by its own consideration. The alleged oral agreement consists of Rowe's promise to leave his other job and enter into a business relationship with Allely and of Allely's promise to provide adequate financial support for that business. The employment contract addresses the duties that Rowe agreed to perform as general manager of the business in exchange for a salary and benefits. The stock agreement addresses Rowe's promise to purchase a certain amount of stock at a certain price from Allely. The consideration contained in the writings—specific duties for a salary and a certain amount of stock for a certain price—is separate from that supporting the alleged oral agreement—Rowe's promise to leave his job and start a business with Allely for Allely's promise to provide the necessary financial support to the business.

Assuming that the employment contract and the stock agreement are completely integrated, they represent only those agreements contained in each of the respective writings. The alleged oral agreement is a separate agreement, and thus, the parol evidence rule does not apply to exclude evidence of that alleged oral agreement.

Because there exists a genuine issue of fact whether the oral agreement was made, summary judgment was improper. We reverse, and remand for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

IN RE ESTATE OF EARL G. TREW, DECEASED. RICK L. CHANEY, PERSONAL REPRESENTATIVE OF THE ESTATE OF EARL G. TREW, DECEASED, AND SANDY K. JOHNSON, APPELLEES AND CROSS-APPELLANTS, V. EVELYN CATLETT ET AL., APPELLANTS AND CROSS-APPELLEES.

507 N.W.2d 478

Filed November 5, 1993. No. S-91-803.

1. **Decedents' Estates: Appeal and Error.** An appellate court reviews probate cases for error appearing on the record made in the county court.
2. **Rules of the Supreme Court: Parties: Physicians and Surgeons: Good Cause.** When the mental or physical condition (including the blood group) of a party is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a physician. The order may be made only on motion for good cause shown.
3. **Decedents' Estates: Paternity: Divorce.** In probate proceedings, there is no rational basis for making a distinction between a determination of paternity in a filiation proceeding and a determination of paternity in a divorce or dissolution proceeding.
4. **Decedents' Estates: Paternity: Final Orders: Courts.** When the paternity of a person has been established by final order in a lawsuit in which the father has participated as a party during his lifetime, that person's paternity cannot be relitigated in connection with the distribution of the father's estate. To hold otherwise would permit an inferior court to invalidate prior final determinations of paternity by courts of general jurisdiction. It would also raise havoc with the efficient and orderly settlement of estates and the dependability of titles to property passing under the intestacy laws of this state.
5. **Judgments: Appeal and Error.** When the record demonstrates that the decision of the trial court is correct, although such correctness is based on different grounds from those assigned by the trial court, an appellate court will affirm.
6. **Decedents' Estates.** The entire intestate estate, if there is no surviving spouse, passes to the issue of the decedent; if they are all of the same degree of kinship to the decedent, they take equally.
7. **Courts: Appeal and Error.** Where a cause has been appealed to a higher appellate court from a district court exercising appellate jurisdiction, only issues properly presented to and passed upon by the district court may be raised on appeal to the higher court. In the absence of plain error, where an issue is raised for the first time in the higher appellate court, it will be disregarded inasmuch as the district court cannot commit error in resolving an issue never presented and submitted for disposition.

Appeal from the District Court for Custer County, RONALD D. OLBERDING, Judge, on appeal thereto from the County Court for Custer County, KEITH J. KOVANDA, Judge. Judgment of District Court affirmed.

Daniel R. Stogsdill and Gregory S. Heier, of Cline, Williams, Wright, Johnson & Oldfather, for appellants.

Craig D. Johnson, of Carpenter & Johnson, P.C., for appellees.

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

FAHRNBRUCH, J.

The dispositive issue in this appeal is whether the nine siblings of the decedent, Earl G. Trew, may challenge Trew's paternity of two children born during his marriage to the children's mother when Trew did not contest his paternity of the children during divorce proceedings instituted by the children's mother.

The district court affirmed the county court's order (1) overruling the siblings' motion for blood testing of the children born during Trew's marriage to the children's mother and (2) determining that those children are the lawful heirs of Trew's intestate estate.

We affirm the order of the district court.

FACTS

Earl Trew married Donna D. Curlile on October 4, 1948. Two children were subsequently born during the marriage. Rickie Lee Trew, now known as Rick L. Chaney, was born on October 24, 1956, and Sandra Kay Trew, now known as Sandy K. Johnson, was born on March 14, 1959.

On February 4, 1960, Donna Trew filed a "Complaint in Divorce" against Earl Trew in the district court for the city and county of Denver, Colorado. She alleged in her complaint that "two children [had] been born as issue of [the] marriage," namely Rickie and Sandra Trew. Donna, inter alia, prayed for "custody of the children of the parties [and] support for said children." Donna also filed a motion for temporary support money "for the minor children of the plaintiff and defendant." On June 1, after hearing testimony by the parties, both of whom were represented by counsel, the Colorado court ordered Earl to pay $25 per week "for support *for the minor children of the parties* and alimony." (Emphasis supplied.) Earl was also

granted reasonable rights of visitation "*with the children of the parties*." (Emphasis supplied.)

On July 11, the Colorado court entered a decree of divorce giving Donna the care, custody, and control of the minor children, Rickie and Sandra, and granting Earl reasonable rights of visitation with the minor children. A further hearing on the division of property, permanent alimony, support money, custody, costs, and attorney fees was set for a date in September.

On September 15, Earl and Donna, being present with their respective attorneys, entered into an oral stipulation in the Colorado court. Pursuant to that oral stipulation and a written stipulation, an order was entered on September 29 granting Donna custody of Rickie and Sandra, and granting Earl "reasonable rights of visitation with the minor children." Throughout the order, the two children were referred to as "the minor children of the parties." Also pursuant to stipulation of the parties, Earl was ordered to pay $100 per month "for the support and maintenance of the minor children of the parties." The order further declared that Earl was $125 in arrears "for support payments for the minor children of the parties."

Following her divorce from Earl, Donna married Bob Chaney, who helped raise Rickie and Sandra, and who referred to them as his son and daughter. Both children called Bob Chaney "dad." Both testified that they always used the name "Chaney" rather than the name "Trew." On September 6, 1974, both children had their last name legally changed to Chaney. Neither child was ever adopted by Bob Chaney.

Earl married a woman named "Bonnie" after his divorce from Donna. It is uncontroverted that there were no children born of this marriage.

On October 4, 1974, Earl executed a last will and testament which included the following language: "SECOND: *I hereby give to my two children*, viz: Ricky [sic] Trew, Denver, Colorado and Sandy Trew, Denver, Colorado each the sum of Five Hundred and no/.100—($500.00)—Dollars." (Emphasis supplied.) Earl's will left the remainder of his property to his wife, Bonnie J. Trew. There was no alternative devise of the residuary estate.

Bonnie died on February 14, 1990. On June 27, Earl died without having executed a new will. Among his survivors were nine siblings. On July 3, the siblings filed in the Custer County Court an "Application for Informal Probate of Will and Informal Appointment of Co-Personal Representatives." The application stated that Earl had no children "*other than Ricky* [sic] *Trew and Sandy Trew*" and that Bonnie had no children. (Emphasis supplied.) The application failed to note that Earl's children, as devisees, under Neb. Rev. Stat. § 30-2412 (Reissue 1989) had priority to be appointed personal representative. Evelyn Catlett, a sibling of the decedent, and one Rena Downey were appointed copersonal representatives of the decedent's estate in unsupervised administration on July 3. The record does not disclose the relationship, if any, of Downey to the decedent.

Neither Rick Chaney nor Sandy Johnson was aware of Earl Trew's death until after he had been buried. On August 13, 1990, Chaney filed a "Petition for Supervised Administration, Adjudication of Partial Intestacy, Determination of Heirship and Appointment of Personal Representative" in the county court for Custer County. Chaney sought to have himself named personal representative of the decedent's estate and asserted his priority pursuant § 30-2412(a)(3).

The siblings filed a motion for discovery pursuant to Neb. Ct. R. of Discovery 35 (rev. 1992) and Neb. Rev. Stat. § 43-1414 (Reissue 1988), requesting an order that Chaney and Johnson submit to a physical examination "for the purpose of obtaining a blood sample from each of the individuals in order to allow genetic testing." The siblings alleged that such testing was necessary to conclusively determine the paternity or nonpaternity of the decedent as to Chaney and Johnson. In its order on appeal, the district court noted that Trew's siblings, "some 30+ years after the birth of the children . . . dug him up to obtain tissue samples for paternity testing . . . ."

On September 28, 1990, the county court conducted a hearing on Chaney's petition for appointment of personal representative and on the siblings' motion for discovery. At that time, the parties stipulated that witnesses for the copersonal representatives would testify that Donna Trew was engaging in

sexual relations with persons other than Earl Trew, namely with Bob Chaney, during the times that Rick Chaney and Sandy Johnson were conceived.

On October 1, the county court entered an order removing the prior-appointed copersonal representatives and appointing Chaney as personal representative under supervised administration.

On November 7, the siblings filed an "Application for Adjudication of Partial Intestacy and Determination of Heirship." The siblings alleged that Chaney and Johnson were not biological or adopted children or heirs of the decedent and that the siblings were the lawful heirs.

On January 28, 1991, the county court filed an order denying the siblings' motion for genetic testing of Chaney and Johnson. The county court invoked the doctrine of collateral estoppel, stating that the decedent had not challenged his paternity of Chaney and Johnson when he had the opportunity to do so in his Colorado divorce action from Donna Trew. Referring to the divorce action, the county judge stated:

> As defendant in an adversarial proceeding, [the decedent] did not challenge nor appeal this adjudication of paternity during his lifetime . . . the privies of this decedent are now precluded from judicial relief on issues previously decided in a suit where the decedent was a proper party and within the jurisdiction of the prior court.

The county court relied upon Neb. Rev. Stat. § 30-2309 (Reissue 1989) of the Nebraska Probate Code to support its finding that Chaney and Johnson were children of Earl Trew because their paternity had been established by an adjudication before Trew's death. Although the county judge recognized that § 30-2309 announces an evidentiary standard with respect to persons born out of wedlock, the court found that the same standard applies, a fortiori, to those persons born in wedlock.

On February 21, the county judge filed a journal entry and order finding that, with the exception of the specific devises of $500 each to Chaney and Johnson, Earl Trew died intestate because the residuary gift in his will had lapsed. The county judge further found that Chaney and Johnson were the lawful issue and heirs of the decedent and were entitled to take equally

from his estate. The siblings' application was dismissed.

On March 13, the siblings filed a notice of appeal to the district court for Custer County. The district court affirmed the orders of the county court in all respects by an order filed July 30. The siblings timely appealed to this court. Chaney and Johnson cross-appeal the failure of the county court and the district court to award them attorney fees.

ASSIGNMENTS OF ERROR

The siblings' assignments of error combine to assert that the district court erred in (1) affirming the county court's overruling of the siblings' motion for blood testing of Chaney and Johnson and (2) affirming the county court's judgment that Chaney and Johnson are entitled to the decedent's intestate estate as his issue and lawful heirs.

Chaney and Johnson assert on cross-appeal that the county court and the district court erred in not assessing attorney fees against the siblings and their counsel.

STANDARD OF REVIEW

An appellate court reviews probate cases for error appearing on the record made in the county court. *In re Estate of Stephenson*, 243 Neb. 890, 503 N.W.2d 540 (1993); *In re Estate of Watkins*, 243 Neb. 583, 501 N.W.2d 292 (1993).

ANALYSIS

MOTION FOR BLOOD TESTING

The siblings contend that the district court erred in affirming the county court's overruling of their motion for genetic blood testing of Chaney and Johnson pursuant to Neb. Ct. R. of Discovery 35 (rev. 1992). Subsection (a) of that rule provides:

> When the mental or physical condition (including the blood group) of a party . . . is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a physician . . . . The order may be made only on motion for good cause shown . . . .

We agree with the county court that "[t]he alpha and omega of this suit can be found in the Nebraska Probate Code at Sec. 30-2309." Section 30-2309 states in relevant part:

> If, for purposes of intestate succession, a relationship of parent and child must be established to determine succession by, through, or from a person,
>
> . . . .
>
> (2) . . . a person born out of wedlock is a child of the mother. *That person is also a child of the father, if*: . . .
>
> (ii) *the paternity is established by an adjudication before the death of the father* or is established thereafter by strict, clear and convincing proof.

(Emphasis supplied.)

When Donna Trew filed her complaint in divorce, she alleged that two children, Rickie and Sandra, had been born as issue of her marriage to Earl Trew. In those divorce proceedings, Earl Trew was ordered to pay child support for the minor children of the parties. He was granted visitation rights with the minor children of the parties. The record reflects that Earl Trew was represented by counsel at all stages of the divorce proceedings and was present in the divorce court when an oral and a written stipulation of the parties concerning the parties' minor children were offered and received in evidence by the divorce court. Although he could have contested his paternity of Chaney and Johnson at that time, he obviously chose not to do so.

The Colorado divorce proceedings involving Earl and Donna Trew constituted a final adjudication of paternity many years before the death of Earl Trew within the meaning of § 30-2309(2)(ii). Although § 30-2309(2) applies specifically to children born out of wedlock, the county court is correct in its finding that the statute applies a fortiori to children born in wedlock. Section 30-2309(2) does not give illegitimate children rights of inheritance *superior* to those of legitimate children. See *Lalli v. Lalli*, 439 U.S. 259, 99 S. Ct. 518, 58 L. Ed. 2d 503 (1978) (noting that the purpose of a statutory evidentiary standard for proof of paternity allowing illegitimate children to inherit from their intestate fathers is to grant illegitimates insofar as practicable rights of inheritance *on a par* with those of legitimate children).

In probate proceedings, there is no rational basis for making a distinction between a determination of paternity in a filiation proceeding and a determination of paternity in a divorce or

dissolution proceeding. We hold as a matter of law that when the paternity of a person has been established by final order in a lawsuit in which the father has participated as a party during his lifetime, the person's paternity cannot be relitigated in connection with the distribution of the father's estate. To hold otherwise would permit an inferior court to invalidate prior final determinations of paternity by courts of general jurisdiction. It would also raise havoc with the efficient and orderly settlement of estates and the dependability of titles to property passing under the intestacy laws of this state.

Although the county court invoked the doctrine of collateral estoppel in combination with § 30-2309 to overrule the siblings' motion for blood testing, we find § 30-2309 alone to be dispositive of the issue on the facts of this case. We therefore affirm the order of the district court affirming the county court's judgment. When the record demonstrates that the decision of the trial court is correct, although such correctness is based on different grounds from those assigned by the trial court, an appellate court will affirm. *State v. $15,518*, 239 Neb. 100, 474 N.W.2d 659 (1991).

DETERMINATION OF HEIRSHIP

Having determined that Chaney and Johnson are children of the decedent, we need look no further than Neb. Rev. Stat. § 30-2303 (Reissue 1989) to determine the heirs to the decedent's intestate estate. According to § 30-2303, "the entire intestate estate if there is no surviving spouse, passes as follows: (1) to the issue of the decedent; if they are all of the same degree of kinship to the decedent they take equally . . . ."

"Issue" is defined in Neb. Rev. Stat. § 30-2209(23) (Reissue 1989) as "all [of a person's] lineal descendants of all generations, with the relationship of parent and child at each generation being determined by the definitions of child and parent contained in this code." Because Chaney and Johnson are children of the decedent, they are the decedent's issue for the purposes of § 30-2303. Chaney and Johnson stand in the same degree of kinship to the decedent, and the decedent's entire intestate estate passes to them in equal shares. This assignment of error is without merit.

ATTORNEY FEES

Finally, we turn to the question of whether the district court and the county court erroneously denied Chaney and Johnson's claim for attorney fees against the siblings and their attorney because the litigation attacking Chaney's and Johnson's paternity was frivolous, groundless, and vexatious.

The record shows that Chaney and Johnson filed a motion for attorney fees in the Custer County Court on December 6, 1990. When the county court denied the siblings' motion for discovery by order dated January 28, 1991, it also denied Chaney and Johnson's motion for attorney fees and ordered each side to pay its own counsel fees.

Upon their appeal to the district court, the siblings filed a statement of errors as required by Neb. Ct. R. of Cty. Cts. 52(I)(G) (rev. 1992). Chaney and Johnson did not file a cross-appeal in the district court contesting the county court's failure to award them attorney fees, nor did they file any statement of errors in the district court. The district court, in affirming the order of the county court, ordered that neither party be awarded attorney fees in the district court.

However, there is no indication in the district court's order that it even considered the question of whether the siblings' lawsuit was frivolous, groundless, and vexatious as alleged by Chaney and Johnson in their motion for attorney fees.

> Where a cause has been appealed to [a higher appellate court] from a district court exercising appellate jurisdiction, only issues properly presented to and passed upon by the district court may be raised on appeal to [the higher] court. In the absence of plain error, where an issue is raised for the first time in [the higher appellate court], it will be disregarded inasmuch as the district court cannot commit error in resolving an issue never presented and submitted for disposition.

Haeffner v. State, 220 Neb. 560, 564, 371 N.W.2d 658, 661 (1985).

It is apparent that the issue of attorney fees was never properly presented to the district court, and therefore, the district court could not commit error in this regard. There being no plain error, this court is obligated to disregard this assignment of error.

CONCLUSION

The order of the district court affirming the judgment of the county court is affirmed.

AFFIRMED.

HASTINGS, C.J., not participating.

ANTHONY R. PANTANO AND ARLENE L. PANTANO, APPELLEES, V. MARYLAND PLAZA PARTNERSHIP, A NEBRASKA GENERAL PARTNERSHIP, APPELLEE, AND FIREMAN'S FUND INSURANCE CO., A CORPORATION, INTERVENOR-APPELLANT.

507 N.W.2d 484

Filed November 5, 1993. No. S-91-805.

1. **Mortgages: Insurable Interest.** In insuring, a mortgagee insures not the real estate, but his interest in or lien on the real estate.
2. _____: _____. The mortgagee has an insurable interest only to the extent of the amount owing under the mortgage.
3. _____: _____. If the underlying debt is satisfied, then the mortgagee's insurable interest terminates.
4. **Judgments: Trusts: Deeds: Sales.** Under Neb. Rev. Stat. § 76-1013 (Reissue 1986), the amount of a deficiency judgment is limited to the difference between the total indebtedness and the greater of the sale price or the fair market value.
5. _____: _____: _____: _____. When, under Neb. Rev. Stat. § 76-1013 (Reissue 1986), a trial court finds no deficiency, the underlying obligation is satisfied.
6. **Mortgages: Insurance: Subrogation.** On payment to the mortgagee, the insurer becomes subrogated to the rights of the mortgagee against the mortgagor.
7. **Mortgages: Insurance.** When the mortgagee does not suffer a security loss, the insurer is entitled to recover the insurance proceeds paid to the mortgagee.

Appeal from the District Court for Douglas County: JOHN E. CLARK, Judge. Reversed and remanded with directions.

Ronald H. Stave, of Stave & Coffey, P.C., for intervenor-appellant.

Leo A. Knowles and Robert G. Dailey, of McGrath, North, Mullin & Kratz, P.C., for appellees Pantano.

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

WHITE, J.

This case arose from a deficiency judgment action in which the trust deed beneficiary sued the trustor and the beneficiary's insurer intervened. The district court found that no deficiency judgment was warranted and dismissed the action against the trustor. The district court also dismissed the insurer's petition in intervention. The insurer appeals. We reverse, and remand with directions.

In January 1984, Maryland Plaza Partnership executed a promissory note for $734,260 in favor of Panalene Realty Company. The note was secured by a trust deed for two parcels of real property: 1325 South 72d Street and 1217 South 72d Street, Omaha, Nebraska (the trust properties). In June 1984, Panalene assigned all of its interest in the note and trust deed to Anthony R. and Arlene L. Pantano.

In September 1988, the trustee filed a notice of default. Maryland Plaza failed to cure the default within 30 days. The Pantanos declared the entire balance of the note immediately due and payable, and instructed the trustee to sell the trust properties.

In October 1988, the Pantanos purchased fire insurance from Fireman's Fund Insurance Co. on both trust properties. The Fireman's Fund policy protected the Pantanos' interest "as mortgagees." The Fireman's Fund policy did not protect Maryland Plaza's interest in the trust properties.

The trust properties were also insured against fire damage under a second policy. United Fire & Casualty Company issued a fire insurance policy insuring the interests both of the Pantanos and of Maryland Plaza. Maryland Plaza later assigned its interest in this policy to the Pantanos.

In January 1989, a fire occurred at 1217 South 72d Street, one of the trust properties. As a result of the fire, Fireman's Fund paid the Pantanos $155,000, the face amount of the policy on that property. United Fire & Casualty Company paid the Pantanos $192,500.

In July 1989, the trustee conducted a sale of the two trust

properties, in accordance with the Nebraska Trust Deeds Act, Neb. Rev. Stat. § 76-1001 et seq. (Reissue 1986 & Cum. Supp. 1988). At the trustee's sale, the Pantanos purchased the properties for $500,000. At the time of sale, Maryland Plaza owed the Pantanos the following amounts: $750,903.35 in principal on the note, $115,596.82 in accrued interest on the principal, $50,424.64 for real estate taxes, $201.78 for costs of public sale, and $17,856.10 in trustee's fees. In all, the total indebtedness of Maryland Plaza was $934,982.69.

The Pantanos sued Maryland Plaza, seeking a deficiency judgment. Fireman's Fund intervened, seeking to recover the proceeds that it had paid to the Pantanos. The trial was held on stipulated evidence, and the parties submitted written arguments. Among other things, the Pantanos and Fireman's Fund stipulated:

> Without conceding one way or the other whether the mortgage indebtedness due from [Maryland Plaza] to [the Pantanos] has been paid in full [the Pantanos] may not recover a deficiency judgment against [Maryland Plaza] pursuant to Nebraska Revised Statute Section 76-1013 since the fair market value of the property at least equals the outstanding, outstanding [sic] indebtedness to [the Pantanos].

The district court first dismissed the deficiency judgment action against Maryland Plaza. The district court then found generally for the Pantanos and against Fireman's Fund. The court reasoned that Fireman's Fund was not entitled to recover the proceeds it had paid to the Pantanos until Maryland Plaza's total indebtedness had been paid in full. The district court held that although the Pantanos were unable to obtain a deficiency judgment, the total indebtedness had never been fully satisfied. The district court therefore determined that Fireman's Fund was not entitled to any recovery and dismissed Fireman's Fund's petition in intervention. Fireman's Fund filed a motion for new trial, and the district court overruled the motion. Fireman's Fund appealed to this court.

This is an equity case, and we review it de novo on the record. We are called upon to decide, as between a trust deed beneficiary and its insurer, who has rights to certain insurance

proceeds.

At the outset, it is necessary to describe the nature of the insurance policy issued to the Pantanos by Fireman's Fund. We have long recognized that mortgagees have an insurable interest in the mortgaged property. See *Hanover Fire Ins. Co. v. Bohn*, 48 Neb. 743, 67 N.W. 774 (1896). In insuring, a mortgagee insures not the real estate, but his interest in or lien on the real estate. *Id.*; 3 George J. Couch et al., Cyclopedia of Insurance Law § 24:72 (rev. 2d ed. 1984). The mortgagee has an insurable interest only to the extent of the amount owing under the mortgage. *Wriedt v. Beckenhauer*, 183 Neb. 311, 159 N.W.2d 822 (1968). If the underlying debt is satisfied, then the mortgagee's insurable interest terminates. See, *id.*; 3 Couch et al., *supra*. For purposes of insurable interest, a trust deed beneficiary is the functional equivalent of a mortgagee.

The parties' first dispute is whether Maryland Plaza's underlying debt was satisfied when the trial court found that no deficiency judgment action would lie. Nebraska's deficiency judgment statute, contained in the Nebraska Trust Deeds Act, limits the amount which a court can award as a deficiency judgment:

> The court shall not render judgment for more than the amount by which the amount of the indebtedness with interest and the costs and expenses of sale, including trustee's fees, exceeds the fair market value of the property or interest therein sold as of the date of the sale, and in no event shall the amount of said judgment, exclusive of interest from the date of sale, exceed the difference between the amount for which the property was sold and the entire amount of the indebtedness secured thereby, including said costs and expenses of sale.

§ 76-1013. The district court properly found that because the fair market value of the property was at least equal to the indebtedness at the time of the public sale, no deficiency judgment action would lie against Maryland Plaza.

The district court also found that Maryland Plaza's underlying obligation had not been satisfied. In so doing, the district court relied on *Sumner v. Enercon Development Company*, 307 Or. 579, 771 P.2d 619 (1989). In *Sumner*,

Oregon's anti-deficiency-judgment statute wholly precluded deficiency judgment actions by foreclosing purchase money mortgagees against mortgagors. Unable to recover against the mortgagor, the mortgagee in *Sumner* sought a deficiency judgment against the guarantor. The Supreme Court of Oregon held that the anti-deficiency-judgment statute limited "the trial court's authority to enter a deficiency judgment" but had "no effect on the existence of the underlying debt." *Id.* at 582, 771 P.2d at 620. Accord *Consolidated Capital Income v. Khaloghli*, 183 Cal. App. 3d 107, 227 Cal. Rptr. 879 (1986) (although anti-deficiency-judgment statute precludes mortgagee from recovering against principal debtor, mortgagee may recover deficiency from guarantor).

The Pantanos argue that the Oregon anti-deficiency-judgment statute is analogous to § 76-1013 and that the district court properly relied on *Sumner*. We disagree.

Under § 76-1013, a court may allow a deficiency judgment in certain circumstances. We interpret § 76-1013 to require the following calculations: The court must first determine the fair market value of the property. The court must next compare the fair market value of the property to the sale price to determine which is the greater amount. Finally, the court must subtract this greater amount from the total indebtedness to arrive at the amount of the deficiency. The amount of the deficiency represents the amount still due and owing to the creditor. Accordingly, a finding of "no deficiency" is tantamount to a finding that nothing is due and owing to the creditor because either the value of the property or the proceeds of the sale were sufficient to satisfy the debt.

Section 76-1013 contrasts starkly with the Oregon statute at issue in *Sumner*. While § 76-1013 allows a cause of action for a deficiency judgment and places some limits on the amount of recovery, the Oregon statute wholly denies a cause of action for a deficiency judgment. Moreover, the Oregon statute requires no comparison of debt, fair market value, and sale price. The Oregon statute never asks the question which lies at the heart of § 76-1013: Did the creditor get its due? We thus find the reasoning of *Sumner* inapplicable to the present case.

The Nebraska Trust Deeds Act was enacted in 1965. The act

authorizes the use of trust deeds to secure the performance of obligations. *Blair Co. v. American Savings Co.*, 184 Neb. 557, 169 N.W.2d 292 (1969). The act provides that a trust deed may confer a power of sale on a trustee. *Id.*; § 76-1005. The act provides for the possibility of a deficiency judgment following a trustee's sale. § 76-1013. The amount of the deficiency judgment is limited; a creditor can recover only the difference between the total indebtedness and the greater of the sale price or the fair market value. *Id.*

In the world of deficiency judgments, this statute represents a departure from tradition. Traditionally, the amount of a deficiency judgment was the total indebtedness minus the price paid at public sale. 1 Grant S. Nelson & Dale A. Whitman, Real Estate Finance Law § 8.3 (3d ed. 1993). This equation resulted in considerable benefit to the creditor. At sale, the creditor could radically underbid a valuable property, take title, and then sue the debtor for the deficiency. *Id.*

Legislatures responded to this problem in part by enacting statutes, like § 76-1013, which added the element of fair market value. See 1 Nelson & Whitman, *supra*. Under § 76-1013, for example, the amount of a deficiency judgment would be the total indebtedness minus the greater of (1) the sale price or (2) the fair market value of the property. A creditor gains no advantage by underbidding a property because, if he does, the deficiency will still be calculated on the basis of the fair market value. In essence, the creditor must apply the value of the property toward the indebtedness. See, *OMP v. Security Pacific Business Finance, Inc.*, 716 F. Supp. 251 (N.D. Miss. 1989); *Lake Hillsdale Estates, Inc. v. Galloway*, 473 So. 2d 461 (Miss. 1985); *Investments v. Housing, Inc.*, 292 N.C. 93, 232 S.E.2d 667 (1977). Thus, the debtor gets credit for the value of the property. *Guardian Depositors Corp. v. Powers*, 296 Mich. 553, 296 N.W. 675 (1941); *Carrols Equities Corp. v. Della Jacova*, 126 N.H. 116, 489 A.2d 116 (1985).

Crediting the value of the property against the debt is especially appropriate when the mortgagee or trust deed beneficiary purchases the property. See *Hellman v. Capurro*, 92 Nev. 314, 549 P.2d 750 (1976). In *Hellman*, the trust deed beneficiaries purchased the trust property. The trust property

was valued at $117,600, the debt was approximately $65,400, and the sale price was $20,000. Applying a statute substantially similar to § 76-1013, the Supreme Court of Nevada found that the debt had been satisfied:

> Finding that no action for a deficiency judgment will lie for the reason that the deed of trust beneficiary purchased the property and obtained value in excess of the indebtedness is equivalent to finding that the trustor's debt has been extinguished. [Citations omitted.] A mortgagee or a beneficiary to a deed of trust is entitled to only one satisfaction of his debt. [Citations omitted.] . . . It cannot in fairness be asserted that the [trustor's] obligation to the [beneficiary] remains unsatisfied . . . .

92 Nev. at 316, 549 P.2d at 751. *Hellman* thus stands for the proposition that when a trust deed beneficiary purchases trust property that has a fair market value greater than the amount of the debt, the underlying obligation is satisfied.

We find the reasoning of *Hellman* persuasive. Accordingly, we hold that when, under § 76-1013, a trial court finds no deficiency, the underlying obligation is satisfied.

In the present case, Fireman's Fund and the Pantanos stipulated that the fair market value of the property at least equaled the total indebtedness secured by the property. Because of that stipulation, the trial court correctly found that neither Fireman's Fund nor the Pantanos were entitled to a deficiency judgment. As a result, we find that Maryland Plaza's debt owed to the Pantanos has been satisfied.

Because the debt owed to the Pantanos has been satisfied, the Pantanos' insurable interest has terminated. See 3 George J. Couch et al., Cyclopedia of Insurance Law § 24:72 (rev. 2d ed. 1984). If the Pantanos' insurable interest has terminated, then it would seem that the Pantanos are not entitled to any share of the insurance proceeds. The Pantanos contend, however, that Fireman's Fund cannot recover the proceeds because Fireman's Fund is limited to exercising its subrogation rights against the trustor. Fireman's Fund responds that because the debt has been satisfied, the Pantanos have not suffered a security loss and must return the proceeds.

The parties' second dispute, therefore, is whether Fireman's

Fund has a cause of action against the Pantanos. Both parties rely heavily on our decision in *Wriedt v. Beckenhauer*, 183 Neb. 311, 159 N.W.2d 822 (1968).

In *Wriedt*, three men, Day, Mohr, and Beckenhauer, owned a tract of land. The three men purchased fire insurance to cover improvements to the property. After purchasing the insurance, the three men sold the property to Wriedt. Wriedt executed and delivered a mortgage back to Beckenhauer. A fire occurred, partially damaging a house on the property. The three men filed a proof of loss and received insurance proceeds. Wriedt brought an action against the three men to recover these proceeds, and the insurance company intervened.

In reviewing the case, we first determined the insurable interests of each of the parties. We found that Day and Mohr, having conveyed their entire interest in the property, had no insurable interest and were not entitled to any share of the proceeds. We also found that although Wriedt had an insurable interest, his interest was not protected by the policy, and thus Wriedt was not entitled to any share of the proceeds. We then found that Beckenhauer did have an insurable interest, but only to the extent of the amount owing under the mortgage.

In *Wriedt*, as in the present case, the two parties with any claim to the insurance proceeds were the mortgagee and the insurance company. In discussing the relative rights of the mortgagee and the insurance company in *Wriedt*, we stated:

> In the event of a loss by fire of the insured property, or a part thereof, the mortgagee is entitled to be compensated by his insurance, but if the mortgage indebtedness is subsequently paid in full, he has not sustained a security loss and insurer is entitled to recover the insurance paid. "If the mortgagee, or one in like position, is the party insured and the policy is written so as to cover his interest only, insurer, on payment to the mortgagee, becomes subrogated pro tanto to the rights of the mortgagee against the mortgagor, even though the policy contains no subrogation clause purporting to give such right to insurer . . . ."

Id. at 315, 159 N.W.2d at 825.

Wriedt stands for two distinct principles relating to policies

insuring the interest of mortgagees " 'or one in like position.' " First, on payment to the mortgagee, the insurer becomes subrogated to the rights of the mortgagee against the mortgagor. Second, when the mortgagee does not suffer a security loss, the insurer is entitled to recover the insurance proceeds paid to the mortgagee. These two propositions stand independently. That is, an insurer can recover the paid proceeds, but need not do so through a subrogation action. It remains to apply these two principles to the present case.

The subrogation principle is easily applied and is not disputed. Because Fireman's Fund paid the face value of the policy to the Pantanos, Fireman's Fund possessed a subrogation right against the trustor, Maryland Plaza. If the Pantanos had received a deficiency judgment against Maryland Plaza, then Fireman's Fund would have had a subrogation right to a pro tanto share of the judgment, subject only to the Pantanos' right to fully recover their investment. See *id.* However, the Pantanos did not receive a deficiency judgment, and therefore Fireman's Fund was unable to exercise any right of subrogation.

The recovery principle is the focus of the parties' dispute. As we have just stated, if a deficiency judgment had been entered and Maryland Plaza had paid the Pantanos in full, then Fireman's Fund would have been entitled to a share of that payment. Instead of finding a deficiency and ordering payment, the district court found that no deficiency was warranted because the fair market value of the property at least equaled the outstanding indebtedness. Previously in this opinion, we held that this was tantamount to finding that Maryland Plaza had paid the Pantanos in full. Fireman's Fund is entitled to a share of this "payment" just as it would have been entitled to a share of a cash payment. The rights of the insurer do not decrease simply because its insured, a trust deed beneficiary, is paid in equity rather than in cash.

We therefore hold that if a court finds no deficiency because the fair market value of the property is greater than or equal to the total indebtedness, and if the property is insured by a policy insuring the trust deed beneficiary's interest only, then the insurance company is entitled to recover proceeds paid out to

the beneficiary.

The outstanding indebtedness due the Pantanos should have been deemed paid in full by virtue of the trial court's finding of no deficiency. Because the Pantanos received the face value of the policy, which insured only the Pantanos' interest in the trust properties, Fireman's Fund is entitled to recover the proceeds paid to the Pantanos. Fireman's Fund may also be entitled to an award of prejudgment interest, but we are unable, on this record, to determine whether Fireman's Fund has met the procedural prerequisites to such an award. See Neb. Rev. Stat. § 45-103.02 (Reissue 1988). This matter can be examined on remand.

We reverse the decision of the district court and remand the cause with directions to enter judgment for Fireman's Fund against the Pantanos in the amount of $155,000.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. ROBERT M. GERSTNER, APPELLANT.

507 N.W.2d 490

Filed November 5, 1993. No. S-91-1256.

1. **Courts: Appeal and Error.** When a district court reviews the decisions of a county court, only those errors specifically assigned in the appeal to the district court and again assigned as error on further appeal will be considered by higher appellate courts.
2. **Effectiveness of Counsel: Appeal and Error.** Allegations of ineffective assistance of counsel must be set forth in the assignments of error.

Petition for further review from the Nebraska Court of Appeals, HANNON, IRWIN, and MILLER-LERMAN, Judges, on appeal thereto from the District Court for Douglas County, JOSEPH S. TROIA, Judge, on appeal thereto from the County Court for Douglas County, THOMAS G. MCQUADE, Judge. Judgment of Court of Appeals affirmed.

Thomas K. Harmon, of Respeliers and Harmon, P.C., for appellant.

Don Stenberg, Attorney General, and Mark D. Starr for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, FAHRNBRUCH, and LANPHIER, JJ., and MORAN, D.J., Retired.

LANPHIER, J.

Defendant, Robert M. Gerstner, was arrested at the door of his home. The Omaha police officer making the arrest had seen him driving his car erratically. Defendant claimed the arrest was illegal. Defendant's attorney sought to suppress evidence of the arrest and surrounding circumstances, but failed to object to its introduction at trial. Defendant was convicted by a jury of operating a motor vehicle while intoxicated, third offense. New counsel filed a statement of errors, which is governed by Neb. Ct. R. of Cty. Cts. 52(I)(G) (rev. 1992). New counsel later discovered after the bill of exceptions had been prepared that previous counsel had failed to object to the evidence at trial and sought appellate review on the basis of incompetence of counsel. The district court for Douglas County affirmed defendant's conviction, and the Nebraska Court of Appeals reversed the district court's judgment in *State v. Gerstner*, 2 NCA 565 (1993), with directions to dismiss the conviction. We granted further review for the purpose of addressing the issues of timeliness in filing the statement of errors and present defense counsel's failure to assign effectiveness of counsel within the statement of errors. We affirm the decision of the Court of Appeals.

FACTS

Officer Daniel Tanner of the Omaha Police Division was conducting a traffic stop on March 2, 1991, at approximately 1:12 a.m. He noticed that a Datsun automobile turning south from Maple Street onto 62d Street went over the curb and hit a park bench located on the southwest corner of 62d and Maple. The driver backed up the vehicle. Tanner turned on his cruiser's overhead rotating lights and motioned for the driver to stop. The driver slowly drove past Tanner, enabling Tanner to

partially see the driver through the vehicle's tinted windows. Tanner was able to learn the identity of the registered owner of the Datsun after radioing headquarters. After returning the driver's license of the driver involved in the traffic stop, Tanner proceeded to the address provided for the owner of the Datsun. He arrived at the home of defendant shortly thereafter and found the Datsun in the driveway. After inspecting the Datsun and determining that it was the vehicle that hit the park bench, he called for backup and knocked on the door. When defendant came to the door, Tanner recognized him as the driver of the Datsun. Tanner immediately grabbed defendant's right wrist and told him he was under arrest for "hit and run." As he arrested defendant, Tanner noticed symptoms of intoxication displayed by defendant. Defendant pulled Tanner into the house, and a struggle ensued. Eventually, other officers arrived and helped subdue defendant. At trial, Tanner testified that after defendant was handcuffed, defendant told his girl friend he had "fucked up," to which the girl friend responded, "I know." At the police station, defendant voluntarily submitted to, and failed, a breath test. Defendant was subsequently charged with driving under the influence of alcohol.

Defendant's counsel filed a motion to suppress the Intoxilyzer test, the results of the test, and apparently, the statement made by defendant to his girl friend. The motion was denied. At trial, defense counsel made no objection to the introduction of the breath test or the statement, and they were admitted into evidence.

The jury returned a guilty verdict on June 12, 1991, and defendant's counsel filed a motion for a new trial on June 17. No error was assigned to the trial court's failure to sustain the motion to suppress nor to the introduction of the evidence. At an enhancement hearing on June 27 for defendant's third-offense drunk driving, he was represented by trial counsel, James P. Miller. On August 15, at the sentencing hearing, defendant's present counsel, Thomas K. Harmon, explained to the court that he had been retained to represent defendant after Miller had suffered a heart attack. On July 22, Harmon had filed an appearance of counsel and had advised the court of his intention to proceed on the motion for new trial

filed by Miller.

On August 20, defendant's present counsel filed a notice of appeal, a praecipe for a bill of exceptions, and a praecipe for a transcript. On September 5, the certificate of transcript was filed in the district court. Defendant's new counsel had filed a statement of errors in the district court on September 16. On October 29 and 30, the bill of exceptions was certified by the two county judges who presided over the trial. The statement of errors filed before the bill of exceptions had been prepared failed to specify as error the claim of ineffectiveness of trial counsel.

On November 21, at the hearing on the appeal, the district court denied the motion for new trial and found that defendant was not prejudiced by his trial counsel's failure to object at trial to the introduction of the evidence.

The Court of Appeals reversed the district court's judgment on the ground that defendant was, in fact, prejudiced by his trial counsel's failure to object at trial. It also gave directions to dismiss the action because it found the evidence of the breath test and the results were inadmissible because of an illegal arrest. The State petitioned this court for further review, claiming that the Court of Appeals erred in hearing the issue of ineffectiveness of counsel because it was not contained in the statement of errors as required by *State v. Erlewine*, 234 Neb. 855, 452 N.W.2d 764 (1990), and because the statement of errors was untimely filed under Neb. Ct. R. of Cty. Cts. 52(I)(G) (rev. 1992).

TIMELINESS AND STATEMENT OF ERRORS

In *Erlewine*, this court held that in reviewing decisions of the district court appealed from the county court, it would 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." 234 Neb. at 857, 452 N.W.2d at 767. On February 21, 1991, the Supreme Court adopted rule 52(I)(G), which provides:

> Statement of errors. Within 10 days of filing a notice of appeal, the appellant shall file with the district court a statement of errors, which shall consist of a separate,

> concise statement of each error a party contends was made by the trial court. . . . Consideration of the case will be limited to errors assigned and discussed. The district court may, at its option, notice a plain error not assigned.

There is no question that the statement of errors was not filed within the prescribed time and that the statement of errors did not include the claim of ineffective assistance of counsel. The notice of appeal was filed on August 20, 1991, along with praecipes for the bill of exceptions and transcript. The statement of errors was not filed until September 16, and no mention is made therein of the ineffectiveness of counsel claimed now by defendant. The question which remains is whether the rule should be applied in this instance where defense counsel was unable to review the record for error because the bill of exceptions was not filed in the district court until October 31, at least 5 days after the 10 days in which to file the statement of errors had expired.

The Court of Appeals' opinion sets forth several reasons why defendant's failure to allege ineffectiveness of counsel as error constitutes an exception to *Erlewine*.

> First, the defendant alleges that his trial counsel was ineffective because he failed to object to the introduction of certain evidence. Although it may have deprived the defendant of a fair trial, his trial counsel's failure to object was not an error committed by the trial court. Second, in this particular case, new counsel promptly filed a statement of errors which included alleged errors regarding the court's denial of the suppression motion and receipt of the evidence with as much specificity as counsel not present at the trial could be expected to provide.

State v. Gerstner, 2 NCA 565, 571 (1993).

While we agree with the conclusion of the Court of Appeals, we find the first reason provided by the Court of Appeals does not comport with traditional appellate procedures. The first reason apparently suggests that defendant was not required to assign as error the alleged ineffectiveness of his counsel because the error was not committed by the court but by his trial counsel. This reason is not supported by this court's current appellate procedures. Pursuant to Neb. Ct. R. of Prac. 9D(1)d

(rev. 1992), a party must specifically assign all errors allegedly made by the trial court. Allegations of ineffectiveness of counsel fall within the scope of this rule. Indeed, they have invariably been included within a party's assignments of error. See, *State v. Navrkal*, 242 Neb. 861, 496 N.W.2d 532 (1993); *State v. Victor*, 242 Neb. 306, 494 N.W.2d 565 (1993); *State v. Reichert*, 242 Neb. 33, 492 N.W.2d 874 (1993). Furthermore, this court has required that allegations of ineffective assistance of counsel be set forth in the assignments of error. *State v. Wiley*, 225 Neb. 55, 402 N.W.2d 311 (1987).

However, defense counsel had no opportunity to review the bill of exceptions before submitting the statement of errors. This prevented him from discovering any alleged ineffectiveness of defendant's prior counsel until after the statement of errors was due. New defense counsel's failure to assign the claim of ineffectiveness of counsel and the resultant delay in submitting the statement of errors were excusable. Without the benefit of the bill of exceptions, new counsel would have no basis to determine which errors to assign. Under these circumstances, an exception to the rule in *Erlewine* was necessarily in order.

CONCLUSION

We affirm the holding of the Court of Appeals reversing the district court's judgment and remanding the cause with directions to dismiss the charge of operating a motor vehicle while intoxicated, third offense.

AFFIRMED.

BRIAN ZWINGMAN, APPELLEE, V. RONALD KALLHOFF, DEFENDANT AND THIRD-PARTY PLAINTIFF, APPELLANT, AND KEATING INTERNATIONAL, INC., A NEBRASKA CORPORATION, AND FARMHAND, INC., ALSO KNOWN AS NEW FARMHAND, INC., A DELAWARE CORPORATION, THIRD-PARTY DEFENDANTS, APPELLEES.

507 N.W.2d 894

Filed November 12, 1993. No. S-91-784.

1. **Summary Judgment.** A summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences to be drawn therefrom and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing an order sustaining a motion for summary judgment, an appellate court views the evidence in a light most favorable to the party opposing the motion and gives that party the benefit of all reasonable inferences that may be deduced from the evidence.
3. **Employer and Employee: Independent Contractor: Negligence: Liability.** Generally, the employer of an independent contractor is not liable for physical harm caused to another by the acts or omissions of the contractor or his servants.
4. **Independent Contractor.** Control or the right to control is the chief criterion in the determination of whether one acts as an independent contractor.
5. **Sales: Agents.** One who receives goods from another for resale to a third person is not thereby the other's agent unless the former's duty is to act primarily for the benefit of the one delivering the goods.

Appeal from the District Court for Holt County: EDWARD E. HANNON, Judge. Affirmed.

Max G. Dreier, of Jewell, Gatz, Collins, Dreier & Fitzgerald, for appellant.

Robert A. Wichser, of Sodoro, Daly & Sodoro, for appellee Farmhand, Inc.

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

BOSLAUGH, J.

The original plaintiff, Brian Zwingman, brought this negligence action to recover damages resulting from personal injuries which occurred on October 19, 1987, when his clothing became caught on a haystack mover which was owned by the

original defendant and appellant in this appeal, Ronald Kallhoff. Kallhoff filed a third-party petition against Keating International, Inc. and Farmhand, Inc. Those parties moved for summary judgment. The district court granted summary judgment in favor of Farmhand only. Kallhoff appeals from that summary judgment. Thus, this appeal involves only Kallhoff's assertion that the district court erred in granting summary judgment in favor of Farmhand.

A summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences to be drawn therefrom and that the moving party is entitled to judgment as a matter of law. *Gould v. Orr, ante* p. 163, 506 N.W.2d 349 (1993). In reviewing an order sustaining a motion for summary judgment, an appellate court views the evidence in a light most favorable to the party opposing the motion and gives that party the benefit of all reasonable inferences that may be deduced from the evidence. *Design Data Corp. v. Maryland Cas. Co.*, 243 Neb. 945, 503 N.W.2d 552 (1993).

The record shows that the appellee Farmhand manufactured the haystack mover on which Zwingman was injured. Farmhand shipped the partially unassembled haystack mover to its dealer, Keating International. The machine was accompanied by printed assembly instructions. Keating International assembled the machine and sold the machine to the appellant, Kallhoff, on October 11, 1979.

Within 2 weeks after purchasing the haystack mover, Kallhoff encountered difficulty in maintaining the required coupling of two component parts of the haystack mover. Kallhoff discussed the problem with John Keating of Keating International. John Keating indicated to Kallhoff that someone from Keating International would travel to Kallhoff's farm to "have it checked out." Within a week after that conversation, Kallhoff discovered that set screws in the coupling had been replaced by protruding hex-headed bolts. It is one of these bolts which caught Zwingman's clothing.

There remains a dispute as to whether Keating International actually performed the repairs which resulted in the protruding

headbolt's being placed into the drive shaft, and there is also some question whether the repair, if made by Keating International, was made pursuant to the manufacturer's warranty. For purposes of this opinion, however, we assume that Keating International did make the repair, that Keating International was negligent in making the repair, and that the repair was covered by the manufacturer's warranty. Given these assumptions, the question presented is whether, under the circumstances in this case, a manufacturer is vicariously liable for a dealer's negligent repair of the manufacturer's product when the repair is covered by the manufacturer's warranty.

Generally, the employer of an independent contractor is not liable for physical harm caused to another by the acts or omissions of the contractor or his servants. *Erickson v. Monarch Indus.*, 216 Neb. 875, 347 N.W.2d 99 (1984); *Sullivan v. Geo. A. Hormel and Co.*, 208 Neb. 262, 303 N.W.2d 476 (1981). See *Herman v. Bonanza Bldgs., Inc.*, 223 Neb. 474, 390 N.W.2d 536 (1986). Furthermore, control or the right to control is the chief criterion in the determination of whether one acts as an independent contractor. *Herman v. Bonanza Bldgs., Inc., supra*; *Erspamer Advertising Co. v. Dept. of Labor*, 214 Neb. 68, 333 N.W.2d 646 (1983). In addition, one who receives goods from another for resale to a third person is not thereby the other's agent unless the former's duty is to act primarily for the benefit of the one delivering the goods. *Herman v. Bonanza Bldgs., Inc., supra.*

Consistent with these principles is the analysis contained in *Peeples v. Kawasaki Heavy Indust., Ltd.*, 288 Or. 143, 603 P.2d 765 (1979). In *Peeples*, a motorcyclist who was injured in an accident allegedly caused by a loose chain drive slipping off a sprocket sought recovery against the dealer and also the distributor and manufacturer of the motorcycle on the theory that they were vicariously liable for the dealer's negligence in performing service work under the terms of the warranty agreement. The court reviewed the contract between the distributor and the dealer and stated:

> This agreement clearly gives the distributor the right, through its power to set "standards" governing the dealer's method of operation, service, and warranty repair

> and its power of immediate termination for the dealer's breach of any of those standards, to control to some degree the physical conduct of the dealer and his employees in the performance of warranty-related service work. If that right exists, we have said that it is not important that the right may not actually have been exercised. [Citations omitted.] In this case there was, however, some evidence that the distributor's right of control was in fact exercised. There was testimony from which the jury could conclude that the distributor furnished the dealer with charts showing how certain adjustments, including adjustments to the drive chain, should be made and that the dealer's mechanics were directed to follow those charts. The jury could also find that the distributor required the dealer's mechanics to attend its training schools and that the distributor periodically sent representatives to visit the dealer's shop to see that instructions were being followed.

288 Or. at 148-49, 603 P.2d at 768. The Supreme Court of Oregon concluded that based upon such evidence, a jury could find that the distributor was vicariously liable for its dealer's negligence in performing service work under terms of the warranty.

The court then considered the prospective vicarious liability of the manufacturer and determined that the manufacturer could not be held liable for the dealer's negligence in servicing the motorcycle. The court stated:

> As to the manufacturer, however, we find no comparable evidence in the record. So far as the evidence shows, there is no contractual relationship between the dealer and the manufacturer, and no history of either the exercise of actual control by the manufacturer over the dealer's performance of service work or any recognition by the dealer of the manufacturer's right to exert such control. The failure to grant the manufacturer's motion for directed verdict was error, and the judgment against the manufacturer must be reversed.

288 Or. at 150, 603 P.2d at 769.

With respect to Farmhand, the record contains no evidence

that Farmhand either had a right to control or in fact exercised any control over Keating International with respect to warranty service work which Keating International performed on equipment manufactured by Farmhand. While there may have been some form of dealership contract between Keating International and Farmhand, and while Keating International did receive credit for warranty work which it performed on Farmhand equipment, the record affirmatively shows that Farmhand conducted no seminars or training courses regarding the assembly or the performance of warranty work on equipment which it manufactured. Furthermore, the record contains no evidence that Farmhand did anything more to control the work done by Keating International than to include an assembly and operating manual with the equipment which it shipped to Keating International. Farmhand's inclusion of this manual with the equipment it shipped to Keating International is insufficient to render Farmhand vicariously liable for Keating International's possible negligence in repairing the equipment, even if the repairs were covered under Farmhand's warranty. Consequently, the district court properly granted summary judgment in Keating International's favor.

We acknowledge the appellant's argument regarding the applicability of the Restatement (Second) of Torts § 423 (1978), which is entitled "Making or Repair of Instrumentalities Used in Highly Dangerous Activities." That section states at 410:

> One who carries on an activity which threatens a grave risk of serious bodily harm or death unless the instrumentalities used are carefully constructed and maintained, and who employs an independent contractor to construct or maintain such instrumentalities, is subject to the same liability for physical harm caused by the negligence of the contractor in constructing or maintaining such instrumentalities as though the employer had himself done the work of construction or maintenance.

Relying upon § 423 of the Restatement, *supra*, and *Rager v. Superior Coach Sales & Serv. of Arizona*, 111 Ariz. 204, 526 P.2d 1056 (1974), Kallhoff argues that Farmhand's duty to make warranty repairs was nondelegable and that Farmhand is

therefore liable for Keating International's negligence in making those repairs. In *Rager*, the manufacturer of a bus arranged for the repair of defective brakes on the vehicle under terms of the warranty. The repair was to be done by an independent contractor. Relying upon § 423 of the Restatement, *supra*, the Arizona Supreme Court found that the manufacturer could be held liable for the independent contractor's negligence on the basis that the repair of brakes is "an undertaking which creates a high degree of risk of serious bodily harm" and is, therefore, a nondelegable duty. 111 Ariz. at 211, 526 P.2d at 1063.

Comment *a.* to § 423 of the Restatement, *supra*, states at 410-11:

> The rule stated in this Section is applicable only in those exceptional activities in which an imperfection in their appliances and instrumentalities involves a grave risk of causing serious bodily harm or death. Notwithstanding the great danger which is threatened by the slightest imperfection in the instrumentalities used in them, they are recognized as so generally useful that they are permitted to be carried on without liability unless there is some carelessness in their operation or in the preparation of the appliances and instrumentalities used. They are not carried on at the risk of answering for any harm which results from them, as may be the case of an activity which is abnormally dangerous even if carefully carried on and which is carried on to meet some peculiar need of the persons who conduct them. (See §§ 519 and 520.) However, the danger involved in the inadequacy of the appliances and instrumentalities by which such activities are carried on is so great that those who carry them on are subject to liability for harm caused by any negligence in constructing or maintaining them, irrespective of whether it is their own negligence or that of a contractor employed by them. Such activities stand midway between those which are so little dangerous and of such universal utility that personal fault is necessary to liability and those abnormal activities which are so dangerous even if carefully carried on as to require the imposition of liability

> irrespective of negligence.
>
> Thus an electric light or power company which conveys its high voltage electricity over wires upon or close to public highways or privately owned property is carrying on a business which involves great danger of extremely serious harm or death unless its wires are kept properly safeguarded and its other appliances are kept in perfect condition. If it entrusts to an independent contractor the maintenance or repair of its wires or appliances, it remains liable for any harm caused by the contractor's carelessness or incompetence to those who are in the vicinity of the defective wire or appliance. This is true irrespective of whether the person injured is at the time of his injury upon a public highway or is upon land privately owned. Indeed, under such circumstances the electric light or power company is liable even to the possessor of land who has given to the electric light company a license to carry its current over his land.

We believe that the Restatement language clearly contemplates a nondelegable duty in the maintenance or repair of "instrumentalities" which are used by a party in carrying on activity, and not the maintenance or repair of products which are produced by that activity. That is, § 423 of the Restatement, *supra*, may be applicable to instrumentalities used to produce a product, but that section does not apply to issues of product liability or, as in this case, negligence which occurs when repairs are performed under terms of a warranty.

Thus, in this instance, we decline to follow the analysis set forth in *Rager*, and instead adhere to the logic offered by *Peeples v. Kawasaki Heavy Indust., Ltd.*, 288 Or. 143, 603 P.2d 765 (1979). This is not to say that a manufacturer cannot be held to be liable for the negligent repair of its products. Where a manufacturer does exercise a reasonable degree of control over those performing warranty work, negligence in the completion of such work may be attributed to the manufacturer. A manufacturer's vicarious liability in such a case is particularly appropriate when the manufacturer promotes, as an integral part of the product it sells, warranty service by service technicians trained by the manufacturer. Such a representation

may be typified by the marketing of new automobiles. In the present case, however, there is no evidence that Farmhand in any way controlled those performing warranty work on its products, nor is there evidence that Farmhand represented that warranty work would be done by technicians trained by the manufacturer.

The judgment of the district court is affirmed.

AFFIRMED.

WHITE, J., concurring.

The majority assumes that Keating International negligently repaired the stack mover and that the repair was covered by the manufacturer's warranty. Given these assumptions, the majority states that the issue in this case is whether "a manufacturer is vicariously liable for a dealer's negligent repair of the manufacturer's product when the repair is covered by the manufacturer's warranty." The majority concludes that a manufacturer is vicariously liable *only if* the manufacturer has the right to control the dealer, that is, only if the dealer is an actual agent of the manufacturer. I write separately because, given the assumptions of the majority, I believe this rule is too narrow.

A manufacturer's warranty often promises that certain repairs will be performed free of charge. This promise usually requires that the repairs be performed by an authorized dealer. Essentially, the manufacturer leads the purchaser to rely upon the care or skill of the dealer designated by the manufacturer. In most situations, the purchaser does not know the precise relationship between the manufacturer and the dealer; the purchaser assumes that some relationship exists because the dealer is "authorized."

If a manufacturer's warranty holds out a dealer as being authorized to make warranty repairs, then a reasonable person might infer that the dealer is the manufacturer's agent for the purpose of repairs. When a manufacturer's warranty directs the purchaser to a particular dealer, and the dealer performs repairs under the warranty, the manufacturer should be estopped from denying liability for the dealer's negligent repairs. Cf. Restatement (Second) of Agency § 267 (1958).

In the present case, there is no evidence that the

manufacturer's warranty instructed Kallhoff to have repairs made by an authorized dealer, and no evidence that Kallhoff relied on the manufacturer's warranty when seeking repairs. In his deposition, Kallhoff testified that he did not receive any warranty materials and did not recall any discussions with the dealer regarding warranty materials. Furthermore, the manufacturer's manual which accompanied the stack mover requires that to be eligible for warranty, a warranty registration form must be filed with the manufacturer within 5 days of delivery. There is no evidence that Kallhoff complied with these requirements.

I therefore concur in the result.

JOHN A. FECHT, DIRECTOR, WAREHOUSE DEPARTMENT, NEBRASKA PUBLIC SERVICE COMMISSION, APPELLEE, V. QUALITY PROCESSING, INC., APPELLEE, AND THOMAS CULLAN AND HARRY CULLAN, DOING BUSINESS AS CULLAN FARMS, ET AL., APPELLANTS.

508 N.W.2d 236

Filed November 19, 1993. No. S-91-266.

1. **Statutes: Appeal and Error.** Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the trial court.
2. **Sales: Public Service Commission: Notice: Time.** Under Neb. Rev. Stat. § 75-905(1)(c) (Reissue 1990), a seller has no recourse to the security of a grain dealer unless the Public Service Commission has notice of any apparent loss within 10 days.

Appeal from the Nebraska Public Service Commission. Affirmed.

Terry Curtiss, of Curtiss, Moravek & Curtiss, P.C., for appellants.

Don Stenberg, Attorney General, and L. Jay Bartel for appellee Fecht.

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

BOSLAUGH, J.

This is an appeal from a modified order determining claims entered by the Nebraska Public Service Commission (PSC) on February 12, 1991. The modified order amended an order determining claims entered by the PSC on August 28, 1990, allowing and disallowing various claims made against the bond of Quality Processing, Inc. (QPI), a licensed grain dealer whose license was revoked by the PSC on April 24, 1990.

Nebraska's Grain Dealer Act requires all licensed grain dealers to post security in the event the grain dealer fails to pay for grain it has purchased and received. Neb. Rev. Stat. § 75-903 (Reissue 1990).

The appellants are producers who sold and delivered dry edible beans to QPI but were not paid. The complainant-appellee is John A. Fecht, the director of the Warehouse Department of the PSC.

QPI was obligated by Neb. Rev. Stat. § 75-905 (Reissue 1990) to pay for all grain purchased within 10 days of its receipt. QPI did not do so, but negotiated contracts with the appellants to make payment for the beans at subsequent dates.

On February 27, 1990, Fecht, as director of the PSC's Warehouse Department, filed a complaint and request for temporary suspension of QPI's license pursuant to Neb. Rev. Stat. § 75-903.01 (Reissue 1990). The complaint alleged that QPI was in violation of its grain dealer security because QPI had failed to pay for dry edible beans delivered to it by two producers who had contracts for the purchase of their beans.

On March 2, the PSC examined QPI's records. The examination revealed that in addition to not paying the contracts of the parties listed in the complaint, QPI had failed to make payments due on numerous other contracts for the purchase of edible beans. On March 28, a hearing was held before the PSC concerning the allegations in the complaint. The appellants' attorney presented evidence of their claims and was granted leave to mail further claims at a later date.

Section 75-905 provides:

> (1) Except as provided in subsection (2) of this section, no seller shall have recourse to the grain dealer's security unless the seller:
>
> (a) Demands that payment from the grain dealer be made within ten days of the date the grain dealer takes possession of the seller's grain;
>
> (b) Negotiates any negotiable instrument issued as payment for grain by the grain dealer within ten days of its issuance; and
>
> (c) Notifies the commission within ten days of any apparent loss to be covered under the terms of the grain dealer's security.
>
> (2) When grain is delivered to a grain dealer in multiple shipments comprising one contract, the seller shall not have recourse to the grain dealer's security unless the seller notifies the commission within forty-five days of the date of the first shipment of any apparent loss to be covered under the terms of the grain dealer's security.

The appellants' claims were denied by the PSC because they were not presented to the PSC within 10 days of the date the appellants' contracts for payment became due and were not paid.

The appellants contend the PSC erred in its determination as to when their apparent losses occurred and in allowing some, but not all, claims discovered in its investigation of QPI made on March 2, 1990.

> Although in an appeal from the commission this court ordinarily examines the record to determine whether the commission acted within the scope of its authority and whether the evidence establishes that the order in question is not unreasonable or arbitrary, *In re Application of A Touch of Class Limousine, Inc., ante* p. 33, 497 N.W.2d 71 (1993), and *In re Application of Overland Armored Exp.*, 229 Neb. 524, 428 N.W.2d 166 (1988), the issues presented by the assignments of error in this case are controlled by statute. Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the trial court. *Curry v.*

State ex rel. Stenberg, 242 Neb. 695, 496 N.W.2d 512 (1993); *Northern Bank v. Federal Dep. Ins. Corp.*, 242 Neb. 591, 496 N.W.2d 459 (1993).

Fecht v. The Bunnell Co., 243 Neb. 1, 3, 497 N.W.2d 50, 52 (1993).

In the *Bunnell Co.* case, this court affirmed the PSC's determination that a claim filed by the seller of grain to The Bunnell Co. was untimely because the seller failed to provide the PSC notice of its apparent loss within 45 days of the date it first shipped grain to The Bunnell Co., as provided in § 75-905(2).

In the present case, the plain language of § 75-905(1)(c) requires that in order for a seller to have recourse to a grain dealer's security, the PSC must have notice of any apparent loss to the seller within 10 days of such loss. Without deciding whether coverage existed in the first instance, we note that in any event, a claim was not filed within 10 days of an apparent loss.

In the *Bunnell Co.* case, the grain dealer made similar promises to the seller; however, the evidence was uncontroverted that the seller did not furnish the PSC with notice within 45 days of its first shipment of grain, and this court held that the PSC correctly determined that the seller had no recourse to the grain dealer's security.

In the present case, the PSC did not err in its determination that in order for the appellants to have recourse to QPI's security, they were required to provide notice to the PSC of their apparent loss within 10 days of the dates their contracts became due but were not paid. "The key to coverage of the grain dealer's bond is a breach of the duty to pay . . . ." *Department of Agriculture v. Ackerman*, 34 Ill. App. 3d 796, 798, 341 N.E.2d 48, 50 (1975). In *Stock v. Meissner*, 209 Neb. 636, 309 N.W.2d 86 (1981), this court held that a cause of action against a grain dealer or its surety accrues when the seller has the right to make demand for payment.

In this case, the evidence is uncontradicted that the appellants failed to notify the PSC of QPI's failure to pay their contracts within 10 days of their due dates. Accordingly, the PSC did not err in denying the appellants recourse to QPI's

security because of their failure to timely notify the PSC of their claims.

The appellants argue that the PSC erred in using the date of its examination of QPI's records, March 2, 1990, as the date upon which it had notice of apparent loss in allowing or disallowing various claims. The appellants contend the PSC should have used the date on which it temporarily suspended QPI's grain dealer license, February 27, 1990, as the date it received notice of the various claimants' apparent losses.

The PSC temporarily suspended QPI's license on February 27 based on the complaints of two grain sellers. The PSC had no notice of any other sellers' apparent losses until it actually inspected QPI's records on March 2 and discovered QPI's failure to make timely payment on contracts for grain it had purchased. The PSC did not act arbitrarily in disallowing the appellants' claims because the appellants' 10-day notification period had already expired on March 2, when the inspection took place.

The PSC's modified order determining claims is supported by the record and is affirmed.

AFFIRMED.

JAY R. WILSON AND GREGORY G. JENSEN, DOING BUSINESS AS W J ENTERPRISES, APPELLANTS, V. WILLIAM MISKO, APPELLEE.

508 N.W.2d 238

Filed November 19, 1993. No. S-91-396.

1. **Pleadings: Appeal and Error.** In its review, an appellate court disposes of an appeal on the basis of the theory presented by the pleadings on which the case was tried.
2. **Contracts: Rescission.** Rescission entails the annulling, abrogation, or unmaking of a contract and the placing of the parties to it in status quo.
3. **Appeal and Error.** As to questions of law, an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the trial court.
4. **Directed Verdict: Appeal and Error.** In reviewing the action of a trial court, an appellate court must treat a motion for directed verdict as an admission of the truth of all competent evidence submitted on behalf of the party against whom

the motion is directed. Such being the case, the party against whom the motion is directed is entitled to have every controverted fact resolved in its favor and to have the benefit of every inference which can reasonably be deduced from the evidence.

5. **Directed Verdict.** In order to sustain a motion for directed verdict or for judgment notwithstanding the 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.
6. **Witnesses: Testimony: Juries.** The credibility of witnesses and the weight to be given their testimony are solely for the consideration of the jury.
7. **Securities Regulation: Liability.** Liability under the Securities Act of Nebraska, Neb. Rev. Stat. § 8-1101 et seq. (Reissue 1991 & Cum. Supp. 1992), extends only to a person who successfully solicits purchase of securities, motivated at least in part by desire to serve his or her own financial interests or those of the securities owner.
8. **Jury Instructions: Appeal and Error.** An inadvertent grammatical error in an instruction is harmless error if it is clear from the instruction itself and the other instructions given that the jury was not misled.
9. _____: _____. An instruction that misstates the issues or defenses and has a tendency to mislead the jury is erroneous.
10. **Statutes.** Effect must be given, if possible, to all the several parts of a statute; no sentence, clause, or word should be rejected as meaningless or superfluous if it can be avoided.
11. **Jury Instructions.** The proper method of presenting a case to a jury in its instructions is by a clear and concise statement by the trial court of the issues which find support in the evidence.
12. **Jury Instructions: Appeal and Error.** It is the duty of the trial court to instruct on the proper law of the case, and failure to do so constitutes prejudicial error.
13. **Fraud.** The elements of fraud by concealment are (1) that the defendant concealed or suppressed a material fact; (2) that the defendant had knowledge of this material fact; (3) that this material fact was not within the reasonably diligent attention, observation, and judgment of the plaintiff; (4) that the defendant suppressed or concealed this fact with the intention that the plaintiff be misled; (5) that the plaintiff was reasonably so misled; and (6) that the plaintiff suffered damage as a result.
14. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden of showing that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction.
15. **Jury Instructions.** Whether requested to do so or not, the trial court has the duty of instructing the jury on issues presented by the pleadings and the evidence.
16. **Pretrial Procedure: Appeal and Error.** Permission to have additional time in which to answer requests for admission is addressed to the discretion of the trial court, and absent an abuse of discretion will not be reversed.
17. **Trial: Self-Incrimination.** Where a defendant in a civil case refuses to testify on

the ground that the evidence may incriminate him, the trier of fact may draw an adverse inference from his refusal.

18. **Pretrial Procedure: Self-Incrimination: Trial: Jury Instructions.** Where a party served with requests for admissions refuses to respond, relying on the constitutional privilege, the offering party may introduce the requested admissions in evidence, and the court must instruct the jury that it could, but did not have to, draw adverse inferences from the responding party's refusal to answer.
19. **Venue: Appeal and Error.** Where the record does not show an abuse of discretion, a ruling on a motion to transfer venue will not be disturbed on appeal.
20. **Judges: Words and Phrases: Appeal and Error.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system.

Appeal from the District Court for Valley County: EDWARD E. HANNON, Judge. Reversed and remanded for a new trial.

J. Scott Searl and William G. Dittrick, of Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, for appellants.

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

HASTINGS, C.J., BOSLAUGH, WHITE, SHANAHAN, FAHRNBRUCH, and LANPHIER, JJ.

HASTINGS, C.J.

The plaintiffs appeal from a jury verdict in favor of the defendant in this action to recover damages for misrepresentation, securities violations, and fraud and deceit. The action was originally filed in the district court for Douglas County, but upon a request for change of venue, the case was tried in the district court for Valley County.

The plaintiffs' assignments of error combine to assert that the district court erred (1) in failing to rule that defendant, as a matter of law, was a seller or offeror of unregistered securities who is liable to the plaintiffs under Neb. Rev. Stat. § 8-1118(1) (Reissue 1991); (2) in failing to instruct the jury that the defendant could be found liable under § 8-1118(1) if the jury determined the defendant was an offeror of an unregistered security, in failing to instruct the jury on fraudulent

concealment, and in giving its instruction defining "seller" rather than giving the plaintiffs' proposed instruction defining "seller"; (3) in failing to grant the plaintiffs' motions for directed verdict, for order to set aside verdict, for new trial, and for reconsideration of motion for directed verdict; (4) in failing to (a) grant plaintiffs' motion for summary judgment by deeming admitted plaintiffs' requests for admissions, (b) receive defendant's admissions of the plaintiffs' requests for admissions into evidence, and (c) instruct the jury as to facts established by reason of defendant's failure to timely respond to plaintiffs' requests for admissions; and (5) in granting the defendant's motion for change of venue.

The plaintiffs assert that the standard of review with regard to the trial court's legal rulings, the requested jury instructions, the motion for summary judgment, the motion for directed verdict, and the jury verdict on the rescission under § 8-1118(1) of the Securities Act of Nebraska should be de novo on the record. Section 8-1118(1) provides in pertinent part:

> Any person who offers or sells a security in violation of section 8-1104 or offers or sells a security by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made in the light of the circumstances under which they are made not misleading, the buyer not knowing of the untruth or omission, and who does not sustain the burden of proof that he did not know and in the exercise of reasonable care could not have known of the untruth or omission, *shall be liable to the person buying the security from him, who may sue either at law or in equity to recover the consideration paid for the security*, together with interest at six percent per annum from the date of payment, costs, and reasonable attorneys' fees, less the amount of any income received on the security, *upon the tender of the security, or for damages if he no longer owns the security*.

(Emphasis supplied.)

The plaintiffs note that there is apparently no case law in Nebraska addressing the issue of whether a suit under § 8-1118(1) is an action at law or in equity, but argue that a

"reasonable and logical interpretation" of the statute is that a suit to recover consideration paid for a security is a claim for rescission and therefore, in equity. Brief for appellants at 3 n.1. While the plaintiffs assert that their claim was for rescission, their third amended petition, as well as two previously filed petitions, prayed for damages rather than equitable relief.

In its review, an appellate court disposes of an appeal on the basis of the theory presented by the pleadings on which the case was tried. *Sikyta v. Arrow Stage Lines*, 238 Neb. 289, 470 N.W.2d 724 (1991); *Union Pacific RR. Co. v. Kaiser Ag. Chem. Co.*, 229 Neb. 160, 425 N.W.2d 872 (1988).

The plaintiffs owned the security at the time of trial, and they then tendered the security to the defendant in accordance with § 8-1118(1). Rescission entails "[a]nnulling, abrogation or unmaking of contract and the placing of the parties to it in status quo." Black's Law Dictionary 1174 (5th ed. 1979). Although one of the issues at trial was whether the defendant was a seller of the security, the defendant did not have title to the security prior to the plaintiffs' purchase, and consideration for the security was made payable to Paradox Energy Program, not to the defendant. Abrogation of the contract would not place the parties in status quo, and thus, it would appear that the relief requested by the plaintiffs would most appropriately be termed damages, as pled, rather than rescission, and de novo review would not apply.

Therefore, we will review this case as an action at law, determining only whether there is credible evidence to support the findings of fact. However, as to matters of law, an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the trial court. *VanDeWalle v. Albion*, 243 Neb. 496, 500 N.W.2d 566 (1993); *Universal Assurors Life Ins. Co. v. Hohnstein*, 243 Neb. 359, 500 N.W.2d 811 (1993).

In reviewing the action of a trial court, we must treat a motion for directed verdict as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed. Such being the case, the party against whom the motion is directed is entitled to have every controverted fact resolved in its favor and to have the benefit of

every inference which can reasonably be deduced from the evidence. *Humphrey v. Nebraska Public Power Dist.*, 243 Neb. 872, 503 N.W.2d 211 (1993); *Sell v. Mary Lanning Memorial Hosp.*, 243 Neb. 266, 498 N.W.2d 522 (1993).

In order to sustain a motion for directed verdict or for judgment notwithstanding the 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. *Humphrey v. Nebraska Public Power Dist., supra*; *Patterson v. Swarr, May, Smith & Anderson*, 238 Neb. 911, 473 N.W.2d 94 (1991).

In 1987, plaintiffs Gregory G. Jensen and Jay R. Wilson and defendant William Misko were residents of Valley County, Nebraska. Jensen and Misko were good friends, and Jensen had served as Misko's attorney on several business matters. Wilson and Misko were also friends and were partners in an underground sprinkler business. In early May 1987, Wilson and Misko traveled to a farm and home show in Kearney, where they had a display for their sprinkler company. While in Kearney, Misko spoke with Tom Clement at the Misko Sporting Goods store. Clement had been employed there, but was in the process of moving from Kearney to Greeley, Colorado. Clement told Misko that he was involved with the Paradox Energy Program and was going to be selling units of that program, which was an oil exploration entity. Misko testified that he became interested in the program because it had the potential for earning a lot of money. While Misko stated that Wilson was also present for the conversation with Clement, Wilson testified that he did not recall seeing Clement that day, but spoke with Misko about investing in the program on their drive from Kearney to Ord.

Misko subsequently attended a seminar in Greeley that dealt with the Paradox Energy Program, and he brought a prospectus home from that meeting. Misko testified that the meeting's sales pitch was very effective and that he became excited about the program. On May 23 or 24, he took the prospectus to Jensen's office and asked Jensen to look it over. He stated that Jensen told him it looked like a legitimate document but that this was not his area of expertise, and he,

Jensen, did not know if it was a good deal or not.

Jensen testified that on June 15, Misko came to his office and told him about "a very good deal" he was going to let Jensen in on. Jensen stated that Misko told him that he had borrowed money to buy a $25,000 unit in the oil venture, that he had "inside contacts and inside information," and that Clement had sold two of the units to his own parents. Jensen testified that he was leery of the investment and asked to see something in writing. According to Jensen, Misko came back a day or two later with a prospectus. Jensen sent the prospectus to his uncle, who had invested in oil wells previously. His uncle ultimately advised him not to invest, because the company was taking too much money in commissions. Jensen said that when he related his uncle's concerns to Misko, Misko replied, "What would you rather have, 97% of nothing or 90% of a million dollars?" Jensen further stated that Misko told him that Misko would receive a finder's fee of one-half of Clement's commission if Jensen bought into a unit.

According to Jensen, Misko arranged another meeting with him and Wilson on June 22. Misko was said to have told him that Wilson wanted to buy into the oil deal, but that it was almost sold out and if they did not take any action that night, they probably would not be able to get into it. By the end of the evening, Wilson and Jensen decided they would "each go into it 50-50," so Jensen wrote out a check for $25,000 and Wilson gave him a check for $12,500. Jensen recalled signing a document at that time which might have been a subscription agreement, but he did not make a copy before he gave the check and document to Misko.

Wilson testified that he borrowed $12,500 from a bank in May 1987 in order to invest as a partner with Misko in the Paradox Energy Program. When Misko later told him that he was not going to invest, Wilson decided he would not invest either and paid the money back to the bank. He stated that he later had a conversation with Misko, on June 22, in which Misko told him that he had decided that the Paradox Energy Program was such a good deal that he "went ahead and borrowed the money to invest in a whole unit of $25,000 himself." Misko then told him that Jensen was interested in

investing and asked if Wilson would want to be Jensen's partner. Wilson went with Misko to Jensen's office, and after some discussion he and Jensen decided they would share in the investment. Wilson also recalled signing a document which might have been a subscription agreement, which was given to Misko. Both Wilson and Jensen testified that they trusted Misko and that in making the investment they relied on Misko's statements that he had invested $25,000 of his own money and that Clement's parents had each bought a unit in the Paradox Energy Program.

Misko testified that Jensen initiated the meeting on June 22. He stated that he told Jensen that Clement's parents were involved in the program, but nothing more specific than that, and also denied telling Jensen and Wilson that he himself had invested. Misko received a check for $1,250 from Bataa Oil, Inc., the parent of Bataa Exploration, Inc., issuer-seller of the Paradox Energy Program, and an IRS Form 1099 indicating the amount of compensation. The compensation was declared as income on his income tax return. However, Misko stated that when he first saw the check, it did not occur to him what it was for, and he called Clement. Clement testified that he received $2,500 for the sale of the unit bought by Jensen and Wilson, and had a check for $1,250 sent to Misko. He testified at the trial that he sent the money to Misko because "Bill and I were always just like kind of partners, and I felt that he is the one that put me in touch with Greg Jensen. He knew him better than I did, so that's why I gave him the money." However, in earlier deposition testimony introduced by the plaintiffs, Clement had stated, "I had a deal with Bill, you know, once he did this, that if everything worked I was going to take care of him on a backside deal, too. And I don't even recall what that was. It was kind of complicated —."

In early November 1988, Jensen received a letter from Bataa Oil, informing him that he needed to invest another $3,000 to complete an oil well. Jensen testified that he was upset because Misko had represented that $25,000 would be the only investment, so he called Misko to ask if he was going to put in his $3,000. Jensen stated that Misko responded that he was not sure. Jensen later spoke with Clement, who told him that Misko

would be sending his money the next day. Jensen further stated that on November 10, Misko came to his office and told him that his father had already sent in the $3,000 and that the unit was in his father's name. However, Jensen said that on that same day he spoke with David Calvin, president of Bataa Oil, who told him that he, Calvin, had overheard the conversation that he had had with Clement and wanted Jensen to know he, Jensen, had been lied to, that neither Misko nor any of his family had invested.

Clement testified that he had told Jensen that Misko had invested, that it was not true, and that Misko had asked him to do that. He later called Jensen back and told him that Misko had not invested, because he "didn't feel it was right." In addition, Clement stated that at the time when they were finishing completion costs, after all the wells had been drilled, Misko told him that he had told Jensen and Wilson that he, Misko, had invested. Misko also admitted asking Clement to lie, in order to "buy time" until the next morning so he could tell Jensen himself that he had not invested.

At the close of the trial, the parties stipulated that any securities at issue were not in fact registered under the Securities Act of Nebraska. The jury found in favor of the defendant on all of the plaintiffs' theories of recovery.

We deal first with the issue of whether the trial court erred in failing to rule that the defendant, as a matter of law, was a seller or offeror of unregistered securities who was liable to the plaintiffs under § 8-1118(1).

The plaintiffs alleged that the defendant was liable for the sale of an unregistered security, pursuant to Neb. Rev. Stat. § 8-1104 (Reissue 1991) ("[i]t shall be unlawful for any person to offer or sell . . .") and § 8-1118(1) ("[a]ny person who offers or sells a security in violation of section 8-1104 . . .") of the Securities Act of Nebraska, and contended that the defendant should have been deemed an offeror or seller of an unregistered security as a matter of law. Neb. Rev. Stat. § 8-1101(10) (Reissue 1991) provides the following definitions:

> Sale or sell shall include every contract of sale of, contract to sell, or disposition of, a security or interest in a security for value. Offer or offer to sell shall include every attempt

> or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security for value.

While the act fails to define "seller" or "offeror," the plaintiffs argue that the defendant should be deemed a seller or offeror as a matter of law under § 8-1101(10) because he had numerous conversations with the plaintiffs, enthusiastically discussed his commitment to be involved with the Paradox Energy Program, directed technical questions to Clement or Calvin, and accepted $1,250 for finding and encouraging the plaintiffs' investment.

The foregoing section is almost identical to the language found in 15 U.S.C. § 776(3) (1988) of the Securities Act of 1993:

> The term "sale" or "sell" shall include every contract of sale or disposition of a security or interest in a security, for value. The term "offer to sell", "offer for sale", or "offer" shall include every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security, for value.

In *Pinter v. Dahl*, 486 U.S. 622, 108 S. Ct. 2063, 100 L. Ed. 2d 658 (1988), the U.S. Supreme Court considered whether one must intend to confer a benefit on himself or a third party in order to qualify as a seller under § 12(1) (now codified as 15 U.S.C. § 77l(1) (1988)) of the Securities Act of 1933. The Court found that under the act's definitions of "sale" or "sell" and "offer," the range of persons potentially liable under § 12(1) was not limited to those who pass title. The Court noted that inclusion of the phrase "solicitation of an offer to buy" within the definition of "offer" brought within the scope of § 12 those who had engaged in solicitation, an activity "not inherently confined to the actual owner." 486 U.S. at 643. While finding that Congress intended § 12(1) liability to extend to those who solicit securities purchases, the Court concluded that Congress did not intend to impose strict liability on one who urges the purchase solely to benefit the purchaser, noting that "[t]he language and purpose of § 12(1) suggest that liability extends only to the person who successfully solicits the purchase, motivated at least in part by a desire to serve his own financial interests or those of the securities owner." 486 U.S. at 647.

Although the petitioner in *Pinter* urged the adoption of a "substantial factor" test which would impose liability on one " 'whose participation in the buy-sell transaction is a substantial factor in causing the transaction to take place,' " 486 U.S. at 649, the Court rejected that test, stating that "§ 12's failure to impose express liability for mere participation in unlawful sales transactions suggests that Congress did not intend that the section impose liability on participants collateral to the offer or sale," 486 U.S. at 650.

The Court concluded that it was not clear in that case whether the respondent had the kind of interest in the sales that made him liable as a statutory seller, and remanded for further proceedings. The Court found inconclusive the fact that the respondent had received no commissions, noting:

> Typically, a person who solicits the purchase will have sought or received a personal financial benefit from the sale, such as where he "anticipat[es] a share of the profits" . . . or receives a brokerage commission . . . . But a person who solicits the buyer's purchase in order to serve the financial interests of the owner may properly be liable under § 12(1) without showing that he expects to participate in the benefits the owner enjoys.

(Citations omitted.) 486 U.S. at 654-55.

Thus, *Pinter* at least suggests that liability as a statutory seller may attach even if no remuneration is involved. The plaintiffs contend that "[t]he Supreme Court's extension of the term 'seller' to situations where compensation has *not* been paid reflects the Court's view that the Securities Act of 1933 should be broadly construed, applied, and interpreted." Brief for appellants at 21. The plaintiffs also argue that the failure to direct a verdict against the defendant would undermine the protective nature of the Securities Act of Nebraska and allow individual sellers without compensation agreements to discuss investments with potential buyers and then "wait to receive 'gifts' of supposedly unsolicited 'income.' " Brief for appellants at 23.

In applying the reasoning of *Pinter* to the facts of this case, we note that the defendant did receive remuneration for his participation in the sale. In determining whether, in soliciting

the purchase, he was motivated by his own financial interests or those of the buyer, we find that the evidence is in conflict regarding the issue of whether the defendant knew or anticipated that he would receive this remuneration. The question squarely before us is whether, whatever the subjective intent of the defendant was, as a matter of law the actual receipt of a commission by a seller is conclusive evidence that the seller was motivated by financial interests other than those of the buyer.

We stated in *Labenz v. Labenz*, 198 Neb. 548, 550, 253 N.W.2d 855, 857 (1977), that "[t]he Securities Act of Nebraska should be liberally construed to afford the greatest possible protection of the public." However, in this case the evidence was also in conflict on the issue of the defendant's actual participation in the sale, and *Pinter* instructs that strict liability should not be imposed on those who are merely collateral to the sale, as opposed to those who actively solicit a purchase.

The defendant testified that Wilson was present for the initial contact with Clement; that Jensen initiated the majority of their conversations about the program; that he never told Wilson and Jensen that he had invested; that Jensen also initiated the meeting of June 22, during which the decision was made to purchase a unit of the Paradox Energy Program; and that he was not expecting compensation. The defendant's credibility is certainly at issue. However, in its order denying the plaintiffs' motion to set aside the verdict, the district court stated:

> The evidence establishes without dispute that the defendant participated in or was present during the time the plaintiffs were considering making the investment and at the time they made it. He encouraged the plaintiffs at least by his interest. The evidence does not establish the defendant's motive was any benefit or gain to anyone other than the plaintiffs, but of course, the evidence would certainly support a finding that the defendant was motivated by his own interest, or that of the sellers. Perhaps, the defendant would be a seller as a matter of law, if the evidence established without dispute that before the plaintiffs made the investment the defendant believed

> he would receive compensation of some type if the plaintiffs made the investment. The plaintiffs introduced a great deal of evidence that would support the conclusion he believed he would receive compensation if the plaintiffs made the investment, but I do not think that conclusion is required.

The credibility of witnesses and the weight to be given their testimony are solely for the consideration of the jury. *Pearson v. Richard*, 201 Neb. 621, 271 N.W.2d 326 (1978).

Following *Pinter*, we hold that liability under the Securities Act of Nebraska, Neb. Rev. Stat. § 8-1101 et seq. (Reissue 1991 & Cum. Supp. 1992), extends only to a person who successfully solicits purchase of securities, motivated at least in part by desire to serve his or her own financial interests or those of the securities owner. Therefore, absent de novo review and independent factual findings by this court, and despite policy arguments to the contrary, the district court did not err in failing to find that the defendant was a seller or offeror as a matter of law.

The next issue to be considered is the question of whether the trial court erred in failing to instruct the jury properly. The plaintiffs contend that the district court erred in failing to properly define "seller" and in failing to give an instruction defining "offeror." The district court instructed the jury on "Determining if the Defendant is a Seller" with the following, in instruction No. 6:

> For purposes of this action, a person who successfully solicits the purchase of a security when the solicitor is motivated at least in part by a desire earn [sic] a commission or to serve his own financial interest, or the financial interest of a seller. The defendant is not a seller if he merely urges another to make an investment, or if he gives gratuitous advice, even if it is strongly and enthusiastically given.
>
> The following may be considered by you in making this determination:
>
> 1. All the facts and circumstances known to the parties at the time of the sale.
>
> 2. The words and acts of the defendant or the plaintiffs.

3. The acts and words of the sellers or their representatives with or towards the defendant, the plaintiffs, or either of them.

4. If you find that the defendant knew before the sale that he was or was likely to receive compensation if the plaintiffs invested in Paradox, you should consider that fact.

There may be more than one seller of an investment.

Notably, the first sentence of the instruction fails to include the crucial phrase "is a seller." The defendant argues the applicability of *Greenberg v. Bishop Clarkson Memorial Hospital*, 201 Neb. 215, 266 N.W.2d 902 (1978), in which we found that an inadvertent grammatical error in an instruction is harmless error if it is clear from the instruction itself and the other instructions given that the jury was not misled. However, in *Greenberg*, one instruction contained a misplaced phrase regarding a physician's applicable standard of care, while six separate instructions correctly informed the jury of the appropriate standard. Such was not the case here. Since instruction No. 6 was the only instruction which defined "seller" and since the jury's understanding of the term "seller" was critical, the error in failing to correctly define "seller" cannot be considered harmless.

An instruction that misstates the issues or defenses and has a tendency to mislead the jury is erroneous. *Omaha Mining Co. v. First Nat. Bank*, 226 Neb. 743, 415 N.W.2d 111 (1987); *Zimmerman v. Continental Cas. Co.*, 181 Neb. 654, 150 N.W.2d 268 (1967).

Further, § 8-1118(1) makes it clear that liability may be imposed on either an offeror or a seller: "Any person who *offers* or *sells* a security in violation of section 8-1104 . . . shall be liable to the person buying the security from him . . . ." (Emphasis supplied.) As discussed above, "[s]ale or sell" and "[o]ffer or offer to sell" are separately defined in § 8-1101(10), and we presume they are to be considered separately as well.

Effect must be given, if possible, to all the several parts of a statute; no sentence, clause, or word should be rejected as meaningless or superfluous if it can be avoided. *Canas v. Maryland Cas. Co.*, 236 Neb. 164, 459 N.W.2d 533 (1990);

NC+ Hybrids v. Growers Seed Assn., 219 Neb. 296, 363 N.W.2d 362 (1985).

While "sell" and "offer" are two separate concepts, the instruction, as given, apparently attempts to merge the two into one, and as a result, correctly defines neither. Again, *Pinter v. Dahl*, 486 U.S. 622, 108 S. Ct. 2063, 100 L. Ed. 2d (1988), is instructive as to the distinction between a seller and an offeror. Noting that the statutory terms "offer" and "sell" are expansive enough to encompass the entire selling process, including the seller/agent transaction, the Court stated:

> Determining that the activity in question falls within the definition of "offer" or "sell" in § 2(3), however, is only half of the analysis. The second clause of § 12(1), which provides that only a defendant "from" whom the plaintiff "purchased" securities may be liable, narrows the field of potential sellers. Several courts and commentators have stated that the purchase requirement necessarily restricts § 12 primary liability to the owner of the security. . . . In effect, these authorities interpret the term "purchase" as complementary to only the term "sell" defined in § 2(3). Thus, an offeror, as defined by § 2(3), may incur § 12 liability only if the offeror also "sells" the security to the plaintiff, in the sense of transferring title for value. . . .
>
> We do not read § 12(1) so restrictively. The purchase requirement clearly confines § 12 liability to those situations in which a sale has taken place. Thus, a prospective buyer has no recourse against a person who touts unregistered securities to him if he does not purchase the securities. . . . The requirement, however, does not exclude solicitation from the category of activities that may render a person liable when a sale has taken place. A natural reading of the statutory language would include in the statutory seller status at least some persons who urged the buyer to purchase. For example, a securities vendor's agent who solicited the purchase would commonly be said, and would by thought by the buyer, to be among those "from" whom the buyer "purchased," even though the agent himself did not pass title.

(Citations omitted.) 486 U.S. at 643-44.

Thus, while "seller" and "offeror" are distinct concepts, liability may be predicated on each, and as such, each should have been separately and correctly defined for the jury.

The proper method of presenting a case to a jury in its instructions is by a clear and concise statement by the trial court of the issues which find support in the evidence. *Krehnke v. Farmers Union Co-Op. Assn.*, 199 Neb. 632, 260 N.W.2d 601 (1977); *Nebraska State Bank v. Dudley*, 194 Neb. 1, 229 N.W.2d 559 (1975).

It is the duty of the trial court to instruct on the proper law of the case, and failure to do so constitutes prejudicial error. *Professional Recruiters v. Oliver*, 226 Neb. 16, 409 N.W.2d 304 (1987); *State v. Clayburn*, 223 Neb. 333, 389 N.W.2d 314 (1986).

The instruction given by the trial court failed fully to instruct on the proper law of the case relating to the concepts of "seller" and "offerer," to the detriment of the plaintiffs.

The plaintiffs next assert that the trial court erred in failing to instruct the jury that the defendant could be held liable for fraudulently concealing material information from the plaintiffs.

In count V of their third amended petition, subtitled "Common Law Fraud and Deceit," the plaintiffs alleged that the defendant's misrepresentations and nondisclosures were material, known to be untrue or recklessly made or omitted, and made with the intention that the plaintiffs rely upon the same. It was further alleged that in reliance upon the misrepresentations and nondisclosures, and as a direct and proximate consequence, the plaintiffs were damaged by being left with a totally depreciated investment which they were fraudulently induced to acquire.

In *Security Inv. Co. v. State*, 231 Neb. 536, 549-50, 437 N.W.2d 439, 448 (1989), quoting *Nelson v. Cheney*, 224 Neb. 756, 401 N.W.2d 472 (1987), this court reiterated the elements of fraud by concealment:

> "(1) that the defendant concealed or suppressed a material fact; (2) that the defendant had knowledge of this material fact; (3) that this material fact was not within the reasonably diligent attention, observation, and judgment

> of the plaintiff; (4) that the defendant suppressed or concealed this fact with the intention that the plaintiff be misled . . . (5) that the plaintiff was reasonably so misled; and (6) that the plaintiff suffered damage as a result."

The plaintiffs assert that testimony revealed that the defendant concealed information from them concerning his failure to purchase Paradox Energy Program securities. There is ample evidence in the record to support this assertion. Although the defendant denied making any affirmative representation to the plaintiffs that he had invested, a jury could have found that the defendant made such representations or had, at the very least, concealed the fact that he had *not* invested, based on his own admission that he told Clement, "I knew Greg was under the impression that I had invested." Whether the nondisclosures were material, whether the plaintiffs' reliance was reasonable, and whether the defendant had the requisite intent were questions for the jury.

Based on this court's citations from Restatement (Second) of Torts § 551 (1977) in *Bank of Valley v. Mattson*, 215 Neb. 596, 339 N.W.2d 923 (1983), a case involving fraudulent misrepresentation, the plaintiffs submitted a proposed jury instruction on the law of fraudulent concealment, which stated:

> With regard to whether or not the Defendant fraudulently concealed any information from the Plaintiffs, you are instructed that under the law of the State of Nebraska, a party to a business transaction has a duty to exercise reasonable care to disclose subsequently acquired information that he knows will make untrue or misleading a previous representation that when made was true or believed to be so; and further has a duty to disclose facts basic to the transaction, if he knows that the other party is about to enter into the transaction under a mistake as to them, and that the other party, because of the relationship between them, the customs of the trade or other objective circumstances, would reasonably expect a disclosure of those facts.

To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden of showing that (1) the tendered instruction is a correct statement of the

law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction. *Nichols v. Busse*, 243 Neb. 811, 503 N.W.2d 173 (1993); *Jensen v. Archbishop Bergan Mercy Hosp.*, 236 Neb. 1, 459 N.W.2d 178 (1990).

While the tendered instruction is not necessarily an incorrect statement of the law, neither is it wholly correct, since it does not encompass a complete recital of the elements of fraudulent concealment, which have been delineated above. However, whether requested to do so or not, the trial court has the duty of instructing the jury on issues presented by the pleadings and the evidence. *Worth v. Schillereff*, 233 Neb. 628, 447 N.W.2d 480 (1989); *Anderson v. Union Pacific RR. Co.*, 229 Neb. 321, 426 N.W.2d 518 (1988).

Because of this duty, the trial court, on its own motion, must correctly instruct on the law, and this court may take cognizance of plain error in instructions indicative of a probable miscarriage of justice. *Silvey & Co., Inc. v. Engel*, 204 Neb. 633, 284 N.W.2d 560 (1979); *Barta v. Betzer*, 190 Neb. 752, 212 N.W.2d 352 (1973).

Thus, while the plaintiffs' proposed instruction was insufficient, the district court failed to give an instruction on fraudulent concealment which would have been justified by the pleadings and the evidence.

The plaintiffs next assert that the defendant's failure to timely respond to their requests for admissions constituted an admission of the subject matter of the requests and that the district court erred in refusing to grant the plaintiffs' motion for summary judgment.

Matters admitted pursuant to Neb. Ct. R. of Discovery 36 (rev. 1992) are a proper basis for a summary judgment. *Wibbels v. Unick*, 229 Neb. 184, 426 N.W.2d 244 (1988). However, we recently reiterated in *Petska v. Olson Gravel, Inc.*, 243 Neb. 568, 500 N.W.2d 828 (1993), that a denial of a motion for summary judgment is not a final order and therefore is not appealable. Nevertheless, the plaintiffs also assign as error the district court's failure to admit the defendant's admissions as evidence and to instruct the jury accordingly.

In regard to requests for admissions, rule 36(a) states:

> Each matter of which an admission is requested shall be separately set forth by the party making the request, and shall be repeated by the responding party in the answer or objection thereto. The matter is admitted unless, within thirty days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his or her attorney. . . .

The plaintiffs served the defendant with "Requests for Admissions, Interrogatories and Request for Production of Documents" on September 27, 1989. On October 18, 1989, the defendant filed in the district court for Douglas County an "Objection to Further Discovery and Notice of Hearing," in which the defendant objected to further discovery because of a pending criminal prosecution on two complaints filed against the defendant in Valley County and stated that "he cannot effectively answer the discovery requests of the Plaintiffs without impinging upon his defense of the criminal matters." The defendant further requested that discovery be continued until the criminal matters were resolved. A hearing on the defendant's objection was scheduled for November 16, 1989. The docket sheet for the district court for Douglas County contains a notation entered on November 16, 1989, which states: "Motion to stay Discovery argued & taken under advisement. On this date after review of the brief & law, the Court finds said Motion is overruled."

The defendant's answers were subsequently served on November 28, 1989, and in response to the "Requests for Admissions," it was stated therein that "Defendant hereby objects and refuses to answer the Request for Admissions numbered 1 through 9 propounded upon him by Plaintiffs and hereby asserts his Fifth amendment privilege against self-incrimination as the basis for his objection and refusal to answer." Based on the same objection, the defendant similarly refused to answer the plaintiffs' interrogatories and request for production of documents.

The plaintiffs argue that since the defendant did not serve

answers to the plaintiffs' requests until November 28, the answers were not timely and thus the requests were admitted pursuant to rule 36(a). Accordingly, the plaintiffs assert that with the admission of the requests they were entitled to prevail on their motion for summary judgment because no issue of material fact existed and thus they were entitled to judgment as a matter of law.

At trial before the district court for Valley County, the plaintiffs offered the requests and answers into evidence as exhibit 20 prior to calling their first witness. In response to the plaintiffs' argument that the answers were not timely served, the court found that the objection filed on October 18 should be treated as an objection within 30 days under rule 36, and sustained the defendant's objection to treating the answers as an admission and to the admission of exhibit 20.

The action by the court in Valley County in overruling, in effect, the earlier ruling by the Douglas County court, was not prohibited under any theory of res judicata. The earlier ruling was preliminary in nature and the court which actually tried the case was free to make its own rulings on evidence.

The effect of the Valley County court's ruling was to extend the period of time in which the defendant must answer the requests for admissions and to sustain the defendant's objection. In *Arcadia State Bank v. Nelson*, 222 Neb. 704, 386 N.W.2d 451 (1986), a defendant that had not requested additional time to answer requests for admissions was nevertheless granted additional time by the district court. This court noted that "it is generally true that permission to either amend pleadings or have additional time in which to answer requests for admission is addressed to the sound discretion of the trial court, and absent an abuse of discretion will not be reversed," *id.* at 716, 386 N.W.2d at 460, but found that in the specific case the district court had abused its discretion in granting additional time and should have sustained the plaintiff's motion to have the answers deemed admitted.

In order to understand the ruling in the case, it is necessary that we examine that opinion in greater detail. In holding that the trial court abused its discretion in granting the defendant additional time in which to respond for the request for

admissions, the court pointed out that

> Jerry Nelson already had more than 5 months to file answers, had failed to appear at any hearing, and had filed only a general denial. Furthermore, he had not asked for additional time to file answers to the Bank's request for admission. He had displayed a complete lack of interest in the case, just as he did in this court.

Id. at 717, 386 N.W.2d at 460.

In the case presently before the court, the defendant had filed objections in what the trial court implicitly found to be a timely manner; upon the objections' being overruled, he filed a specific objection on the basis of the Fifth Amendment within 12 days. The trial court saw fit to treat the response as timely and as effective and sustained the objections to declaring the requests for admission as having been admitted. The court did not abuse its discretion in this regard.

In *Kramer v. Levitt*, 79 Md. App. 575, 558 A.2d 760 (1989), *cert. denied* 317 Md. 510, 564 A.2d 1182, a civil case, the appellant responded to the appellee's request for admissions by invoking the Fifth Amendment. At trial, the appellee's counsel argued that since the appellant had neither denied nor admitted the admissions, Md. Rule 2-424(b) (substantially the same as rule 36(a)) required that they should be deemed admitted and conclusively established. The trial court allowed the appellee's counsel to read the requests for admissions to the jury, noting that the assertion of the privilege against self-incrimination was available to the appellant, affording him the protection of the Constitution, but that it did not protect him from the rules of civil procedure, which provided that where an admission is requested and it is neither admitted nor denied, it should be taken as admitted.

On appeal, the appellant argued that the trial judge erred in allowing the appellee's requests for admissions to be deemed admitted and read to the jury. The appellate court agreed, noting:

> Though by its terms applicable only in criminal proceedings, the Fifth Amendment privilege against self-incrimination has long been held to be properly asserted by parties or witnesses in civil proceedings.

> *McCarthy v. Arndstein*, 266 U.S. 34, 40, 45 S.Ct. 16, 17, 69 L.Ed. 158 (1924). The privilege may be invoked by anyone whose statements could incriminate him, either by directly admitting the commission of illegal acts or by relating information which would "furnish a link in the chain of evidence needed to prosecute the claimant." *Hoffman v. United States*, 341 U.S. 479, 486-87, 71 S.Ct. 814, 818-19, 95 L.Ed. 1118 (1951). The privilege protects persons "against being forced to make incriminating disclosures at any stage of the proceeding if they could not be compelled to make such disclosures as a witness at trial." *National Acceptance Co. of America v. Bathalter*, 705 F.2d 924, 927 (7th Cir.1983). It therefore applies not only at trial, but at the discovery stage as well. *See Lefkowitz v. Turley*, 414 U.S. 70, 77, 94 S.Ct. 316, 322, 38 L.Ed.2d 274 (1973); *United States v. Kordel*, 397 U.S. 1, 7, 90 S.Ct. 763, 766, 25 L.Ed.2d 1 (1970).

79 Md. App. at 582-83, 558 A.2d at 764. The appellate court found that by invoking the Fifth Amendment, the appellant had complied with the directive of rule 2-424(b) that a party responding to a request for admissions must specify an objection, admit or deny the matter. Quoting *Mayo v. Ford*, 184 A.2d 38 (D.C. 1962), *rev'd on other grounds* 191 A.2d 603 (D.C. 1963), the court further noted that " 'the Fifth Amendment protection against compelled self-incrimination would be meaningless and hollow if the objective sought through the asking of the question could be achieved as well by a refusal to answer as by the answer itself.' " 79 Md. App. at 584-85, 558 A.2d at 765. Although the court found that the appellant's refusal to respond to the requests for admissions could not be considered evidence of the truth of the matters stated therein, it considered what effect the appellant's claim of the Fifth Amendment had on the subsequent litigation of the civil case.

The Maryland court noted that in examining a prisoner's refusal to testify at a prison disciplinary hearing, the U.S. Supreme Court, in *Baxter v. Palmigiano*, 425 U.S. 308, 96 S. Ct. 1551, 47 L. Ed. 2d 810 (1976), found that a disciplinary hearing is a civil action and that " 'the Fifth Amendment does

not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them: the Amendment "does not preclude the inference where the privilege is claimed by a *party to a civil cause*." ' " (Emphasis in original.) *Kramer v. Levitt*, 79 Md. App. at 585, 558 A.2d at 766, quoting *Baxter v. Palmigiano, supra*, quoting 8 John H. Wigmore, Evidence in Trials at Common Law § 2272(1)(e) (John T. McNaughton rev. 1961). The court went on to find that *Baxter* suggests three criteria which must be met in order to permit an inference to be drawn against a person exercising his privilege against self-incrimination, i.e., the action must be a civil action, the party seeking to draw the inference must have established a prima facie case, and the person must be a party and not a mere witness. The Maryland court concluded that it would have been constitutionally permissible under *Baxter* for the trial judge to have allowed the appellee to read the requests for admissions to the jury. The court should then have instructed the jury that the appellant objected to answering by relying on his constitutional privilege against self-incrimination and that the jury could, but need not, draw an adverse inference from the appellant's assertion of the privilege.

In *State ex rel. Schuler v. Dunbar*, 208 Neb. 69, 74-75, 302 N.W.2d 674, 678 (1981), this court stated: "We note also that where a defendant in a civil case refuses to testify on the ground that the evidence may incriminate him, the trier of fact may draw an adverse inference from his refusal." See, also, *U.S. v. Sack*, 118 F.R.D. 500 (D. Neb. 1987) (it is not a deprivation of rights to require a litigant to choose between invoking the Fifth Amendment privilege in a civil case, thereby risking a loss, or alternatively answering the questions, thus risking criminal prosecution).

The Maryland court also held:

> We adopt this reasoning and hold that when a defendant in a civil action pleads his privilege against self-incrimination in response to discovery requests, he is prohibited from testifying at trial on matters pertaining to these requests. [Citations omitted.] He is not precluded, however, from producing independent witnesses to prove

> any defenses raised if he complies with the appropriate discovery rules.

79 Md. App. at 588, 558 A.2d at 767.

Although the trial court did not abuse its discretion in failing to treat the requests for admissions as having been admitted, we hold that where a party served with requests for admissions refuses to respond, relying on the constitutional privilege, the offering party may introduce the requested admissions in evidence and the court must instruct the jury that it could, but did not have to, draw adverse inferences from the responding party's refusal to answer. It was error for the trial court not to have done so in this instance.

As their final assignment of error, the plaintiffs assert that the district court for Douglas County erred in granting the defendant's motion for an order changing venue from the district court for Douglas County to the district court for Valley County.

Neb. Rev. Stat. § 25-403.01 (Reissue 1989) provides:

> Any action, other than actions mentioned in sections 25-401 to 25-403, may be brought (1) in the county where any defendant resides, (2) in the county where the cause of action arose, (3) in the county where the transaction or some part of the transaction occurred out of which the cause of action arose, or (4) if all defendants are nonresidents of this state, in any county. When an action has been commenced in any other county, the court in which the action has been commenced shall have jurisdiction over the action, but upon timely motion by a defendant, the court shall transfer the action to the proper court in a county in which such action might have been properly commenced. The court in the county to which the action is transferred, in its discretion, may order the plaintiff or the plaintiff's attorney to pay to the defendant all reasonable expenses, including attorney's fees, incurred by the defendant because of the improper venue or in proceedings to transfer the action.

The plaintiffs claim that the defendant's motion was not timely because it was filed on July 16, 1990, after the filing of the plaintiffs' third amended petition and prior to trial, but

approximately 17 months after the filing of the plaintiffs' first petition. Relying on *Peitz v. Hausman*, 198 Neb. 344, 252 N.W.2d 628 (1977); *Blitzkie v. State*, 228 Neb. 409, 422 N.W.2d 773 (1988); and *Corn Belt Product Co. v. Mullins*, 172 Neb. 561, 110 N.W.2d 845 (1961), the plaintiffs argue that the matter of improper venue in a transitory action must be raised in the answer or earlier, or it is waived.

Where the record does not show an abuse of discretion, a ruling on a motion to transfer venue will not be disturbed on appeal. *Everlasting Golden Rule Ch. v. Dakota Title*, 230 Neb. 590, 432 N.W.2d 803 (1988); *Johnsen v. Parks*, 189 Neb. 712, 204 N.W.2d 804 (1973).

A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system. *Wulff v. Wulff*, 243 Neb. 616, 500 N.W.2d 845 (1993); *Pendleton v. Pendleton*, 242 Neb. 675, 496 N.W.2d 499 (1993).

There is nothing in the record which would indicate that the district court's decision was untenable or unfairly deprived the plaintiffs of a substantial right or a just result. Neb. Rev. Stat. § 25-410 (Reissue 1989) provides that "[f]or the convenience of the parties and witnesses or in the interest of justice, a district court of any county may transfer any civil action to the district court of any other county in this state." According to the plaintiffs' "Objection to Motion for Change of Venue," the plaintiffs' counsel and the defendant's previous counsel had agreed that the case should be tried in Douglas County. However, this action would properly have been filed in Valley County, since it is the county where the defendant resided and where the cause of action arose. Although one of the plaintiffs resided elsewhere at the time of trial, the other plaintiff and two witnesses were residents of Valley County; two other witnesses were from Greeley, Colorado. Where there has been no showing of prejudice to the plaintiffs, the trial court did not abuse its discretion in granting the motion for change of venue.

Because of the errors noted above, the judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

CAPORALE, J., not participating.

WHITE, J., concurring.

I agree with the opinion except for the portion holding that the person selling must be motivated by private gain in order to be covered by Neb. Rev. Stat. § 8-1101(10) (Reissue 1991). No language is present in the statute which logically requires that interpretation.

ANITA DRAIN, APPELLANT, V. BOARD OF EDUCATION OF FRONTIER COUNTY SCHOOL DISTRICT NO. 46, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, AND FRONTIER COUNTY SCHOOL DISTRICT NO. 46, A POLITICAL SUBDIVISION, APPELLEES.

508 N.W.2d 255

Filed November 19, 1993. No. S-91-420.

1. **Schools and School Districts: Teacher Contracts: Evidence: Appeal and Error.** The standard of review in an error proceeding from an order terminating the contract of a tenured teacher is whether the school board acted within its jurisdiction and whether there is sufficient evidence as a matter of law to support its decision. The evidence is sufficient as a matter of law if the school board could reasonably find the facts as it did on the basis of the testimony and exhibits contained in the record before it.
2. **Schools and School Districts: Teacher Contracts: Words and Phrases.** Neb. Rev. Stat. § 79-12,112 (Reissue 1987) confers on school boards the power to terminate the employment of permanent, certificated teachers for just cause. Just cause is defined by Neb. Rev. Stat. § 79-12,107(4) (Reissue 1987) to include neglect of duty and insubordination.
3. **Contracts.** The law does not require the doing of a useless act.
4. **Schools and School Districts: Teacher Contracts.** Except insofar as controlled by statute, the validity of a contract of employment of a teacher in the public schools is governed by rules relating to contracts generally.
5. **Contracts.** A contract written in clear and unambiguous language is not subject to construction.
6. **Contracts: Words and Phrases.** Ambiguity exists in an instrument when a word, phrase, or provision in the instrument has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings.

Petition for further review from the Nebraska Court of Appeals, CONNOLLY and HANNON, Judges, and HOWARD, District Judge, Retired, on appeal thereto from the District Court for Frontier County, JACK H. HENDRIX, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Scott Norby, of McGuire & Norby, and, on brief, Rick G. Wade, of Crosby, Guenzel, Davis, Kessner & Kuester, for appellant.

Larry R. Baumann, of Kelley, Scritsmier & Byrne, P.C., for appellees.

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

FAHRNBRUCH, J.

Anita Drain's teaching contract with Frontier County School District No. 46 was terminated for insubordination and neglect of duty following a 21 1/2-day absence before and after her mother's death.

The district court for Frontier County and the Nebraska Court of Appeals affirmed Drain's dismissal. Drain's petition for further review by this court was granted. We reverse the decision of the Court of Appeals and remand the cause with directions to remand it to the district court for further proceedings and entry of judgment in favor of Drain.

FACTS

A certified, tenured teacher, Drain had a contract with the Board of Education of Frontier County School District No. 46 (Board) to teach first grade in the Maywood, Nebraska, public schools for the 1989-90 school year. At that time, Drain was beginning her 20th year of teaching in the Maywood schools. On Wednesday, November 15, 1989, Drain requested to be off work the following day to be with her seriously ill mother.

Drain taught on Friday, November 17. She called superintendent Charles Denson on Sunday, November 19, to request additional time off because her mother's condition had not improved.

Drain was absent the following week, which included the Thanksgiving holiday. On Sunday, November 26, Drain was unable to reach Denson by telephone, but called a friend who relayed the message that Drain needed additional time off because her mother was being transferred to another city for tests.

On Thursday, November 30, Drain called Denson and notified him that her mother was scheduled for surgery the next day. Drain's mother died unexpectedly during surgery on Friday, December 1. Drain's former sister-in-law called the school office that same afternoon and left a message informing the school that Drain's mother had died. Drain provided lesson plans for her substitute teacher up through this time, a total of about 2 weeks.

On December 4, Drain's brother, Dennis, advised Denson by telephone that Drain was taking her mother's death hard and that she would not be returning to work until January 8, 1990. During the Board's hearing, Denson admitted on cross-examination that he did not tell Dennis Drain at that time that Drain should contact him immediately, nor did he state that Drain's remaining off work until January 8 was too long a time for Drain to be absent from her position.

On Saturday, December 9, Drain's brother-in-law, Jon Almquist, called the school and talked to the high school principal, Dennis Dolliver. Almquist testified at the hearing that he contacted the school because he had received an anonymous phone call from a Maywood resident who stated there were rumors that Drain's employment was in jeopardy because of her leave of absence. Almquist further testified that when he questioned Dolliver about the rumor, Dolliver responded, " 'Oh, no, we were just having problems concerning what type of leave to put Anita on. We were concerned about establishing a precedent.' " Dolliver testified that he did not recall making that statement, but that he could have made it.

At the time of Almquist's call to Dolliver, Drain and her father were en route to Omaha to fly to Arizona so they could spend the holidays with family members. Almquist testified that he asked Dolliver if he should call Drain back from Omaha

before her plane left and was told that it was not necessary. Almquist stated that he would not have let Drain go to Arizona had he known her employment was in jeopardy, because he knew Drain was dedicated to her job.

On Monday, December 11, Dolliver informed Denson about the phone call from Almquist. The following day, December 12, Denson called Drain in Arizona and informed her that her pay would stop as of December 11 unless the Board received a physician's report identifying what was prohibiting Drain from returning to work. Denson conceded that he did not advise Drain at that time that cancellation of her employment contract was an action which was being considered.

Denson testified that he requested Drain to return to work immediately. Drain testified that Denson did not request a specific date for her return, nor did there seem to be any urgency in his voice. Denson received a letter from Drain on December 26 advising that she planned to return to work on January 2.

Drain returned to work on January 3, 1990. On January 5, Drain provided Denson with a letter from her mother's physician stating that Drain had been absent due to her mother's death. Some time later, Denson advised Drain that the letter did not appear to satisfy the requirements of the Board's policy.

On January 16, Denson mailed Drain a certified letter stating that the Board was considering cancellation of her contract for the following reasons:

> Insubordination - Failure to comply with school policy in regard to notification of the principal in advance and preparation of detailed lesson plans for the substitute according to the policy included in the faculty handbook page 12[.]
>
> Insubordination - Failure to comply with a specific request from the superintendent to immediately schedule an appointment with a qualified doctor to examine you and to send a report to the superintendent identifying the reasons you were unable to return to work and detailing the date when you should be expected to return.
>
> Neglect of Duty - Failure to return to duty within a

reasonable period of time and to prepare lesson plans for a substitute to cover the period of absence.

Following a hearing on February 14, the Board canceled Drain's teaching contract on all of the above grounds except insubordination for failing to notify the principal in advance of taking a leave. That finding was not, and is not, an issue on appeal.

Drain's termination was affirmed by the district court and by the Court of Appeals. The effect, in part, of the Court of Appeals' holding is that there was insufficient evidence to find that Drain was insubordinate in failing to provide lesson plans from December 1 to 12 or in failing to submit a letter from a physician. Those findings by the Court of Appeals have not been challenged by the Board. The Court of Appeals did find, however, that there was sufficient evidence for the Board to find that (1) Drain was insubordinate for failing to prepare lesson plans following December 12 and (2) Drain had neglected her duty by taking an "unreasonable" amount of time for family death leave. Drain is before this court on her petition for further review.

ASSIGNMENTS OF ERROR

Drain contends that the Court of Appeals erred in holding that there existed sufficient competent evidence for the Board (1) to find Drain guilty of insubordination for failing to submit lesson plans and (2) to find Drain guilty of neglect of duty for being absent for an unreasonable period of time in violation of the school district's discretionary leave policy.

STANDARD OF REVIEW

The standard of review in an error proceeding from an order terminating the contract of a tenured teacher is whether the school board acted within its jurisdiction and whether there is sufficient evidence as a matter of law to support its decision. See, *Stephens v. Board of Ed. of Sch. Dist. No. 5*, 230 Neb. 38, 429 N.W.2d 722 (1988); *Nuzum v. Board of Ed. of Sch. Dist. of Arnold*, 227 Neb. 387, 417 N.W.2d 779 (1988); *Moser v. Board of Education*, 204 Neb. 561, 283 N.W.2d 391 (1979). The evidence is sufficient as a matter of law if the school board could reasonably find the facts as it did on the basis of the

testimony and exhibits contained in the record before it. *Nuzum v. Board of Ed. of Sch. Dist. of Arnold, supra.*

ANALYSIS

Preliminarily, we note that Neb. Rev. Stat. § 79-12,112 (Reissue 1987) confers on school boards the power to terminate the employment of permanent, certificated teachers for just cause. Just cause is defined by Neb. Rev. Stat. § 79-12,107(4) (Reissue 1987) to include neglect of duty and insubordination. In the present case, the Board had jurisdiction to terminate a tenured teacher if there was just cause to do so. In the state of the record, the only question before this court is whether the record contains sufficient evidence as a matter of law to support the decision to terminate Drain.

INSUBORDINATION: FAILURE TO SUBMIT LESSON PLANS

We first turn to the issue of whether Drain's failure to submit lesson plans for the substitute teacher's use beginning December 11, 1989, constituted insubordination. A school district policy entitled "Teacher Absence" provides that "[d]iscretionary leaves which are known in advance . . . require advance notice to the principal and *preparation of detailed plans for the substitute [teacher]*." (Emphasis supplied.) By contrast, the policy states that "[e]mergency leaves (e.g. for illness) require notification of the principal by 7:15 a.m. so that a substitute may be hired. Do not . . . fail to report for work without contacting your principal." The policy makes no mention of a lesson plan requirement for teachers on emergency leave.

It is undisputed that Drain submitted the lesson plans required by the teacher absence policy for her first 2 weeks of absence, or approximately until the time of her mother's death on December 1. It is clear that Drain's leave converted to emergency leave upon her mother's death and that she was not required by the teacher absence policy to prepare lesson plans for that period of time. It is less than clear how long Drain's absence from the classroom continued to be emergency leave, or whether at some point it converted back to discretionary leave.

However, Drain's leave status from that point forward is irrelevant for the purpose of whether Drain was required to

submit lesson plans to her substitute teacher. The substitute teacher who taught Drain's class in her absence testified that she had a discussion about the lesson plans with Drain and told Drain that she would be more comfortable preparing the lesson plans herself on a day-to-day basis. The evidence before the Board fails to reflect that even had Drain prepared the lesson plans, they would have been used by the substitute teacher.

The law does not require the doing of a useless act. See, *Chiles, Heider & Co. v. Pawnee Meadows*, 217 Neb. 315, 350 N.W.2d 1 (1984); *Fink v. Denbeck*, 206 Neb. 462, 293 N.W.2d 398 (1980); *Otteman v. Interstate Fire & Cas. Co., Inc.*, 172 Neb. 574, 111 N.W.2d 97 (1961). After Drain had been told by her substitute that the substitute preferred to prepare her own lesson plans, it would have been a mere formality and a useless act for Drain to have prepared lesson plans. Therefore, under the facts of this case, Drain was not required to prepare and submit the lesson plans, and her failure to do so was not insubordination.

NEGLECT OF DUTY: ABSENT FOR UNREASONABLE PERIOD OF TIME

Drain also argues that the Court of Appeals erred in finding there was sufficient evidence that she was absent from her teaching position for an unreasonable amount of time or in finding that the time she was absent constituted neglect of duty or just cause for her termination.

At Drain's hearing before the Board, Denson testified that in his "professional opinion," a "reasonable" amount of bereavement leave would be 5 days. The Court of Appeals considered Denson's testimony to be relevant evidence on what constituted a reasonable amount of time for family death leave. The court also took judicial notice that "21 days of leave due to a family death is not a generally accepted practice in this society." *Drain v. Board of Ed. of Frontier Cty.*, 2 NCA 716, 724 (1993). The court then concluded that Drain had neglected her duty by taking an unreasonable amount of leave time.

The Court of Appeals incorrectly held that Denson's testimony on the reasonableness of leave time was relevant, for reasons which we discuss below. The court then compounded

the error by taking judicial notice of the amount of family death leave which it found is generally accepted in today's society.

"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." Neb. Evid. R. 201(2), Neb. Rev. Stat. § 27-201(2) (Reissue 1989). The decision of the Court of Appeals does not reveal a source whose accuracy cannot reasonably be questioned regarding the subject matter of its judicially noticed fact.

Moreover, because the amount of family death leave which Drain was entitled to take is governed by the terms of her teaching contract with the Board, any professional opinion of Denson's or any fact judicially noticed by the Court of Appeals is irrelevant.

The leave policy in effect at the time of Drain's absence and termination is incorporated by reference into Drain's teacher contract. The second paragraph of that contract states: "The Teacher hereby agrees to be governed by the policies of the Board of Education of the District . . . ." The leave policy had been negotiated by the Maywood Education Association and the Board during the 1988-89 school year, and had been accepted by the teachers. Thus, the leave policy was a policy of the Board as referenced in Drain's contract.

Except insofar as controlled by statute, the validity of a contract of employment of a teacher in the public schools is governed by rules relating to contracts generally. *Greer v. Chelewski*, 162 Neb. 450, 76 N.W.2d 438 (1956); *Spence v. School District*, 121 Neb. 64, 236 N.W. 145 (1931). A contract written in clear and unambiguous language is not subject to construction, and must be enforced according to its terms. *Elson v. Pool*, 235 Neb. 469, 455 N.W.2d 783 (1990). Ambiguity exists in an instrument when a word, phrase, or provision in the instrument has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings. *Metropolitan Life Ins. Co. v. Beaty*, 242 Neb. 169, 493 N.W.2d 627 (1993).

The leave policy is a two-page document with the heading

"LEAVE POLICY," with only one subheading entitled "1. SICK LEAVE." In spite of this characterization, the policy provides for leave for personal illness, illness or death in the immediate family, adoption of a child (including consultation and interviews with adoption agencies), childbirth, and doctor and dental appointments for the employee or the employee's children.

The leave policy states in part:

> Employees shall be entitled to absence *without loss of pay* for personal illness or *for illness or death in the immediate family*. Sick leave shall be granted at the rate of 10 days per year. *Employees will be permitted to carry a maximum of 60 days of unused sick leave forward which will permit a maximum of 70 days of sick leave per year.*
>
> In order that employees may assist in the event of extreme circumstances, serious illness, or hospitalization of the immediate family, the sick leave shall apply. Immediate family shall be interpreted to mean the father or mother of the teacher or spouse . . . .
>
> . . . .
>
> In order to prevent possible abuse of the sick leave policy, employees absent due to illness and using sick leave may be required upon request of the Superintendent of Schools to provide a physicians's [sic] statement that they are unable to perform their duties at school, stating the nature of the illness, and the anticipated date of return to work.
>
> . . . .
>
> *If an employee takes time off in excess of sick leave privileges, the sick leave time will be granted but without pay.*

(Emphasis supplied.)

According to the plain terms of the leave policy, employees are entitled to carry forward 10 sick leave days per year, up to a maximum of 70 days of sick leave. Moreover, the policy states *without qualification* that employees are entitled to absence without loss of pay for death in the immediate family. "Immediate family" is defined in the policy to include "mother of the teacher."

The Board and the Maywood Education Association were free to negotiate particular restrictions on the sick leave policy if they chose to do so. For example, the policy restricts to 10 days the amount of sick leave which may be taken by a prospective adoptive parent for consultation, interviews by an adoption agency, and home acclimation following the adoption. The parties could have negotiated a similar limitation on the number of days available to an employee upon the death of a family member. This was not done, nor was there any requirement that the number of days be "reasonable."

The language of the leave policy is clear and unambiguous, and neither the Board nor the courts are free to place a "reasonableness" construction upon the policy as it is written. See *Bedrosky v. Hiner*, 230 Neb. 200, 430 N.W.2d 535 (1988). It is undisputed that Drain had accrued 70 days of paid sick leave at the time of her absence and that she used only 21 1/2 days of leave time during this entire episode. The record shows that Drain, or someone acting on her behalf, repeatedly advised the school of her forthcoming absences in compliance with the teacher absence policy.

That being the case, there is no evidence whatsoever to support the Board's decision to terminate Drain's teaching contract for neglect of duty for being absent an unreasonable amount of time. Drain was merely exercising her right to take paid leave under the negotiated leave policy of her contract with the Board. The decision to terminate this tenured teacher's employment contract was arbitrary and capricious at best, and reprehensible at worst.

Drain is entitled to reinstatement of her teaching contract with backpay and benefits, subject, of course, to mitigation of any damages she has suffered.

CONCLUSION

There being insufficient evidence to support the Board's decision to terminate Drain's teaching contract for either insubordination or neglect of duty, we reverse the decision of the Court of Appeals and remand the cause to that court. The Court of Appeals is directed to remand the cause to the district court for Frontier County with instructions for further

proceedings and entry of a judgment for Drain not inconsistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

HAROLD J. MIX, APPELLANT, V. CITY OF LINCOLN, A MUNICIPAL CORPORATION, APPELLEE.

508 N.W.2d 549

Filed November 19, 1993. No. S-91-772.

1. **Records: Appeal and Error.** A litigant proceeding on a pro se basis is obligated to follow the same appellate rules and procedures applicable to counsel, including the requirement that the appellant point out alleged errors by reference to specific portions of the record.
2. **Appeal and Error.** An appellate court will not consider assignments of error which are not discussed in the brief.
3. **Political Subdivisions Tort Claims Act: Appeal and Error.** A district court's factual findings in a case brought under the Political Subdivisions Tort Claims Act will not be set aside unless such findings are clearly incorrect.
4. **Judgments: Appeal and Error.** In a bench trial of a law action, a trial court's factual findings have the effect of a verdict and will not be set aside unless clearly erroneous. In reviewing a judgment awarded in a bench trial of a law action, an appellate court does not reweigh evidence, but considers the evidence in the light most favorable to the successful party, who is entitled to every reasonable inference deducible from the evidence.
5. **Negligence: Proximate Cause.** A plaintiff is contributorily negligent if (1) the plaintiff fails to protect himself or herself from injury, (2) the plaintiff's conduct concurs and cooperates with the defendant's actionable negligence, and (3) the plaintiff's conduct contributes to the plaintiff's injuries as a proximate cause.

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

Harold J. Mix, pro se.

William F. Austin, Lincoln City Attorney, and Joel D. Pedersen for appellee.

HASTINGS, C.J., BOSLAUGH, CAPORALE, FAHRNBRUCH, and LANPHIER, JJ.

LANPHIER, J.

This action was brought under the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. § 13-901 et seq. (Reissue 1987), in the district court for Lancaster County. The plaintiff-appellant, Harold J. Mix, alleged he was injured when he drove his car into a hole made by the defendant-appellee, City of Lincoln, at an intersection in order to replace a portion of road. He claimed that the appellee was negligent in failing to properly barricade the site. After a bench trial, the district court found that although the appellee was negligent as alleged, the appellant's contributory negligence was more than slight in comparison. The court, therefore, entered judgment in favor of the appellee. We affirm.

BACKGROUND

The accident occurred on August 9, 1988, at approximately 9 p.m. The appellant was traveling eastbound on Harrison Street, a two-lane residential street, toward 10th Street, a three-lane one-way arterial. The appellant claimed that the sun had set and that it was dark, but that the streetlights had not yet come on. He stated, however, that he had his headlights on. Upon reaching the intersection, he stopped. He observed two barricades in the middle of 10th Street just to the north of his vehicle, and he observed numerous barricades in the middle of 10th Street to the south of his vehicle. However, the portion of 10th Street he intended to cross was not barricaded and appeared "normal."

As the appellant proceeded into the intersection, he was looking north. When he reached the middle lane of 10th Street, his car fell into the hole mentioned above and stopped abruptly upon reaching the opposite wall of the hole, 12 feet 8 inches away. The hole measured 12 feet 8 inches by 24 feet 6 inches and was 1 foot deep. Charles Craig, an employee of the appellee, left the site at about 4 p.m. on August 9. Prior to leaving, he placed two barricades on the east end of the hole facing Harrison Street traffic and two on the west end facing 10th Street traffic. However, at the time the appellant's car fell into the hole, two barricades were located in the north end of the hole facing Harrison Street and two barricades were located

just outside the south end of the hole facing 10th Street traffic.

ASSIGNMENTS OF ERROR

As summarized, the appellant asserts that the trial court erred in (1) finding that he failed to keep a proper lookout, (2) finding that he failed to keep his vehicle under reasonable and safe control, (3) finding that he was contributorily negligent and that his contributory negligence was a proximate cause of his injuries, (4) finding that his negligence was more than slight as compared with that of the appellee, (5) entering judgment in favor of the appellee, (6) failing to find that the inadequate barricading of the excavation constituted gross negligence on the part of the appellee, (7) failing to find that the inadequately maintained safety equipment constituted gross negligence on the part of the appellee, and (8) not allowing the appellant to recover partial damages.

The appellee takes issue with the appellant's assignments of error, arguing that they are not sufficiently specific to meet the requirements of Neb. Rev. Stat. § 25-1919 (Cum. Supp. 1992) and Neb. Ct. R. of Prac. 9D(1)d (rev. 1992).

A litigant proceeding on a pro se basis is obligated to follow the same appellate rules and procedures applicable to counsel, including the requirement that the appellant point out alleged errors by reference to specific portions of the record. *GFH Financial Serv. Corp. v. Kirk*, 231 Neb. 557, 437 N.W.2d 453 (1989). Moreover, an appellate court will not consider assignments of error which are not discussed in the brief. *Marple v. Sears, Roebuck & Co., ante* p. 274, 505 N.W.2d 715 (1993).

Although most of the appellant's assignments of error are not discussed in his brief, those assignments that were generally discussed combine to assert that the trial court's decision, especially with respect to the issue of proper lookout, was not supported by the evidence adduced at trial. In raising this issue, the appellant also addresses whether the trial court properly assessed the degree of his contributory negligence.

STANDARD OF REVIEW

A district court's factual findings in a case brought under the Political Subdivisions Tort Claims Act will not be set aside

unless such findings are clearly incorrect. *Lemke v. Metropolitan Utilities Dist.*, 243 Neb. 633, 502 N.W.2d 80 (1993). In a bench trial of a law action, a trial court's factual findings have the effect of a verdict and will not be set aside unless clearly erroneous. In reviewing a judgment awarded in a bench trial of a law action, an appellate court does not reweigh evidence, but considers the evidence in the light most favorable to the successful party, who is entitled to every reasonable inference deducible from the evidence. *Bell Abstract & Title v. Caro, Inc.*, 243 Neb. 576, 500 N.W.2d 834 (1993). See, also, *Schuessler v. Benchmark Mktg. & Consulting*, 243 Neb. 425, 500 N.W.2d 529 (1993); *FirsTier Bank v. Triplett*, 242 Neb. 614, 497 N.W.2d 339 (1993); *Ohnstad v. Omaha Public Sch. Dist. No. 1*, 232 Neb. 788, 442 N.W.2d 859 (1989).

PROPER LOOKOUT

The appellant contends that the evidence adduced at trial cannot support the trial court's finding that he failed to keep a proper lookout. The appellant testified that when he stopped, he saw the two barricades that were just north of his vehicle inside the hole. He also testified that as he entered the intersection, he was looking north, not straight ahead. The appellant testified that although the sun had set and the streetlights had not yet come on, he had his headlights on. Moreover, the appellant concedes that the hole is a different color than the surrounding pavement. Additionally, the hole was 12 feet 8 inches wide, 24 feet 6 inches long, and 1 foot deep. When we construe this evidence in the light most favorable to the appellee, we cannot conclude that the trial court's finding was clearly erroneous.

CONTRIBUTORY NEGLIGENCE

Next, the appellant contends that the trial court erred when it determined that his contributory negligence was more than slight in comparison with the appellee's negligence.

A plaintiff is contributorily negligent if (1) the plaintiff fails to protect himself or herself from injury, (2) the plaintiff's conduct concurs and cooperates with the defendant's actionable negligence, and (3) the plaintiff's conduct contributes to the plaintiff's injuries as a proximate cause.

Lemke v. Metropolitan Utilities Dist., supra.

In pertinent part, Neb. Rev. Stat. § 25-21,185 (Reissue 1989) states:

> In all actions brought to recover damages for injuries to a person or to his property caused by the negligence . . . of another, the fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery when the contributory negligence of the plaintiff was slight and the negligence . . . of the defendant was gross in comparison . . . .

Upon a review of the evidence, especially that evidence showing that the appellant failed to keep a proper lookout, we cannot say the trial court erred in concluding that the appellant's contributory negligence was more than slight as compared to the appellee's. Under our standard for review of the evidence, we cannot say that the appellee was grossly negligent.

CONCLUSION

The judgment of the trial court is affirmed.

AFFIRMED.

WHITE, J., participating on briefs.
SHANAHAN, J., not participating.

O. WILLIAM VONSEGGERN, APPELLEE, V. WALTER H. WILLMAN ET AL., APPELLEES, AND SABRINA MARIE WILLIAMS, APPELLANT.

508 N.W.2d 261

Filed November 19, 1993. No. S-91-800.

1. **Judgments: Appeal and Error.** When deciding questions of law, an appellate court is obligated to reach conclusions independent of those reached by the trial court.
2. **Rules of Evidence.** In all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by the Nebraska Evidence Rules, not judicial discretion, except in those instances under the Nebraska Evidence Rules when judicial discretion is a factor involved in admissibility of evidence.

3. **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 such party the benefit of all reasonable inferences deducible from the evidence.
4. **Summary Judgment.** Summary judgment is to be granted only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
5. **Debtors and Creditors: Attachments: Jurisdiction.** Jurisdiction over attachment proceedings cannot be legitimately exercised unless the attaching creditor pursues substantially the essential statutory requirements.
6. **Attachments: Bonds: Jurisdiction.** Since under the present statutory scheme no attachment shall be issued without a bond, the requirement of a bond is jurisdictional.
7. **Attachments.** An attachment issued without proper statutory authority is void ab initio.
8. **Judgments: Jurisdiction: Collateral Attack.** A judgment entered by a court which lacks subject matter jurisdiction is void. It is the longstanding rule in Nebraska that such a void judgment may be attacked at any time in any proceeding.
9. **Summary Judgment: Proof.** A party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must furnish sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law if the evidence presented for summary judgment remains uncontroverted. After the moving party has shown facts entitling it to a 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.

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

Siegfried H. Brauer III, of Ross, Schroeder & Brauer, for appellant.

Gwyer Grimminger, John A. Wolf, and Arend R. Baack for appellees O. William VonSeggern, Walter H. Willman, and Overland National Bank.

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

LANPHIER, J.

The instant foreclosure action was initiated by the appellee

O. William VonSeggern, who named as defendants all those parties, including the appellant, Sabrina Marie Williams, having a purported interest in certain real estate located in Hall County. Williams' interest resulted from an order in another action granting her a prejudgment attachment on the parcel. That action, also in the district court for Hall County, was a suit for invasion of privacy. The prejudgment attachment was granted on the basis that the defendant in that action sought to transfer property to put it beyond Williams' reach. The district court, in the course of granting VonSeggern's motion for summary judgment in the instant foreclosure action, found that the prejudgment attachment in the other suit was invalid, since it was issued without a bond. The court in the case at bar dismissed Williams' cross-claim to set aside the mortgages in question as fraudulent conveyances. It is from the order granting summary judgment that Williams appeals. We reverse, and remand for further proceedings.

BACKGROUND

On May 3, 1989, Williams filed a petition alleging that Ronald L. Willman invaded her privacy by photographing her through a two-way mirror when she was nude while tanning in a booth located in his beauty salon. VonSeggern was Ronald Willman's attorney in the invasion of privacy action.

On May 18, 1989, Williams filed an application for attachment, alleging that Ronald Willman was attempting to liquidate, transfer, or otherwise encumber his property holdings for the purpose of placing his financial assets beyond the reach of Williams.

On May 19, 1989, Ronald Willman executed a $20,000 note in favor of VonSeggern and gave VonSeggern a $20,000 mortgage to secure the note. On the same date, Ronald Willman also gave a $40,000 mortgage to Walter H. Willman and a $29,000 mortgage to Overland National Bank of Grand Island.

On June 2, 1989, the court ordered the attachment lien, but no bond was required or paid.

On April 30, 1991, VonSeggern initiated the present foreclosure action. Williams cross-claimed on the basis that the

mortgages were fraudulent conveyances. On June 28, VonSeggern moved for summary judgment against Williams, asserting that her attachment lien was invalid for the reason that no bond was paid pursuant to Neb. Rev. Stat. § 25-1003 (Reissue 1989). On the same date, Overland National Bank made a like motion. On July 1, Walter Willman also filed a motion for summary judgment. On August 14, the court granted summary judgment, finding the attachment lien invalid. Williams' cross-claim was dismissed.

ASSIGNMENTS OF ERROR

Williams asserts that the district court erred in (1) finding that her attachment was invalid; (2) dismissing her cross-claim for fraudulent conveyance; (3) failing to receive at the summary judgment hearing exhibits 2 through 6, respectively: a statement of financial affairs for Ronald Willman, a note from Ronald Willman to VonSeggern, a mortgage held by VonSeggern, a mortgage held by Walter Willman, and a mortgage held by Overland National Bank; and (4) in overruling her motion to strike allegations in VonSeggern's answer, Overland National Bank's answer, and Walter Willman's answer.

STANDARD OF REVIEW

When deciding questions of law, this court is obligated to reach conclusions independent of those reached by the trial court. *Bell Abstract & Title v. Caro, Inc.*, 243 Neb. 576, 500 N.W.2d 834 (1993).

In all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by the Nebraska Evidence Rules, not judicial discretion, except in those instances under the Nebraska Evidence Rules when judicial discretion is a factor involved in admissibility of evidence. *Petska v. Olson Gravel, Inc.*, 243 Neb. 568, 500 N.W.2d 828 (1993); *State v. Messersmith*, 238 Neb. 924, 473 N.W.2d 83 (1991).

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. *Ev. Luth.*

Soc. v. Buffalo Cty. Bd. of Equal., 243 Neb. 351, 500 N.W.2d 520 (1993).

Summary judgment is to be granted only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Gould v. Orr, ante* p. 163, 506 N.W.2d 349 (1993).

PREJUDGMENT ATTACHMENT

NECESSITY OF BOND

Williams argues that the trial court erred in finding her prejudgment attachment invalid. She asserts that the lack of a bond is not fatal to her attachment.

However, this court has held that a bond is a statutory requirement. In *Vanburg v. Mauel*, 131 Neb. 685, 686-87, 269 N.W. 626 (1936), we said:

> Except where the ground of attachment is that the defendant is a foreign corporation or a nonresident of the state, no order of attachment shall be issued until an undertaking is filed and approved with one or more sufficient sureties to the effect that plaintiff will pay defendant all damages resulting from a wrongful attachment.

It is widely accepted that jurisdiction over attachment proceedings cannot be legitimately exercised unless the attaching creditor pursues substantially the essential statutory requirements. See, *Ledgebrook Condominium Assn., Inc. v. Lusk Corporation*, 172 Conn. 577, 376 A.2d 60 (1977); *Fletcher & Son v. Gordon*, 219 Iowa 661, 259 N.W. 204 (1935); *Jenkins v. First Nat. Bank et al.*, 73 Mont. 110, 236 P. 1085 (1925); *Winfree v. Mann*, 154 Va. 683, 153 S.E. 837 (1930). That is, the courts have no authority to attach property but that which has been granted them by statute. See, *Bain & Sons v. Mitchell*, 82 Ala. 304, 2 So. 706 (1887); *Stowe v. Matson*, 94 Cal. App. 2d 678, 211 P.2d 591 (1949); *Ledgebrook Condominium Assn., Inc. v. Lusk Corporation, supra*; *Stalvey v. Varn Motors Finance Co.*, 56 Ga. App. 696, 193 S.E. 627 (1937); *Fletcher &*

Son v. Gordon, supra; *Killen v. American Casualty*, 231 Md. 105, 189 A.2d 103 (1963); *Trinidad Asphalt Mfg. Co. v. Standard Oil Co.*, 214 Mo. App. 115, 258 S.W. 64 (1924); *Edwards v. Stein*, 94 N.J. Eq. 251, 119 A. 504 (1923). Since in our statutory scheme no attachment shall be issued without a bond, the requirement of a bond is jurisdictional. See *Vanburg v. Mauel, supra*. See, also, *Martin v. Schillo*, 389 Ill. 607, 60 N.E.2d 392 (1945), *cert. denied* 325 U.S. 880, 65 S. Ct. 1572, 89 L. Ed. 1996; *Edwards v. Stein, supra*. An attachment issued without proper statutory authority is void ab initio. *Stowe v. Matson, supra*; *Lunger v. Page*, 16 N.J. Misc. 529, 2 A.2d 606 (1938).

The trial court, therefore, properly determined that this attachment, issued without a bond, a statutory requirement, was invalid.

PLAINTIFF'S DUTY

Williams next contends that the lack of a bond was the trial court's error and that she should not be penalized for the court's error. She contends that the language of § 25-1003 establishes requirements for the presiding judge, but not for the plaintiff. Although the language of § 25-1003 is directed toward the presiding judge, in *Insurance Co. of North America v. Maxim's of Nebraska*, 178 Neb. 274, 276, 132 N.W.2d 885, 887 (1965), we stated:

> Section 25-1003, R. R. S. 1943, after excepting foreign corporations and nonresidents of the state specifically provides that, "In all other cases, the order of attachment shall not be issued by the clerk . . ." until a bond has been filed as provided therein. We think that it was the legislative intent, when the statute required the plaintiff to comply with the provisions of the general statute on attachment as to necessary allegations, that it must have therefore also intended that it [the plaintiff] comply with the bond provisions of section 25-1003, R. R. S. 1943. These statutes are a part of a comprehensive act. This interpretation harmonizes the meaning of the statutes, gives consistency to them, and achieves the clear legislative purpose of consistent protection for all of the defendant's

property from wrongful attachment.

Complying with the statutory requirements, therefore, was Williams' obligation.

COLLATERAL CONTESTS

Williams next contends that even if the attachment was invalid, the other parties should not have been allowed to contest its validity. Williams asserts that since Ronald Willman did not object to the lack of a bond at the attachment hearing, he was estopped from later raising that issue. With regard to VonSeggern, Overland National Bank, and Walter Willman, Williams argues that they lack standing to contest the validity of the attachment.

Since, as established above, the lack of a bond is a jurisdictional defect, we are confronted with the issue of when a jurisdictional defect in a prejudgment attachment can be raised, and by whom.

A judgment entered by a court which lacks subject matter jurisdiction is void. *Marshall v. Marshall*, 240 Neb. 322, 482 N.W.2d 1 (1992). Also, it is the longstanding rule in Nebraska that such a void judgment may be attacked at any time in any proceeding. *Id.*; *Drennen v. Drennen*, 229 Neb. 204, 426 N.W.2d 252 (1988); *Lammers Land & Cattle Co. v. Hans*, 213 Neb. 243, 328 N.W.2d 759 (1983). It may be impeached in any action, direct or collateral. *Marshall v. Marshall, supra*; *Stanton v. Stanton*, 146 Neb. 71, 18 N.W.2d 654 (1945); *Hassett v. Durbin*, 132 Neb. 315, 271 N.W. 867 (1937). See, also, *Shade v. Kirk*, 227 Neb. 775, 420 N.W.2d 284 (1988). That is because a void judgment is in reality no judgment at all. *Marshall v. Marshall, supra*. The collateral attack in this action was proper.

The court, therefore, also properly refused to strike those portions of VonSeggern's, Overland National Bank's, and Walter Willman's answers which raised the invalidity of Williams' attachment.

ADMISSIBILITY OF EXHIBITS

Williams argues that the trial court erred in sustaining an objection to and in declining to receive her offered exhibits 2 through 6, respectively: a statement of financial affairs for Ronald Willman filed in the U.S. Bankruptcy Court for the

District of Colorado, a note from Ronald Willman to VonSeggern, a mortgage held by VonSeggern, a mortgage held by Walter Willman, and a mortgage held by Overland National Bank. The record reveals that when exhibits 2 through 6 were offered, opposing counsel objected on grounds of relevance. The following then transpired regarding exhibits 3 through 6:

> THE COURT: Well, of course they're in the file, the court would take notice of them anyway. I don't know what you're going to offer them as exhibits for.
>
> [Appellant's counsel]: I just want the court to be aware of where they're at and what they are.
>
> THE COURT: The court is already aware of them.

Given that exhibits 3 through 6 were already contained in the court file as part of the pleadings, these exhibits were properly excluded.

Opposing counsel repeated the objection on grounds of relevance to exhibit 2, Ronald Willman's bankruptcy filing. In her brief, Williams concedes that exhibit 2 does not directly address the issues raised in the motions for summary judgment. Williams suggests that exhibit 2 is relevant in that it explains why Ronald Willman never objected to the lack of a bond. However, since the lack of a bond is a jurisdictional defect, which can be raised at any time, Ronald Willman's failure to object is irrelevant. (See preceding discussion entitled "Collateral Contests.") Thus, exhibit 2 was properly excluded.

SUMMARY JUDGMENT

Finally, Williams contends that the court erred in granting summary judgment on her cross-claim. She claims there were genuine issues of material fact yet to be addressed.

A party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must furnish sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law if the evidence presented for summary judgment remains uncontroverted. After the moving party has shown facts entitling it to a 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.

Ev. Luth. Soc. v. Buffalo Cty. Bd. of Equal., 243 Neb. 351, 500 N.W.2d 520 (1993).

The only evidence offered by the moving parties was exhibit 1, which contained copies of some of the pleadings from Williams' underlying invasion of privacy action against Ronald Willman. If anything, these pleadings tend to establish that there are genuine issues of material fact relevant to Williams' fraudulent conveyance claim. Moreover, the court took notice of a note from Ronald Willman to VonSeggern, a mortgage held by VonSeggern, a mortgage held by Walter Willman, and a mortgage held by Overland National Bank, all dated after notice of the application for attachment had been delivered and before the order of attachment was signed.

The parties moving for summary judgment against the cross-claim that the mortgages were fraudulent conveyances did not furnish any evidence to demonstrate that they were entitled to judgment as a matter of law. They merely established that the prejudgment attachment was invalid. The lack of a prejudgment attachment, alone, is not enough to resolve all the issues of fact involved in Williams' cross-claim. Even without the prejudgment attachment, Williams is still a creditor under the Uniform Fraudulent Transfer Act, Neb. Rev. Stat. § 36-701 et seq. (Cum. Supp. 1992). She is therefore in a position to claim that the conveyances that Ronald Willman made were fraudulent as to her. The moving parties did not carry their burden of establishing that they were entitled to judgment as a matter of law on Williams' cross-claim. The court therefore erred in granting summary judgment on such cross-claim.

We therefore reverse, and remand for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

SHANAHAN, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. WENDELL MITCHELL, APPELLANT.

508 N.W.2d 552

Filed November 19, 1993. No. S-92-624.

1. **Lesser-Included Offenses: Controlled Substances.** The delivery of an imitation controlled substance is not a lesser-included offense of delivery of a controlled substance.
2. **Lesser-Included Offenses: Jury Instructions: Evidence.** A court must instruct on a lesser-included offense if (1) the elements of the lesser offense for which an instruction is requested are such that one cannot commit the greater offense without simultaneously committing the lesser offense and (2) the evidence produces a rational basis for acquitting the defendant of the greater offense and convicting the defendant of the lesser offense.
3. **Lesser-Included Offenses: Controlled Substances.** A controlled substance may be delivered without also delivering an imitation controlled substance.

Petition for further review from the Nebraska Court of Appeals, SIEVERS, Chief Judge, and HANNON and IRWIN, Judges, on appeal thereto from the District Court for Douglas County, JOHN D. HARTIGAN, JR., Judge. Judgment of Court of Appeals reversed, and cause remanded with direction.

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

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

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, FAHRNBRUCH, and LANPHIER, JJ., and MORAN, D.J., Retired.

FAHRNBRUCH, J.

In this case, we hold, as matter of law, that the delivery of an imitation controlled substance is not a lesser-included offense of delivery of crack cocaine, a controlled substance.

Wendell Mitchell was convicted by a district court for Douglas County jury of unlawfully and knowingly or intentionally distributing, delivering, or dispensing a controlled substance, to wit: crack cocaine, in violation of Neb. Rev. Stat. § 28-416(1)(a) (Cum. Supp. 1992), a Class II felony, carrying a penalty of not less than 1 nor more than 50 years' imprisonment. See § 28-416(2) and Neb. Rev. Stat. §§ 28-405

(Cum. Supp. 1990) and 28-105 (Reissue 1989). He was sentenced to 18 months' imprisonment.

Mitchell appealed his conviction to the Nebraska Court of Appeals. There, he claimed that the trial court erred by (1) admitting into evidence a State's exhibit containing the crack cocaine which the jury found Mitchell had sold to police officers and (2) refusing Mitchell's request for a jury instruction that delivering an imitation controlled substance is a lesser-included offense of delivering a controlled substance. Delivery of an imitation controlled substance is a Class III misdemeanor carrying a penalty of not more than 3 months' imprisonment, up to a $500 fine, or both. See Neb. Rev. Stat. §§ 28-445 and 28-106 (Reissue 1989). In his testimony, Mitchell denied selling crack cocaine. He claimed that the substance he sold was "gank," that is, fake crack cocaine made of cake mix and water.

The Court of Appeals held that the exhibit containing the crack cocaine was properly admitted into evidence. The Court of Appeals agreed with Mitchell that delivery of an imitation controlled substance is a lesser-included offense of delivery of a controlled substance and that the trial court's failure to give that type of instruction was reversible error. The Court of Appeals reversed Mitchell's conviction and remanded the cause to the district court for a new trial.

The State successfully petitioned this court for further review, claiming that the Court of Appeals erred in determining that the trial court committed reversible error by not giving Mitchell's requested lesser-included offense instruction.

This court recently discussed the requirements for a trial court to instruct on a lesser-included offense in *State v. Williams*, 243 Neb. 959, 503 N.W.2d 561 (1993). In *State v. Garza*, 236 Neb. 202, 459 N.W.2d 739 (1990), this court abandoned the statutory-elements approach for determining what constituted a lesser-included offense and adopted the cognate-evidence approach. Subsequently, in *Williams*, the court returned to the statutory-elements approach, and it is under that approach that we decide whether Mitchell was entitled to a lesser-included offense instruction.

> [A] court must instruct on a lesser-included offense if (1) the elements of the lesser offense for which an instruction

> is requested are such that one cannot commit the greater offense without simultaneously committing the lesser offense and (2) the evidence produces a rational basis for acquitting the defendant of the greater offense and convicting the defendant of the lesser offense.

State v. Williams, 243 Neb. at 965, 503 N.W.2d at 566.

According to § 28-416(1)(a), it is unlawful for any person to knowingly or intentionally "manufacture, distribute, deliver, dispense, or possess with intent to manufacture, distribute, deliver, or dispense a controlled substance." To prove that Mitchell was in violation of § 28-416(1)(a) as charged, the State was required to prove that Mitchell (1) knowingly or intentionally (2) delivered (3) a controlled substance.

Section 28-445, on the other hand, provides criminal penalties for any person who "knowingly and intentionally manufactures, distributes, delivers, or possesses with intent to distribute or deliver an imitation controlled substance." To prove that Mitchell was in violation of § 28-445, the State would have been required to prove that Mitchell (1) knowingly and intentionally (2) delivered (3) an imitation controlled substance.

Turning to the first step of our statutory-elements analysis, it is readily apparent that Mitchell could have committed the greater offense of delivery of a controlled substance without committing the lesser offense of delivery of an imitation controlled substance. Crack cocaine may be delivered without also delivering an imitation controlled substance. Therefore, delivery of an imitation controlled substance is not a lesser-included offense of delivery of a controlled substance. The first step in the analysis having failed, it is not necessary to continue to the second step of the analysis.

Because delivery of an imitation controlled substance is not a lesser-included offense of delivery of a controlled substance, the trial court properly refused Mitchell's proposed jury instruction on the lesser-included offense of delivery of an imitation controlled substance. We, therefore, reverse the judgment of the Court of Appeals and remand the cause to that court with direction to reinstate the judgment of the district court.

REVERSED AND REMANDED WITH DIRECTION.

STATE OF NEBRASKA, APPELLEE, V. CALVIN J. WHITE, APPELLANT.

508 N.W.2d 554

Filed November 19, 1993. No. S-92-937.

1. **Jury Instructions: Appeal and Error.** All the jury instructions 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.
2. **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 the trial court's factual findings unless those findings are clearly erroneous.
3. **Judgments: Appeal and Error.** When deciding questions of law, this court is obligated to reach conclusions independent of those reached by the trial court.
4. **Constitutional Law: Right to Counsel: Self-Incrimination.** There is no violation of a defendant's Sixth Amendment right to counsel when the defendant makes incriminating statements which were not deliberately elicited by the government.
5. **Venue: Appeal and Error.** A trial court's ruling on a motion for change of venue will not be disturbed absent an abuse of discretion.
6. _____: _____. A trial court abuses its discretion in denying a motion to change venue where a defendant establishes that local conditions and pretrial publicity make it impossible to secure a fair trial.
7. **Constitutional Law: Statutes: Proof.** The party claiming a statute is unconstitutional has the burden to show and clearly demonstrate that the questioned statute is unconstitutional.
8. **Appeal and Error.** Absent plain error, assignments of error not discussed in the briefs will not be addressed by this court.
9. **Rules of Evidence.** Admissibility of evidence is controlled by the Nebraska Evidence Rules, not judicial discretion, except in those instances under the Nebraska Evidence Rules when judicial discretion is a factor involved in admissibility of evidence.
10. **Rules of Evidence: Other Acts.** Evidence of other crimes or acts may be admitted where the evidence is so related in time, place, and circumstances to the offense charged as to have substantial probative value in determining the accused's guilt of the offense in question.
11. **Trial: Evidence: Other Acts: Appeal and Error.** It is within the discretion of the trial court to determine admissibility of evidence of other wrongs or acts, and the trial court's decision will not be reversed absent abuse of that discretion.
12. **Trial: Photographs.** The admission of photographs of a gruesome nature rests largely within the discretion of the trial court, which must determine their relevancy and weigh their probative value against their possible prejudicial effect.
13. **Homicide: Photographs.** In a homicide case, photographs of the victim, upon a proper foundation, may be received in evidence for purposes of identification, to show the condition of the body, to show the nature and extent of the wounds or injuries, and to establish malice or intent.

14. **Lesser-Included Offenses.** To constitute a lesser-included offense, the elements of the lesser offense must be such that it is impossible to commit the greater without at the same time having committed the lesser.
15. _____. In determining whether a lesser offense is indeed a lesser-included one, a court initially does not look to the evidence in a particular case, but, rather, as the name of the statutory-elements rule implies, looks only to the elements of the criminal offense.
16. **Lesser-Included Offenses: Jury Instructions: Evidence.** A court must instruct on a lesser-included offense if (1) the elements of the lesser offense for which an instruction is requested are such that one cannot commit the greater offense without simultaneously committing the lesser offense and (2) the evidence produces a rational basis for acquitting the defendant of the greater offense and convicting the defendant of the lesser offense.
17. **Lesser-Included Offenses: Theft: Motor Vehicles.** Unauthorized use of a propelled vehicle is not a lesser-included offense of theft by unlawful taking or disposition.
18. **Lesser-Included Offenses: Jury Instructions.** The trial court may instruct a jury, over a defendant's objection, on any lesser-included offenses supported by the evidence and the pleadings.
19. **Jury Instructions: Self-Defense: Proof.** Once the jury has been instructed that the State has the burden of proving the defendant did not act in self-defense, it is unnecessary to instruct the jury that the defendant does not have the burden to prove he did not act in self-defense.
20. **Verdicts: Appeal and Error.** 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.
21. _____: _____. 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.
22. **Jury Misconduct: Presumptions: Proof.** In a criminal case, misconduct involving an improper communication between a nonjuror and a juror gives rise to a rebuttable presumption of prejudice which the State has the burden to overcome.
23. **Motions for Mistrial.** A mistrial is properly declared when an event occurs during the course of a trial which is of such a nature that its damaging effects cannot be removed by proper admonition or instruction to the jury and would thus result in preventing a fair trial.
24. **Motions for Mistrial: Appeal and Error.** Whether to grant a mistrial is a matter within the discretion of the trial court, whose ruling regarding a mistrial will be upheld unless such ruling constitutes an abuse of discretion.
25. **Prior Convictions: Right to Counsel: Waiver: Proof: Presumptions.** In a sentence enhancement proceeding, the State need only show that at the time of the prior conviction the defendant had, or waived, counsel. A final judgment of conviction offered for purposes of sentence enhancement is presumed to have been validly obtained. That is, once a final judgment of conviction has been

proven, that the defendant knowingly, intelligently, and understandingly waived his privilege against compulsory self-incrimination, his right to trial by jury, and his right to confront his accusers at the time he entered his guilty plea is presumed.

Appeal from the District Court for Fillmore County: ORVILLE L. COADY, Judge. Remanded with directions.

Joseph H. Murray, Lance J. Johnson, and Gregory C. Damman for appellant.

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

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, FAHRNBRUCH, and LANPHIER, JJ., and MORAN, D.J., Retired.

LANPHIER, J.

Defendant, Calvin J. White, was charged with killing Patricia Cool by firing a shotgun into her multiple times. Cool was to shelter defendant's girl friend from him following a breakup. He was also charged with theft of an auto, which he allegedly did in an attempt to flee. Defendant was convicted, following a jury trial in the district court for Fillmore County, of second degree murder, use of a firearm to commit murder, and theft of an auto. Defendant asserts 14 assignments of error.

BACKGROUND

On December 26, 1991, defendant and his girl friend, Penny Ward, argued. The next day, defendant went to visit her. She told defendant to leave, which he did, but he later returned and took a gun barrel out of a closet. Penny Ward called her friend Patricia Cool, the victim, after he left. Penny Ward asked if she could spend a couple of days with Cool. Cool arranged to pick Penny Ward up at Wilma Ward's house. Cool arrived in a pickup truck with her mother, Mona Thole. Cool went inside to help Penny Ward get her children ready to leave. Thole waited in the pickup truck. Defendant arrived, approached the pickup, and tried to open the driver's side door, but it was locked. Defendant then went up to the house. As defendant walked from the truck to the house, Thole saw that he had a shotgun. She started to honk the horn to warn Cool and Penny Ward.

Hearing the horn, Cool went to the front door and started to open it. Apparently seeing defendant, Cool made an exclamation and started to shut the door. Penny Ward then heard a gunshot and saw Cool move back from the door. Penny Ward also saw defendant enter the house and fire a second shot. From the truck, Thole saw defendant raise the gun and shoot it toward the front door. Thole saw him raise the gun and fire again. After the second shot, Thole drove to get help from some police officers whose patrol cars she recalled seeing.

After the second shot, Penny Ward stood in front of defendant to try to protect the others in the home: Cool; Penny Ward's son Wayne; and Wilma Ward's daughter, Candice. Cool was slouched on the floor wounded when defendant fired a third shot. Penny Ward testified that she thought she was on top of Cool at this point trying to protect her by attempting to push the gun barrel away. Penny Ward testified that after the third shot, defendant swung the gun around toward her son and may have said something like "choose." Penny Ward then ran over and tackled her son to protect him. Just after she tackled her son, she heard a fourth shot. Defendant left.

Defendant took a 1992 Oldsmobile and drove to Texas. He then decided to return to Nebraska. When defendant was driving north through McPherson County, Kansas, a deputy sheriff spotted him. Defendant was arrested after he drove into a ditch while being chased by the deputy. The deputy transported defendant to the McPherson County jail after reading him his *Miranda* rights.

In the McPherson County jail, defendant was placed two cells down from Jason Thomas, an inmate trustee. Thomas offered defendant a cigarette, and defendant began talking about the shooting. This conversation lasted only a few minutes. However, later, during a second conversation, defendant told Thomas some details of the shooting. Thomas left defendant to get some coffee and told the sheriff of McPherson County of the conversation. The sheriff told Thomas to write down what he remembered of the conversation. Thomas then spoke more with defendant and later wrote down what he remembered.

As of the time of these conversations, defendant had been

charged only with assault in the first degree for the beating of Brian Moul, as discussed later in this opinion.

ASSIGNMENTS OF ERROR

Defendant asserts that the trial court erred when it (1) overruled defendant's motion to suppress statements made to a jail trustee and to law enforcement officers; (2) overruled defendant's motions to hire a public opinion pollster and to change venue; (3) overruled defendant's motions to declare Neb. Rev. Stat. § 29-2006 (Reissue 1989) unconstitutional, to preclude discussion of punishment with the jury, and to preclude death qualification of the jury; (4) told the jury that the Nebraska Supreme Court would not reverse its decision; (5) overruled defendant's motion in limine to prohibit introduction into evidence of an assault alleged to have occurred the day before the acts upon which the State based its charges; (6) overruled defendant's motion in limine to prohibit the introduction of autopsy photographs into evidence because their probative value was outweighed by their prejudicial effect; (7) instructed the jury on the lesser-included offense of second degree murder after defendant requested that such an instruction not be given; (8) failed to instruct the jury that in the event it found that defendant did not have the intent necessary for a conviction of theft of an auto, it could find him guilty of the lesser-included offense of unauthorized use of a propelled vehicle; (9) failed to instruct the jury that an element of the charge of theft is proof of a finding that the property taken had a value in excess of $1,000; (10) overruled defendant's request to instruct the jury that the State had the burden of disproving that defendant acted in self-defense and that defendant did not have the burden of proving he acted in self-defense; (11) overruled defendant's motion to dismiss on grounds that the evidence was insufficient to support his conviction; (12) overruled defendant's motion for a mistrial after a witness, Jason Thomas, spoke to the jury while the trial judge and counsel were in chambers; (13) found that defendant was a habitual criminal on the basis of defendant's guilty plea to a prior felony conviction, which plea was not shown to have been freely and voluntarily entered or entered after defendant had been

informed of his constitutional rights; and (14) rendered excessive sentences.

STANDARD OF REVIEW

With regard to those issues concerning the propriety of jury instructions, we note that all the jury instructions 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. *Kozeny v. Miller*, 243 Neb. 402, 499 N.W.2d 75 (1993).

The abuse of discretion standard is applied to our review of the trial court's ruling on the mistrial, the sentence imposed, the admissibility of evidence of other conduct, the admission of the photographs, and the ruling on the motion to change venue. See, *State v. Clancy*, 224 Neb. 492, 398 N.W.2d 710 (1987) (review of mistrial); *State v. Ellen*, 243 Neb. 522, 500 N.W.2d 818 (1993) (review of sentence); *State v. Messersmith*, 238 Neb. 924, 473 N.W.2d 83 (1991) (review of trial court's ruling on evidence of other conduct); *State v. Jacobs*, 226 Neb. 184, 410 N.W.2d 468 (1987) (review of trial court's ruling on motion to change venue).

In determining the correctness of a trial court's ruling on a motion to suppress, an appellate court will uphold the trial court's factual findings unless those findings are clearly erroneous. *State v. Stott*, 243 Neb. 967, 503 N.W.2d 822 (1993).

All other issues addressed concern questions of law. When deciding questions of law, this court is obligated to reach conclusions independent of those reached by the trial court. *Petska v. Olson Gravel, Inc.*, 243 Neb. 568, 500 N.W.2d 828 (1993).

PRETRIAL MOTIONS

MOTION TO SUPPRESS

Defendant contends the trial court erred when it overruled his motion to suppress those statements he made to Jason Thomas, a McPherson County, Kansas, jail trustee.

Defendant contends that the law enforcement authorities in McPherson County "intentionally created a situation that was

likely to induce [defendant] to make incriminating statements." Brief for appellant at 13. He argues that Thomas, the trustee, was the unwitting pawn of the McPherson County law enforcement authorities. Defendant urges that Thomas was purposely allowed to hear what type of crime defendant was suspected of committing. Next, defendant alleges that the trustee was, by design, placed in the next cell. He also asserts that Thomas was allowed, in violation of a "jail rule," to converse with him. *Id.* at 11. Finally, because of the fact that Thomas did not serve all 60 days of his sentence, defendant maintains Thomas must have received a " 'special privilege' " for testifying. *Id.* at 16. By orchestrating this scheme, defendant argues, the government has violated his right to counsel under the 6th and 14th Amendments to the U.S. Constitution.

The U.S. Supreme Court has held that the government may not use an undercover agent to circumvent the Sixth Amendment right to counsel once a suspect has been charged with a crime. *Maine v. Moulton*, 474 U.S. 159, 106 S. Ct. 477, 88 L. Ed. 2d 481 (1985); *United States v. Henry*, 447 U.S. 264, 100 S. Ct. 2183, 65 L. Ed. 2d 115 (1980); *Massiah v. United States*, 377 U.S. 201, 84 S. Ct. 1199, 12 L. Ed. 2d 246 (1964).

Assuming without necessarily conceding defendant's Sixth Amendment right to counsel had attached, there could be no violation if the government did not deliberately elicit incriminating statements. See *Kuhlmann v. Wilson*, 477 U.S. 436, 106 S. Ct. 2616, 91 L. Ed. 2d 364 (1986). Whether Thomas, the trustee, was an agent of the government is a question of fact.

Defendant's argument to the effect that the trustee was an agent of the government assumes incorrect facts and requires inferences which we are not willing to make. There was not sufficient evidence presented to support the argument that the government surreptitiously employed Thomas so as to deliberately elicit incriminating statements from defendant. The trial court was correct in its ruling on the motion to suppress.

CHANGE OF VENUE

Defendant asserts the trial court erred by overruling his pretrial motions to hire a public opinion pollster and to change venue. He argues that pretrial publicity and community gossip denied him a fair and impartial trial.

Factors to be considered in determining whether change of venue is required due to pretrial publicity include the nature of the publicity, the degree to which the publicity has circulated throughout the community, the degree to which the publicity circulated in the area to which the venue could be changed, the length of time between the dissemination of the publicity complained of and the trial, the care exercised and ease encountered in selection of the jury, the number of challenges exercised during voir dire, the severity of the offenses charged, and the size of the area from which the venire is drawn. *State v. Boppre*, 234 Neb. 922, 453 N.W.2d 406 (1990).

Neb. Rev. Stat. § 29-1301 (Reissue 1989) states: "All criminal cases shall be tried in the county where the offense was committed . . . unless it shall appear to the court by affidavits that a fair and impartial trial cannot be had therein."

However, a trial court's ruling on a motion for change of venue will not be disturbed absent an abuse of discretion. *State v. Jacobs*, 226 Neb. 184, 410 N.W.2d 468 (1987). A trial court abuses its discretion in denying a motion to change venue where a defendant establishes that local conditions and pretrial publicity make it impossible to secure a fair trial. *Id.* Defendant contends he needed a public opinion pollster to establish such evidence to support his motion for change of venue.

In *State v. Boppre, supra*, we considered the necessity of providing an indigent defendant accused of first degree murder a public opinion pollster at the State's expense. In *Boppre*, the defendant presented evidence that numerous articles appeared in the local area newspaper reporting details concerning the investigation of the murders, the evidence discovered at the scene of the crime, the defendant's arrest, all the pretrial proceedings, and the selection of the jury. He presented several videotaped recordings of local television news shows. The defendant also submitted the affidavits of 38 residents of the county and those of 11 area attorneys stating that because of the

bias, prejudice, and hostility of area residents, the defendant would be unable to receive a fair trial in that county. Despite this evidence and despite the fact that the defendant believed he needed a public opinion pollster to support his motion for change of venue, this court found that the district court did not abuse its discretion in denying the request.

Although we acknowledged in *Boppre* that there may be circumstances under which the denial of funds for a pollster by a district court would be an abuse of discretion, we conclude that under the circumstances of this case, where no evidence to support the motion was offered, the district court did not abuse its discretion. Defendant could have offered affidavits of local residents or other evidence in support of his motion for change of venue. Absent such a record, we are not in a position to review the judge's ruling.

DEATH QUALIFICATION OF THE JURY

Prior to trial, defendant filed a motion requesting the district court to declare § 29-2006(3) unconstitutional. He wishes us to find this section violative of the 6th and 14th Amendments to the U.S. Constitution.

In *State v. Peery*, 223 Neb. 556, 391 N.W.2d 566 (1986), we reaffirmed our earlier holding in *State v. Rust*, 223 Neb. 150, 388 N.W.2d 483 (1986), *cert. denied* 481 U.S. 1042, 107 S. Ct. 1987, 95 L. Ed. 2d 826 (1987), that § 29-2006(3) is constitutional with regard to the 6th and 14th Amendments. Since defendant fails to assert any argument that we have not previously addressed, and since he can point to no change in the law that would require us to overrule those previous decisions, we decline to do so.

However, in asserting that § 29-2006(3) violates article I, § 11, of the Nebraska Constitution, defendant does make a novel claim. For although we have held § 29-2006(3) to be constitutional under article I, § 6, of the Nebraska Constitution, we have never reviewed that statute under article I, § 11. See *State v. Peery, supra*.

Of course, the party claiming a statute is unconstitutional has the burden to show and clearly demonstrate that the questioned statute is unconstitutional. *State v. Connely*, 243

Neb. 319, 499 N.W.2d 65 (1993). In that defendant made no argument in his motion, when he objected, or in his brief which specifically addressed article I, § 11, we find that he has failed to meet his burden. See *Hamilton v. City of Omaha*, 243 Neb. 253, 498 N.W.2d 555 (1993) (absent plain error, assignments of error not discussed in the briefs will not be addressed by this court). Therefore, that issue will not be addressed.

AT TRIAL

COMMENTS OF THE TRIAL COURT

During jury voir dire, the trial court made the following remarks to the jury:

> We have the adversary system that means that there is a lawyer on each side — or the lawyers on each side are to do anything they can to win so long as it is consistent with the truth and with the law.
>
> And that's a part of our jury system, we believe that if both do everything they can to win, that twelve people from this community can do the best job of picking out what the truth is and arriving at a just verdict.
>
> And we have worked with that, find the juries really are very good at coming up with the right verdict at least, I don't know how they get there, but people that work are very satisfied with what jurors do. I have never said this before but I want you all to know the Supreme Court is not going to reverse your decision.
>
> Your decision is final in this matter.
>
> Now, if I give you the wrong law or I make a mistake or the laws make a mistake because we haven't given you the right information it might be reversed, and it might come back. But the Supreme Court doesn't second guess your finding of what the facts are, and how you apply the law to those facts.
>
> So that's the other thing that I wanted to tell you.
>
> It's a juror's duty to follow the law . . . and make a decision under the law even if they disagree with the law.
>
> If you disagree with the law, we have the legislature, that kind of system, to change the law. It's not a juror's duty to change that law.

Defendant contends these remarks prejudiced him by giving the members of the jury the impression that even if they did not follow the law, their decision would stand.

We have stated that trial courts are to refrain from commenting on the evidence or making remarks prejudicial to a litigant or calculated to influence the minds of the jury. *State v. Chapman*, 234 Neb. 369, 451 N.W.2d 263 (1990). However, a defendant must demonstrate that a trial court's conduct, whether action or inaction during the proceeding against the defendant, prejudiced or otherwise adversely affected a substantial right of the defendant. *Id.*

Although we believe the district court's statements, taken as a whole, are prejudicial, we believe that in the light of the overwhelming evidence against the defendant, the court's error is a harmless one. See *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).

Evidence of Other Misconduct

Prior to trial, defendant moved to prohibit the State from introducing evidence of his assault on Brian Moul on December 26, 1991. Evidence adduced at trial showed that while defendant was at Wilma Ward's home on the evening of the 26th, Moul stopped over. Jason Thomas testified that defendant had told him that when Moul arrived at Wilma Ward's home, defendant did not say anything to him, but just started hitting him. Thomas also testified that defendant told him he hit Moul about five times, but that Moul "wouldn't go down." According to Thomas, defendant said he, therefore, picked up a brick and hit Moul in the face with it until Moul fell down. Thomas also testified that defendant said he was mad at Moul for being too friendly with defendant's girl friend.

When such evidence was offered at trial, defendant objected, but his objection was overruled. Defendant argues that admission of the evidence was a violation of Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 1989).

Admissibility of evidence is controlled by the Nebraska Evidence Rules, not judicial discretion, except in those instances under the Nebraska Evidence Rules when judicial discretion is a factor involved in admissibility of evidence. *Petska v. Olson Gravel, Inc.*, 243 Neb. 568, 500 N.W.2d 828

(1993).

Rule 404(2) is an inclusionary rule permitting the use of relevant other crimes, wrongs, or acts for all purposes except to prove the character of a person in order to show that such person acted in conformity with that character. *State v. Messersmith*, 238 Neb. 924, 473 N.W.2d 83 (1991). Evidence of other crimes or acts may be admitted where the evidence is so related in time, place, and circumstances to the offense charged as to have substantial probative value in determining the accused's guilt of the offense in question. *State v. Kern*, 224 Neb. 177, 397 N.W.2d 23 (1986).

The admissibility of evidence concerning other conduct under the provisions of rule 404(2) must be determined upon the facts of each case; no exact limitation of time can be fixed as to when other conduct tending to prove intent to commit the offense charged is remote. *State v. Rincker*, 228 Neb. 522, 423 N.W.2d 434 (1988). It is within the discretion of the trial court to determine admissibility of evidence of other wrongs or acts, and the trial court's decision will not be reversed absent abuse of that discretion. *State v. Bronson*, 242 Neb. 931, 496 N.W.2d 882 (1993). However, rule 404(2) is subject to the overriding protection of Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1989). *State v. Clancy*, 224 Neb. 492, 398 N.W.2d 710 (1987). While proof of motive is not an element of first degree murder, any motive for the crime charged is certainly relevant to the State's proof of the intent element. *State v. Bronson, supra.*

The incident with Moul occurred the day before the incident in which the victim was killed. The State asserts that the events of the day before helped explain defendant's anger at Penny Ward and her friends and tended to show he was jealous of her friends. These are factors which lent themselves to proof of intent and premeditation. The trial court did not abuse its discretion in admitting evidence of the assault on Moul.

INTRODUCTION OF PHOTOGRAPHS

Defendant maintains the district court erred when it overruled his motion in limine and objection at trial to prohibit the introduction of autopsy photographs into evidence. Defendant contends the photographs, showing the external

injuries of the victim, should have been excluded because their probative value was outweighed by their prejudicial effect.

We addressed the issue of "gruesome" photographs in *State v. Rowe*, 210 Neb. 419, 315 N.W.2d 250 (1982). In *Rowe*, we said the admission of photographs of a gruesome nature rests largely within the discretion of the trial court, which must determine their relevancy and weigh their probative value against their possible prejudicial effect. We also said that in a homicide case, photographs of the victim, upon a proper foundation, may be received in evidence for purposes of identification, to show the condition of the body, to show the nature and extent of the wounds or injuries, and to establish malice or intent.

Defendant offered into evidence photographs of the victim at the crime scene. They do not, however, show the nature and extent of the wounds or injuries. The autopsy photos are necessary to understand this information. The district court did not abuse its discretion in admitting the autopsy photographs into evidence.

JURY INSTRUCTIONS

LESSER-INCLUDED OFFENSES

To constitute a lesser-included offense, the elements of the lesser offense must be such that it is impossible to commit the greater without at the same time having committed the lesser. *State v. Williams*, 243 Neb. 959, 503 N.W.2d 561 (1993). Accord *State v. Pribil*, 224 Neb. 28, 395 N.W.2d 543 (1986). In determining whether a lesser offense is indeed a lesser-included one, a court initially does not look to the evidence in a particular case, but, rather, as the name of the statutory-elements rule implies, looks only to the elements of the criminal offense. *State v. Williams, supra*. However, once it is determined that an offense is a lesser-included one, a court must examine the evidence to determine whether it justifies an instruction on the lesser-included offense by producing a rational basis for a verdict acquitting defendant of the offense charged and convicting him of the lesser offense. *Id.* Consequently, a court must instruct on a lesser-included offense if (1) the elements of the lesser offense for which an instruction

is requested are such that one cannot commit the greater offense without simultaneously committing the lesser offense and (2) the evidence produces a rational basis for acquitting the defendant of the greater offense and convicting the defendant of the lesser offense. *Id.*

Defendant complains that the trial court failed to instruct the jury that in the event it found that defendant did not have the intent necessary for a conviction of theft of an auto, it could find him guilty of the lesser-included offense of unauthorized use of a propelled vehicle. This argument fails, however, because unauthorized use of a propelled vehicle is not a lesser-included offense of theft.

Neb. Rev. Stat. § 28-511 (Reissue 1989), theft by unlawful taking or disposition, provides, in pertinent part:

> (1) A person is guilty of theft if he or she takes, or exercises control over, movable property of another with the intent to deprive him or her thereof.
>
> (2) A person is guilty of theft if he or she transfers immovable property of another or any interest therein with the intent to benefit himself or herself or another not entitled thereto.

Neb. Rev. Stat. § 28-516 (Reissue 1989), unauthorized use of a propelled vehicle, provides, in pertinent part: "(1) A person commits the offense of unauthorized operation of a propelled vehicle if he intentionally exerts unauthorized control over another's propelled vehicle by operating the same without the owner's consent."

A brief examination of these statutes reveals that unauthorized use of a propelled vehicle is not a lesser-included offense of theft by unlawful taking or disposition. To be guilty of violating § 28-516, one must operate a propelled vehicle. The operation of a propelled vehicle is not necessary for a violation of § 28-511. One can violate § 28-511 merely by exercising control over another's property. See *State v. Baker*, 231 Neb. 144, 435 N.W.2d 202 (1989) (unauthorized use of a propelled vehicle held not to be a lesser-included offense of theft by receiving stolen property because theft by receiving stolen property would not require the operation of a propelled vehicle).

Defendant also claims the district court erred when it instructed the jury on the lesser-included offense of second degree murder after defendant requested that such an instruction not be given. He argues that a defendant wishing to take the risk of an "all or nothing" verdict should be allowed to.

However, it is the duty of the trial court to instruct the jury as to the law applicable to the case. Neither the defense nor the prosecution has the option of precluding the court from carrying out this duty in hopes of forcing an "all or nothing" verdict. *State v. Pribil*, 224 Neb. 28, 395 N.W.2d 543 (1986). The trial court may instruct a jury, over a defendant's objection, on any lesser-included offenses supported by the evidence and the pleadings. *Id.* We decline to create an exception for those cases in which no more serious crime could be charged.

INSTRUCTION ON THEFT

Defendant argues that the district court erred when it failed to instruct the jury that an element of the charge of theft is proof that the property taken had a value in excess of $1,000. No cases are cited in support of this position.

In *State v. Garza*, 241 Neb. 256, 487 N.W.2d 551 (1992), we explicitly held that value is not an element of theft. However, we also held in *Garza* that the State must prove, beyond a reasonable doubt, the value of the property which is the subject of the theft charge. In the case at bar, the district court instructed the jury that "the State must prove beyond a reasonable doubt . . . [t]he market value of such automobile." The verdict form returned by the jury reveals that the jury determined the automobile in question had a market value of $24,052. Thus, defendant's claim is without merit.

INSTRUCTION ON SELF-DEFENSE

Defendant complains the trial court erred when it overruled his request to instruct the jury that the State had the burden of disproving defendant acted in self-defense and that defendant did not have the burden of proving he acted in self-defense. This complaint is also without merit. The district court instructed the jury that it was the State's burden to prove defendant did not act in self-defense. We do not believe that,

after telling the jury the State has the burden of proving the defendant did not act in self-defense, it is necessary to tell the jury it is not the defendant's burden. The instructions given correctly state the law.

POSTTRIAL

SUFFICIENCY OF THE EVIDENCE

Defendant maintains the district court erred when it overruled defendant's motion to dismiss on grounds that the evidence was insufficient to support his conviction.

In determining whether evidence is sufficient to sustain a conviction in a jury trial, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, evaluate explanations, or reweigh the evidence presented to the 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. Moreover, on such a claim, 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. Connely*, 243 Neb. 319, 499 N.W.2d 65 (1993).

The evidence, when viewed in a light most favorable to the State, establishes that on December 27, 1991, defendant, while not acting in self-defense, intentionally killed Patricia Cool. It also establishes that he proximately caused the death of Cool by using a firearm. The evidence further establishes that defendant took and exercised control over a movable 1992 Oldsmobile, which was owned by Ray and Helen Holroyd, with the intent to deprive them of that automobile and that the automobile had a market value of $24,052. The evidence presented at trial was sufficient to convict defendant, consistent with the jury's verdict.

MOTION FOR MISTRIAL

Finally, defendant asserts that the district court erred when it overruled his motion for a mistrial after a witness, Jason

Thomas, spoke to the jury while the trial judge and counsel were in chambers. The record reveals that Thomas said something to the effect of "I'm so nervous." Apparently, some of the jurors acknowledged the comment and uttered a laugh. The trial court then instructed the jury that Thomas' statement was not evidence and that the jury should disregard it.

In a criminal case, misconduct involving an improper communication between a nonjuror and a juror gives rise to a rebuttable presumption of prejudice which the State has the burden to overcome. *State v. McDonald*, 230 Neb. 85, 430 N.W.2d 282 (1988).

A mistrial is properly declared when an event occurs during the course of a trial which is of such a nature that its damaging effects cannot be removed by proper admonition or instruction to the jury and would thus result in preventing a fair trial. Whether to grant a mistrial is a matter within the discretion of the trial court, whose ruling regarding a mistrial will be upheld unless such ruling constitutes an abuse of discretion. *State v. Clancy*, 224 Neb. 492, 398 N.W.2d 710 (1987).

Given the nature of the comment and the fact that the jury was admonished to disregard it, we cannot say the trial court abused its discretion in overruling the motion for mistrial.

HABITUAL CRIMINAL

Defendant next complains that the trial court erred when it found that he was a habitual criminal on the basis of his guilty plea to a prior felony conviction. He claims it was not shown to have been freely and voluntarily entered after he was informed of his constitutional rights.

We have held that in an enhancement proceeding, the State need only show that at the time of the prior conviction the defendant had, or waived, counsel. *State v. Johns*, 233 Neb. 477, 445 N.W.2d 914 (1989).

Defendant argues that *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969), requires that the State, in an enhancement proceeding, show that the defendant knowingly, intelligently, and understandingly waived his privilege against compulsory self-incrimination, right to trial by jury, and right to confront his accusers at the time he entered his

guilty plea. In *Parke v. Raley*, ____ U.S. ____, 113 S. Ct. 517, 121 L. Ed. 2d 391 (1992), the Court held that *Boykin* does not require the State to prove those things in an enhancement proceeding. The Court stated:

> *Boykin* involved direct review of a conviction allegedly based upon an uninformed guilty plea. Respondent, however, never appealed his earlier convictions. They became final years ago, and he now seeks to revisit the question of their validity in a separate recidivism proceeding. To import *Boykin's* presumption of invalidity into this very different context would, in our view, improperly ignore another presumption deeply rooted in our jurisprudence: the "presumption of regularity" that attaches to final judgments, even when the question is waiver of constitutional rights.

Parke v. Raley, 113 S. Ct. at 523. We reaffirm our holding in *State v. Johns, supra.* The State did show that defendant had, or waived, counsel. Defendant's argument is without merit.

Excessive Sentences

Defendant was sentenced to life imprisonment for the second degree murder conviction. His sentence for use of a firearm to commit a felony was 10 years. He was sentenced to 1 year in prison for theft of an auto. His sentences for use of a firearm to commit a felony and theft of an auto are to run consecutively, but concurrently with his sentence for second degree murder. The habitual criminal conviction merged with the second degree murder conviction.

In reviewing these sentences, we note plain error. The trial court determined that the 10-year sentence for use of a firearm to commit a felony was to run concurrently with the life sentence for second degree murder. However, we have held Neb. Rev. Stat. § 28-1205(3) (Reissue 1989) mandates that any sentence for use of a firearm to commit a felony run consecutively to any sentence imposed for the predicate felony. *State v. Trevino*, 230 Neb. 494, 432 N.W.2d 503 (1988). See, also, *State v. Egger*, 234 Neb. 175, 449 N.W.2d 558 (1989).

CONCLUSION

After consideration of defendant's 14 assignments of error,

we find only the error in the sentencing. We therefore remand this cause solely for resentencing pursuant to § 28-1205(3).

REMANDED WITH DIRECTIONS.

IN RE APPLICATION OF JOHN ANDREW MAJOREK FOR ADMISSION TO THE NEBRASKA STATE BAR ON EXAMINATION.

508 N.W.2d 275

Filed November 24, 1993. No. S-34-930003.

1. **Rules of the Supreme Court: Attorneys at Law.** Neb. Ct. R. for Adm. of Attys. 2 (rev. 1992) requires an applicant for admission to the Nebraska State Bar to show, among other things, that the applicant is of good moral character.
2. _____: _____. The primary purposes of character and fitness screening before admission to the Nebraska State Bar are to assure the protection of the public and to safeguard the justice system.
3. _____: _____. The public interest requires that the public be secure in its expectation that those who are admitted to the Nebraska State Bar are worthy of the trust and confidence clients may reasonably place in them.
4. **Attorneys at Law.** An attorney should be one whose record of conduct justifies the trust of clients, adversaries, courts, and others with respect to the professional duties owed to them.
5. **Rules of the Supreme Court: Attorneys at Law.** A record manifesting a significant deficiency in the honesty, trustworthiness, diligence, or reliability of an applicant for admission to the Nebraska State Bar may constitute a basis for denial.
6. _____: _____. The Nebraska Supreme Court, and only the Nebraska Supreme Court, is invested with the power to admit persons to the practice of law and to fix qualifications for admission to the Nebraska State Bar.
7. _____: _____. The Nebraska Supreme Court has the responsibility to adopt and implement systems designed to protect the public and safeguard the justice system by assuring that those admitted to the Nebraska State Bar are of such character and fitness as to be worthy of the trust and confidence such admission implies.
8. _____: _____. False, misleading, or evasive answers to Nebraska State Bar application questions may be grounds for a finding of lack of requisite character and fitness.
9. _____: _____. The ultimate test of present moral character, applicable to original admissions to the Nebraska State Bar, is whether, viewing the applicant's character in the period subsequent to the applicant's misconduct, the applicant has been so convincingly rehabilitated that it is proper that the applicant become a member of a profession which must stand free from all suspicion.
10. **Rules of the Supreme Court: Attorneys at Law: Proof.** Payment of a fine or

service of a sentence imposed, and not committing further crimes, standing alone, do not prove rehabilitation.

11. _____: _____: _____. Merely showing that an individual is now living as and doing those things the individual should have done throughout life, although necessary to prove rehabilitation, does not prove that the individual has taken a useful and constructive place in society.

Original action. Recommendation sustained.

Patrick W. Healey for applicant.

James J. DeMars, of DeMars, Gordon, Olson, Recknor & Shively, for Nebraska State Bar Commission.

HASTINGS, C.J., BOSLAUGH, CAPORALE, FAHRNBRUCH, and LANPHIER, JJ.

PER CURIAM.

The applicant, John Andrew Majorek, born September 28, 1959, challenges the recommendation of the Nebraska State Bar Commission to this court that he not be permitted to take the bar examination because of his failure to establish that he presently possesses the proper character and fitness to practice law. We accept the commission's recommendation and thus rule that the applicant be, and hereby is, denied permission to take the bar examination until such time as this court may determine otherwise on further application filed directly in this court in this proceeding.

Neb. Ct. R. for Adm. of Attys. 2 (rev. 1992) requires an applicant for admission to the bar to show, among other things, that the applicant is of "good moral character." Appendix A to said rules provides, in relevant part:

> PURPOSE. The primary purposes of character and fitness screening before admission to the bar of Nebraska are to assure the protection of the public and to safeguard the justice system. The attorney licensing process is incomplete if only testing for minimal competence is undertaken. The public is adequately protected only by a system that evaluates character and fitness as those elements relate to the practice of law. The public interest requires that the public be secure in its expectation that those who are admitted to the bar are worthy of the trust

and confidence clients may reasonably place in their attorneys.

. . . .

STANDARD OF CHARACTER AND FITNESS. An attorney should be one whose record of conduct justifies the trust of clients, adversaries, courts, and others with respect to the professional duties owed to them. A record manifesting a significant deficiency in the honesty, trustworthiness, diligence, or reliability of an applicant may constitute a basis for denial of admission.

RELEVANT CONDUCT. The revelation or discovery of any of the following should be treated as cause for further inquiry before the bar commission decides whether the applicant possesses the character and fitness to practice law:

1. misconduct in employment;

2. acts involving dishonesty, fraud, deceit, or misrepresentation;

3. abuse of legal process, including the filing of vexatious lawsuits;

4. neglect of financial responsibilities;

5. neglect of professional obligations;

6. violation of an order of a court, including child support orders;

7. evidence of mental or emotional instability;

8. evidence of drug or alcohol dependence or abuse;

9. denial of admission to the bar in another jurisdiction on character and fitness grounds;

10. disciplinary action by a lawyer disciplinary agency or other professional disciplinary agency of any jurisdiction.

USE OF INFORMATION. The bar commission will determine whether the present character and fitness of an applicant qualify the applicant for admission. In making this determination through the processes described above, the following factors should be considered in assigning weight and significance to prior conduct:

1. the applicant's age at the time of the conduct;

2. the recency of the conduct;

3. the reliability of the information concerning the conduct;

4. the seriousness of the conduct;

5. the factors underlying the conduct;

6. the cumulative effect of the conduct or information;

7. the evidence of rehabilitation;

8. the applicant's positive social contributions since the conduct;

9. the applicant's candor in the admissions process;

10. the materiality of any omissions or misrepresentations.

In responding to an inquiry on the bar application form as to whether he had been disciplined by a school, college, or university, the applicant revealed that he had been disciplined in 1991 for making personal use of student funds while attending law school. In response to another question, the applicant disclosed that on April 27, 1992, he had been charged with speeding while his operator's license was suspended and with providing false information to an officer.

In investigating the applicant, the commission discovered two matters the applicant had not made known, namely, that he had encountered the criminal justice system in May 1982 for writing a bad check and that on June 25, 1991, he had been charged with taking merchandise without making payment.

The first of the aforedescribed misdeeds occurred on March 20, 1991, apparently during the applicant's second year of law school when, as treasurer of the student chapter of a lawyers' association, he wrote a check to himself in the amount of either $300 or $350 on the chapter's account. Within approximately a week, the applicant repaid the amount he had taken by mailing a deposit of his own funds to the chapter account. At about the same time, without having been confronted by anyone, the applicant notified the chapter president of his actions.

The applicant explained that in December 1990, his father suffered a paralyzing stroke while visiting in Washington, D.C. His father remained hospitalized and underwent speech and physical therapy until sometime in April 1992. At this time, the applicant lived and attended law school in Lincoln, worked as a law clerk for an Omaha law firm, and took responsibility for

managing his parents' household in Omaha until they returned. In addition, he served as president of a student organization and was active in political campaigns.

While all this was occurring, the transmission in the applicant's automobile "went out." Being between paychecks, he tried to contact several friends to borrow the money to repair the vehicle, as he felt that because of his parents' situation he could not borrow from them. After twice unsuccessfully trying to call the chapter president for help, he came to feel that he was between a rock and a hard place, or in a Catch-22 situation, stating: "If I did not repair my car, I could not work, and could not get to classes. If I did not work, I could not earn money to repair my car."

When the applicant was questioned by a commission member, the following exchange occurred:

> [Commissioner]: Do you feel that what you have told us about this situation excuses your action?
>
> [Applicant]: Oh, no. There is never an excuse for that action. I think there are mitigating factors that perhaps should enlighten on why I acted the way I did. No, I never expect to be excused for the wrongs that I have done.
>
> [Commissioner]: Your continued use of the word "borrowing" gives me great concern because what you did was not borrow funds. You were embezzling funds.
>
> [Applicant]: I realize that the act is an act of embezzlement, sir, and I do accept — I think as I said earlier, that I used that word to explain the state of my mind I was at that time. Yes, I took the money, it was wrong and I can never — I never expect to be totally resolved in my whole life for it. I mean it's something I have to live with forever.

As to the second revealed transgression, the applicant explained that his operator's license had been suspended because he had accumulated an excessive number of points and was thus "trying to refrain from driving." He commuted to law school from Omaha with other students, and at times he stayed with a friend in Lincoln. On the day in question, he had forgotten class notes which he needed to study for a final examination in Lincoln, and was driving back to Omaha to get

them when he was stopped for speeding. He panicked and gave his twin brother's name and address to the officer. After 5 to 10 minutes, he concluded he could not do that and identified himself correctly. He pled guilty to giving false information to an officer and to driving without an operator's license on his person.

The applicant claims to have no recollection of the bad check charge discovered by the commission but, having reviewed the court files, is satisfied that he did indeed write the check in question. The court records show that the check had been issued to a department store in the amount of $36.40 and that the charge was subsequently dismissed at the applicant's cost. He further admits that on a couple of occasions, he has written checks that have been returned for insufficient funds, adding that he has made them good.

Finally, the applicant explains that he did not mention the second act of misconduct the commission discovered simply because it had slipped his mind. On the day of his arrest, he had gone to a grocery store to pick up two packs of cigarettes and a newspaper, paying for the goods at a courtesy counter. The clerk apparently charged him for only one pack of cigarettes and the newspaper. The applicant gave no thought to the amount he was charged and did not realize he had not been charged for the second pack. He proceeded into the restaurant portion of the establishment and had breakfast. When he left more than an hour later, he was stopped at the door and accused of taking the second pack of cigarettes.

Although he continues to maintain that he did not intend to take the merchandise without paying, he decided to enter the pretrial diversion program. He successfully completed the program by payment of restitution and costs and by performing 30 hours of community service.

The applicant acknowledges that it was improper for him not to disclose the merchandise event, although he does not believe actual charges were ever filed because of his entrance into the diversion program. However, the relevant application question is very broad, reading:

> Have you, either as an adult or as a juvenile, been arrested, taken into custody, or accused formally or

informally of the violation of any law? Yes ____ No ____. You must disclose each instance even though charges may not have been formally brought against you or they were dismissed or you were acquitted or adjudication was withheld or a conviction was reversed, set aside or vacated or the record sealed or expunged.

In extenuation, the applicant told the commission:

> I'm not asking you to bury your head in the sand or look the other way with the transgressions I had in the past or with my omission because they're all serious and you're justified in raising the questions about them. . . . I would never intentionally hide something from this Commission because . . . I knew that I would come under scrutiny because I know the things that — the two very serious things that were reported were quite serious and you would take a look at them.
>
> As [my employer] testified, I worked very long hours, plus I had, during the preparation time for the bar application, I was also staying on with the Clinic. I was also going through the Bar Review portion that started at the end of May, beginning of June. In sum, I allowed myself to be overloaded and made the mistake of waiting to the last moment and I made a mistake in not requesting a police report on myself. If I would had [sic] done that, everything would have been clear and I would have had the paper in front of me to do it. I made the mistake of waiting to the last moment to do it, and that's not right in anything in life, especially in the practice of law. There are timetables that need to be done, schedules you got to stick with, otherwise you can't adequately represent your clients and I know that and I've taken steps to manage my time, manage my life better.

A Lincoln attorney, who has employed the applicant as a law clerk since May 1991, testified that he was not aware of the four incidents at the time they occurred or prior to hiring the applicant, but became aware of those matters in June or July 1992. The attorney stated that the applicant had certainly changed in the 2-year period he has known him, becoming more contemplative; the attorney had no reservations about the

applicant's candor or trustworthiness and considered him to be fully honest in all respects. The attorney also described the applicant as being quite diligent and competent as compared to numerous others entering the practice of law whom he has known and with whom he has associated.

A second attorney for whom the applicant had also worked had been made aware of the four incidents and, notwithstanding that knowledge, had no question about the applicant's integrity or moral character. This second attorney, too, had noticed a change in the applicant; in her eyes he had matured and felt contrition for his past conduct. She believed the applicant had proven himself able to survive pressures without resorting to inappropriate responses as he had previously.

The applicant testified before the commission that in his mind, the turning point had occurred when he provided false information to the police, realized his mistake, and belatedly corrected it.

After the commission's recommendation, and with the second attorney's encouragement, the applicant sought professional counseling. His counselor submitted an affidavit declaring that she had counseled the applicant 12 times between October 10, 1992, and April 19, 1993. According to the counselor, during the sessions, the applicant looked at the self-destructive and self-defeating behaviors to which he appeared to have succumbed when under stress or feeling low self-esteem or low self-worth. It was the counselor's impression that the applicant may have acted inappropriately at the time of his father's stroke because of the applicant's intense need to succeed and gain his father's approval. In the counselor's view, the applicant has matured since October 1992.

Both a college professor and a professor at the law school the applicant attended recommended that the applicant be admitted, notwithstanding their knowledge of his past indiscretions. Indeed, the dean of the law school, with full knowledge of the misappropriation of funds, certified the applicant as fit to practice under supervision as a law school senior, pursuant to Neb. Ct. Misc. R., Rule of Legal Prac. by Approved Sr. Law Students (rev. 1992). A former U.S.

Representative for whom the applicant had handled campaign funds and other campaign responsibilities and in whose congressional office the applicant later worked highly recommended the applicant, as did a county commissioner on whose campaign the applicant had also worked.

A number of the applicant's other friends and business and political associates filed affidavits with the commission attesting to their perception of the applicant's good character.

The legal reality is, however, that this court, and only this court, is invested with the power to admit persons to the practice of law and to fix qualifications for admission to the bar. Neb. Const. art. II, § 1, and art. V, §§ 1 and 25; *State, ex rel. Ralston, v. Turner*, 141 Neb. 556, 4 N.W.2d 302 (1942); *State, ex rel. Wright, v. Hinckle*, 137 Neb. 735, 291 N.W. 68 (1940). Thus, this court has the responsibility to adopt and implement systems designed to protect the public and safeguard the justice system by assuring that those admitted to the bar are of such character and fitness as to be worthy of the trust and confidence such admission implies. See *State v. Fisher*, 103 Neb. 736, 174 N.W. 320 (1919) (license to practice law granted on implied understanding licensee shall demean self in proper manner and abstain from practices which bring discredit upon licensee, profession, and court).

The applicant was 31 years old when he misappropriated his fellow students' funds and had spent considerable time studying law—the misappropriation was hardly the act of a naive and callow youth. While the applicant found himself in a difficult financial situation, the circumstance provides no excuse for his conduct.

We routinely disbar attorneys who cannot distinguish between their money and that of their clients. *State ex rel. NSBA v. Veith*, 238 Neb. 239, 470 N.W.2d 549 (1991); *State ex rel. NSBA v. Statmore*, 218 Neb. 138, 352 N.W.2d 875 (1984); *State ex rel. Nebraska State Bar Assn. v. Ledwith*, 197 Neb. 572, 250 N.W.2d 230 (1977). We also hold that a lawyer's restitution of funds wrongfully converted after his or her being faced with legal accountability does not exonerate professional misconduct. *State ex rel. NSBA v. Statmore, supra*; *State ex rel. Nebraska State Bar Assn. v. Ledwith, supra*.

A brief year after misappropriating funds and shortly before graduating from law school, the applicant's first impulse, when faced with the fact that he was caught driving at a time when the law says he should not have been, was to take the easy way out and identify himself as someone else.

The fact that the applicant could forget encountering the criminal justice system for writing an insufficient-funds check even as long as 10 years earlier, when he was 22 years old, is, in and of itself, bothersome. Does the lapse of memory indicate that he did not consider the matter serious? Does it indicate that he represses unpleasant experiences and thus does not learn from them? Does the latter hypothesis explain why he has written other insufficient-funds checks? Whatever the explanation, the applicant's self-confessed forgetfulness about so serious a matter does not inspire confidence in his fitness to practice law.

While we can understand that the applicant may well have been unaware that he had not been charged for, and thus had not paid for, the second pack of cigarettes, his explanation that he forgot to disclose the event because he was in a hurry when completing his application for admission to the bar is neither credible nor exculpatory. He either failed in his obligation to accurately complete the application or deliberately tried to conceal the charge against him. Neither is comforting.

In this regard, we agree with the courts which hold that false, misleading, or evasive answers to bar application questions may be grounds for a finding of lack of requisite character and fitness. *In re Beasley*, 243 Ga. 134, 252 S.E.2d 615 (1979). Accord, *Layon v. North Dakota State Bar Bd.*, 458 N.W.2d 501 (N.D. 1990); *In re Johnson*, 259 Ga. 509, 384 S.E.2d 668 (1989); *In re Green*, 464 A.2d 881 (Del. 1983); *In re Fitzpatrick*, 247 Ga. 55, 273 S.E.2d 618 (1981); *In re Ascher*, 81 Ill. 2d 485, 411 N.E.2d 1 (1980), *cert. denied* 450 U.S. 919, 101 S. Ct. 1365, 67 L. Ed. 2d 345 (1981); *Application of Walker*, 112 Ariz. 134, 539 P.2d 891 (1975), *cert. denied* 424 U.S. 956, 96 S. Ct. 1433, 47 L. Ed. 2d 363 (1976); *In re Bowen*, 84 Nev. 681, 447 P.2d 658 (1969).

The applicant's claim that, whatever may be said about his past conduct, he has rehabilitated himself is not persuasive.

While he claims that the turning point came when he immediately corrected the false information he gave to the police, the fact remains that he was less than candid when he later completed his application for admission to the bar.

One of the better statements of the nearly universal position on character and rehabilitation is found in *In re Application of Allan S.*, 282 Md. 683, 690, 387 A.2d 271, 275 (1978):

> Although a prior conviction is not conclusive of a lack of present good moral character, particularly where the offense occurred a number of years previous to the applicant's request for admission, it adds to his burden of establishing present good character by requiring convincing proof of his full and complete rehabilitation. [Citations omitted.] Thus, a prior conviction must be taken into account in the overall measurement of character and considered in connection with other evidence of subsequent rehabilitation and present moral character. [Citations omitted.] It is not without significance in this regard, as bearing upon moral fitness, that an applicant for admission to the bar refuses to admit his criminal conduct. [Citation omitted.]
>
> The ultimate test of present moral character, applicable to original admissions to the Bar, is whether, viewing the applicant's character in the period subsequent to his misconduct, he has so convincingly rehabilitated himself that it is proper that he become a member of a profession which must stand free from all suspicion. [Citations omitted.] That the absence of good moral character in the past is secondary to the existence of good moral character in the present is a cardinal principle in considering applications for original admission to the Bar.

Accord *In re Application of A.T.*, 286 Md. 507, 408 A.2d 1023 (1979).

The practice of law is not a stress-free pursuit, and we are not convinced that the counseling the applicant undertook only after the commission recommended that he not be permitted to take the bar examination will be as successful as his counselor predicts or that he has yet learned not to take on more than he can handle.

The applicant's heavy reliance on *In re Application of Simmons*, 63 Ohio St. 3d 1, 584 N.E.2d 1159 (1992), for the proposition that he should be permitted to take the bar examination at this time is misplaced. It is true that in *In re Application of Simmons*, the court concluded that, a year having elapsed after the applicant first sought to take the bar examination, the applicant, who admitted having misappropriated funds from a student organization while at law school, could then sit for the examination. Not only is *In re Application of Simmons* distinguishable on the facts, as the miscreant therein had been guilty of no other misconduct, but also we simply consider the inability to distinguish between what is one's own and what is another's a serious character flaw not easily overcome.

As noted in *In re Cason*, 249 Ga. 806, 808-09, 294 S.E.2d 520, 522-23 (1982):

> Payment of the fine or service of the sentence imposed, and not committing further crimes, standing alone, do not prove rehabilitation. Merely showing that an individual is now living as and doing those things he or she should have done throughout life, although necessary to prove rehabilitation, does not prove that the individual has undertaken a useful and constructive place in society. Positive action showing rehabilitation may be evidenced by such things as a person's occupation, religion, or community service.

The fact is that in reviewing an application for admission to the bar, the decision as to an applicant's good moral character must be made on an ad hoc basis. *Application of Greenberg*, 126 Ariz. 290, 614 P.2d 832 (1980). In a disciplinary proceeding against a district court judge, we observed:

> In the final analysis . . . any effort to design the appropriate discipline in this matter by comparing it with that imposed in any case by any other jurisdiction is of limited value. Although analyzing what other jurisdictions have done is instructive, the responsibility of defining and enforcing proper conduct for Nebraska judges falls upon this tribunal.

In re Complaint Against Kneifl, 217 Neb. 472, 485, 351 N.W.2d

693, 700 (1984).

In like manner, it falls to this court to determine that the applicant has failed to show he presently possesses the proper character and fitness to be admitted to the bar of Nebraska and must thus be denied the opportunity to take the bar examination until such time as this court may determine otherwise on further application filed directly in this court in this proceeding.

RECOMMENDATION SUSTAINED.

WHITE and SHANAHAN, JJ., not participating.

TODD E. SANWICK, APPELLANT, V. CLARK E. JENSON, APPELLEE.
508 N.W.2d 267

Filed November 24, 1993. No. S-91-749.

1. **Damages: Verdicts: Juries: Appeal and Error.** Where the amount of damages allowed by a jury is clearly inadequate under the evidence, it is error for the trial court to refuse to set the verdict aside.
2. **Damages: Witnesses: Juries.** In determining the amount of damages, the credibility of witnesses is for the jury.
3. **Verdicts: Appeal and Error.** An appellate court will not reverse a jury verdict on appeal as inadequate unless it is so clearly against the weight and reasonableness of the evidence and so disproportionate to the injury proved as to demonstrate that it was the result of passion, prejudice, mistake, or some other means not apparent in the record, or that the jury disregarded the evidence or rules of law.
4. **Damages: Negligence: Juries: Evidence.** In awarding damages under the provisions of Neb. Rev. Stat. § 25-21,185 (Cum. Supp. 1992), it is the jury's responsibility to comparatively measure the amount of negligence on the defendant's part to the contributory negligence, if any, on the plaintiff's part by considering all the evidence presented on the issue.
5. **Damages: Appeal and Error.** In analyzing the jury's award of damages, an appellate court must examine the particular facts and circumstances of the case in light of the applicable damages rules.
6. **Rules of the Supreme Court: Records: Evidence: Appeal and Error.** Neb. Ct. R. of Prac. 5A(2) (rev. 1992) requires the court reporter to include in the bill of exceptions only those portions of the evidence specified in the request for preparation of the bill; if the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the bill of exceptions must include all evidence relevant to the finding or conclusion.

7. **Records: Appeal and Error.** It is an appellant's responsibility to present a record which supports the error assigned.

Appeal from the District Court for Washington County: DARVID D. QUIST, Judge. Affirmed.

Tim J. Kielty for appellant.

Michael J. Mooney, of McCormack, Cooney, Mooney, Hillman & Elder, for appellee.

HASTINGS, C.J., BOSLAUGH, CAPORALE, FAHRNBRUCH, and LANPHIER, JJ.

CAPORALE, J.

I. STATEMENT OF CASE

In this negligence action, the district court, in accordance with the verdict, entered a $9,359.35 judgment in favor of the plaintiff-appellant, Todd E. Sanwick, and against the defendant-appellee, Clark E. Jenson. Sanwick asserts, in summary, that the district court erred in overruling his motion for a new trial on the ground that the verdict is inadequate. We affirm, for (1) the incomplete record Sanwick brought to us presents no evidence that the verdict was inadequate, and (2) even if the record presented were to have shown an inadequate verdict, its lack of completeness makes appellate review impossible.

II. FACTS

The court reporter's certificate tells us that the bill of exceptions contains all the evidence Sanwick requested, and the reporter further tells us that the document begins with the third witness. As a consequence, it contains Sanwick's, and only Sanwick's, description of the collision. But we know that Jenson and another person also testified on the matter of how the collision occurred, because Sanwick tells us so in his testimony.

The partial record does establish that the action arises out of a collision which occurred at an intersection on November 2, 1987, between a vehicle operated by Sanwick on a highway protected by a stop sign and one operated by Jenson on an unprotected road. While Sanwick's petition alleges the collision

was due to Jenson's negligence, Jenson's answer pleads that the collision was the proximate result of Sanwick's negligence and contributory negligence and that such negligence and contributory negligence were of a degree sufficient to bar Sanwick's recovery.

There is evidence that as a consequence of the collision, the presently 29-year-old Sanwick, who was formerly in good health, now suffers from a chronic back strain; that all available means of conservative treatment have been exhausted and that surgery will not be beneficial; that the condition is painful and permanent; that he has missed work; that Sanwick has in the past needed and will in the future require medication; that Sanwick's occupation at the time of the collision as a carpenter made it necessary that he lift, bend, and crawl, and that these activities aggravate his condition; that he has been depressed; and that because of his chronic and disabling symptoms Sanwick gave up his soon-to-be-$9-per-hour carpenter job and at the time of trial in May 1991 was working at a less taxing job in a cabinet shop, at which he was earning less than $8 per hour.

There is also evidence that Sanwick incurred approximately $8,000 in medical and hospital expenses, that Sanwick sustained a 20- to 30-percent loss of earning capacity, and that the present value of the economic loss he will sustain over his worklife expectancy, including the wages he has already lost, is $133,000.

However, the record also establishes that Sanwick was symptom-free as of January 18, 1988; that when he was examined on April 18, 1990, he demonstrated full and painless back movement; that he had no spasms or shrinking of the back and leg muscles; and that, in short, he suffers no physical defect which can be medically associated with his back injury.

III. ANALYSIS

1. AMOUNT OF VERDICT

It is true, as Sanwick argues, that where the amount of damages allowed by a jury is clearly inadequate under the evidence, it is error for the trial court to refuse to set the verdict aside. Although *Kearney Conv'n Center v.*

Anderson-Divan-Cottrell Ins., 220 Neb. 319, 370 N.W.2d 86 (1985), appears to be the most recent case citing the foregoing rule in reversing a judgment on a verdict, the case actually turned on the fact that the trial court had erroneously instructed the jury on the measure of damages. In another recent case which cited the rule, *O'Neil v. Behrendt*, 212 Neb. 372, 322 N.W.2d 790 (1982), the reversal of the refusal to grant a new trial rested on the trial court's failure to have instructed the jury as properly requested by the plaintiff. And although in ordering new trials in *Gross v. Johnson*, 174 Neb. 273, 117 N.W.2d 534 (1962), and *Nye v. Adamson*, 130 Neb. 887, 266 N.W. 767 (1936), we noted that the verdicts were inadequate, in each instance the trial court's instructions were erroneous.

Nonetheless, there are instances in which a verdict has been characterized as inadequate notwithstanding the absence of erroneous instructions. For example, in *Bohn v. Kruger*, 185 Neb. 407, 176 N.W.2d 14 (1970), a verdict in an amount less than the stipulated special damages was said to be inadequate, and the trial court was thus held to be wrong in refusing to grant a new trial. In *Webster v. Halbridge*, 185 Neb. 409, 176 N.W.2d 8 (1970), we ruled that because the trial court had observed the demeanor of the witnesses, it could not be said that it erred in granting a new trial in the face of a verdict the trial court considered to be inadequate because of the influence of an irrelevant matter brought to the jury's attention. In like fashion, in *Schaffer v. Bolz*, 181 Neb. 509, 149 N.W.2d 334 (1967), we affirmed the granting of a new trial where the limits of the defendant's policy of insurance had been disclosed to the jury. And in reversing the refusal to grant a new trial in *Dolen v. Beatrice Restaurant Co.*, 137 Neb. 247, 289 N.W. 336 (1939), we noted that the verdict was in an amount less than the uncontradicted amount of the reasonably and necessarily incurred medical, nursing, and hospital bills.

However, where the instructions have not been found wanting, no improper influences were before the jury, and the extent of injury or the amount of damages was disputed, verdicts claimed to have been inadequate have been sustained. For example, in *Nickal v. Phinney*, 207 Neb. 281, 298 N.W.2d 360 (1980), a verdict for the amount of the medical expenses

was affirmed. In *Hunter v. Sorensen*, 201 Neb. 153, 266 N.W.2d 529 (1978), this court, in reversing the granting of a new trial, upheld a verdict for less than the amount of the property damage, medical expenses, and loss of wages. In doing so, the *Hunter* court detailed the evidence disputing the source and extent of the plaintiff's continuing physical complaints. And in *Cullinane v. Milder Oil Co.*, 174 Neb. 162, 116 N.W.2d 25 (1962), this court reversed the granting of a new trial, holding that a verdict of $2,000 for injuries to the head, shoulder, spine, and legs, resulting in alleged scars, pain, and the inability to lift heavy objects, and a $2,300 wage loss, was not inadequate as a matter of law. In so holding, the *Cullinane* court remarked that in determining the amount of damages, the credibility of witnesses was for the jury. Here, no improper influences were brought to the jury's attention, no complaint is made of the trial court's instructions, the evidence as to the nature and extent of Sanwick's injury and disability is in dispute, and the amount of damages was anything but stipulated.

Under this state of the partial record, it cannot be said that the verdict is inadequate as a matter of law, even if Sanwick was guilty of no contributory negligence whatsoever. The law is well established that an appellate court will not reverse a jury verdict on appeal as inadequate unless it is so clearly against the weight and reasonableness of the evidence and so disproportionate to the injury proved as to demonstrate that it was the result of passion, prejudice, mistake, or some other means not apparent in the record, or that the jury disregarded the evidence or rules of law. *Beauford v. Father Flanagan's Boys' Home*, 241 Neb. 16, 486 N.W.2d 854 (1992); *Bay v. House*, 226 Neb. 521, 412 N.W.2d 466 (1987); *Bashus v. Turner*, 218 Neb. 17, 352 N.W.2d 161 (1984); *Cooper v. Hastert*, 175 Neb. 836, 124 N.W.2d 387 (1963).

2. Incompleteness of Record

However, inasmuch as the collision occurred, and thus Sanwick's cause of action accrued, prior to February 8, 1992, this case is controlled by Neb. Rev. Stat. § 25-21,185 (Reissue 1989). See Neb. Rev. Stat. § 25-21,185 (Cum. Supp. 1992). In pertinent part, § 25-21,185 provides that in an action for

injuries caused by another's negligence,

> the fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery when the contributory negligence of the plaintiff was slight and the negligence or act or omission giving rise to strict liability in tort of the defendant was gross in comparison, but the contributory negligence of the plaintiff shall be considered by the jury in the mitigation of damages in proportion to the amount of contributory negligence attributable to the plaintiff; and all questions of negligence or act or omission giving rise to strict liability in tort and contributory negligence shall be for the jury.

It was therefore the jury's responsibility in awarding damages to comparatively measure the amount of negligence on Jenson's part to the contributory negligence, if any, on Sanwick's part by considering all the evidence presented on the issue. *C. C. Natvig's Sons, Inc. v. Summers*, 198 Neb. 741, 255 N.W.2d 272 (1977); *Niemeyer v. Tichota*, 190 Neb. 775, 212 N.W.2d 557 (1973); *Gross v. Johnson*, 174 Neb. 273, 117 N.W.2d 534 (1962); *Cullinane v. Milder Oil Co., supra*.

In analyzing the jury's award of damages, an appellate court must examine the particular facts and circumstances of the case in light of the applicable damages rules. See *Cooper v. Hastert, supra*.

While the pertinent rule of practice requires the court reporter to include in the bill of exceptions only those portions of the evidence "specified in the request for preparation of" the bill, it also provides that if "the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the bill of exceptions must include all evidence relevant to the finding or conclusion." Neb. Ct. R. of Prac. 5A(2) (rev. 1992).

It was therefore Sanwick's responsibility as appellant to present a record which supports the error he assigned. See, *GFH Financial Serv. Corp. v. Kirk*, 231 Neb. 557, 437 N.W.2d 453 (1989); *Behm v. Northwestern Bell Tel. Co.*, 241 Neb. 838, 491 N.W.2d 334 (1992); *Abboud v. Cutler*, 238 Neb. 177, 469 N.W.2d 763 (1991); *In re Interest of R.R.*, 239 Neb. 250, 475 N.W.2d 518 (1991).

In *Ward v. Ward*, 220 Neb. 799, 373 N.W.2d 389 (1985), we held that given a bill of exceptions which contained only the respondent's testimony and the trial exhibits, we could not make the required de novo review to determine the validity of the respondent's claim that the trial court had erred in dividing the property of the parties. We thus affirmed the trial court's denial of the respondent's motion for new trial.

In like fashion, the condition of the record presented here prevents us from knowing the entirety of the evidence presented to the jury on the manner in which the collision occurred and thus deprives us of the ability to determine whether there was a basis for the jury to mitigate Sanwick's damages by virtue of his own contributory negligence.

IV. JUDGMENT

Accordingly, the judgment of the district court is affirmed.

AFFIRMED.

WHITE, J., participating on briefs.
SHANAHAN, J., not participating.

GABLES CVF, INC., APPELLANT, V. BAHR, VERMEER & HAECKER ARCHITECT, LTD., ET AL., APPELLEES.

506 N.W.2d 706

Filed November 24, 1993. No. S-91-758.

Appeal from the District Court for Douglas County: THEODORE L. CARLSON, Judge. Supplemental opinion: Former opinion modified. Motions for rehearing overruled.

William J. Brennan and Thomas M. White, of Fitzgerald, Schorr, Barmettler & Brennan, for appellant.

Thomas J. Guilfoyle, of Frost, Meyers, Guilfoyle & Govier, for appellee Bahr, Vermeer & Haecker Architect, Ltd.

Susan E. Norris, of Gross & Welch, P.C., for appellee The Chicago Lumber Company of Omaha.

Betty L. Egan, of Walentine, O'Toole, McQuillan & Gordon, for appellee Sol Lewis Engineering Co.

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

PER CURIAM.

This case is now before this court on the motions for rehearing of the defendant and third-party plaintiff, appellant Gables CVF, Inc., and the third-party defendant, appellee Bahr, Vermeer & Haecker Architect, Ltd. The opinion is reported at *Gables CVF v. Bahr, Vermeer & Haecker Architect, ante* p. 346, 506 N.W.2d 706 (1993). Each of said motions is overruled; however, the opinion is modified as hereinafter stated.

The following paragraph, appearing in *Gables CVF, ante* at 355-56, reads:

> It is impossible to say in the present state of the record that, as a matter of law on a motion for summary judgment, Goldman-Kasin was aware of all deviations from the building plans and was not relying upon BVH to inform it of subcontractors' deviations from the architect's plans. However, on remand, in the absence of fraud, if it is established that Goldman-Kasin was aware of the deviations from the building plans, then that knowledge must be imputed to its partner, Gables CVF, and Gables CVF would then be unable to complain that it was damaged by the failure of BVH to provide it with appropriate notice of deviations from the building plans.

It is hereby modified to read:

> It is impossible to say in the present state of the record that, as a matter of law on a motion for summary judgment, Goldman-Kasin was aware of all deviations from the building plans and was not relying upon BVH to inform it of subcontractors' deviations from the architect's plans.

FORMER OPINION MODIFIED.

MOTIONS FOR REHEARING OVERRULED.

WHITE, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. JACK L. BEVERLIN, JR., APPELLANT.

508 N.W.2d 271

Filed November 24, 1993. No. S-92-251.

1. **Criminal Law: Sentences: Judgments.** In criminal cases, it is the sentence which is the judgment.
2. **Courts: Jurisdiction: Appeal and Error.** A district court is divested of subject matter jurisdiction over a particular case when an appeal of that case is perfected to an appellate court.

Petition for further review from the Nebraska Court of Appeals, SIEVERS, Chief Judge, and IRWIN and WRIGHT, Judges, on appeal thereto from the District Court for Douglas County, DONALD J. HAMILTON, Judge. Appeal dismissed.

Phillip G. Wright and John J. Maynard, of Quinn & Wright, for appellant.

Don Stenberg, Attorney General, and Mark D. Starr for appellee.

HASTINGS, C.J., BOSLAUGH, CAPORALE, FAHRNBRUCH, and LANPHIER, JJ.

LANPHIER, J.

Defendant, Jack L. Beverlin, Jr., was convicted of first degree sexual assault in the district court for Douglas County, Nebraska. He was sentenced by the court without an evaluation to determine if he was a mentally disordered sex offender (MDSO), as required by Neb. Rev. Stat. § 29-2912 (Reissue 1989). While that sentence was on appeal, the district court sustained a motion for postconviction relief, ordered the first sentence vacated, and resentenced Beverlin following an MDSO evaluation. The appeal of the first sentence was dismissed at Beverlin's request. The second sentence was appealed. On appeal, the Nebraska Court of Appeals affirmed the conviction. We granted the State's petition for further review because of the jurisdictional question raised by the holding of the Court of Appeals.

BACKGROUND

After Beverlin entered a no contest plea to a charge of first

degree forcible sexual assault, the district court found Beverlin guilty and subsequently sentenced him to 10 to 15 years' imprisonment. This first sentence was imposed without an evaluation of Beverlin to determine whether he was an MDSO, as required under § 29-2912.

Beverlin timely filed a notice of appeal. This first appeal was docketed as case No. A-91-1227. In January 1992, while the case was still pending in the appellate court, Beverlin filed a postconviction motion in the district court to vacate and set aside the first sentence on the ground that the court had imposed the sentence without the benefit of the statutorily required MDSO evaluation.

On February 3, 1992, the district court sustained Beverlin's postconviction motion and ordered a resentencing hearing as soon as the psychological evaluations were received. Beverlin moved for additional psychological examinations and, when denied, filed a motion for leave to withdraw his no contest plea. This motion was also denied. After an MDSO evaluation was performed on Beverlin, the district court found he was not an MDSO and resentenced him to 10 to 15 years' imprisonment.

Beverlin's previous counsel, the public defender, moved to dismiss the appeal of the first sentence, which motion was granted by the Court of Appeals. Beverlin's present counsel timely appealed the second sentence, case No. A-92-251, which is the matter before us.

JURISDICTION

The principal question is whether the jurisdiction of the case was removed to the appellate court when the first appeal was filed, precluding the district court from resentencing Beverlin. The Court of Appeals held that the district court retained jurisdiction to impose the second sentence because the first sentence was invalid, since it was imposed without the benefit of the statutorily required MDSO evaluation. This holding is not supported by prior case law of this court.

In criminal cases, it is the sentence which is the judgment. *State v. Spotted Elk*, 227 Neb. 869, 420 N.W.2d 707 (1988). The Court of Appeals found that the first sentence was not a judgment which was appealable because it was imposed

without receiving the psychological evaluations. It therefore concluded that under *State v. Blankenship*, 195 Neb. 329, 237 N.W.2d 868 (1976), the district court was able to impose the second sentence. *State v. Beverlin*, 3 NCA 717 (1993). However, although the sentence was imposed without the benefit of the MDSO determination, the judgment was not void, but voidable. See *State ex rel. Casselman v. Macken*, 194 Neb. 806, 235 N.W.2d 867 (1975).

DIVESTMENT OF JURISDICTION

This court has held that a district court is divested of subject matter jurisdiction over a particular case when an appeal of that case is perfected to an appellate court. *Sports Courts of Omaha v. Meginnis*, 242 Neb. 768, 497 N.W.2d 38 (1993); *State v. Horr*, 232 Neb. 380, 441 N.W.2d 139 (1989); *State v. Spotted Elk, supra*. Consequently, once Beverlin perfected his first appeal, the district court no longer had the authority to vacate the first sentence and resentence him. The Court of Appeals mistakenly relied upon *Blankenship* to create an unwarranted exception to the above-stated rule. "If a sentence is invalid, 'it is of no effect and the court may then impose any sentence which could have been validly imposed in the first place.' " *State v. Beverlin*, 3 NCA at 719. The Court of Appeals interpreted this statement to mean that since it is the sentence which is the judgment, an invalid sentence is not a judgment which is appealable.

This interpretation is not warranted under the facts of *Blankenship*. In *Blankenship*, the district court determined, on its own motion, that the sentence it had originally imposed was invalid; vacated it; and imposed another. There was no notice of appeal filed until after the second sentence had been imposed. This court found that the district court could correct an original sentence which was invalid by imposing a sentence which could have validly been imposed in the first place.

Furthermore, the court in *Blankenship* cited *State v. Shelby*, 194 Neb. 445, 232 N.W.2d 23 (1975), in support of its holding. In *Shelby*, this court held that an erroneous or invalid sentence could be set aside and replaced by a valid one by the district court during the period of time that it retained jurisdiction over

the defendant. Here, the district court no longer retained jurisdiction over the subject matter because Beverlin had already perfected the appeal of the first sentence. See, *Sports Courts of Omaha v. Meginnis, supra*; *State v. Horr, supra*; *State v. Spotted Elk, supra*.

CONCLUSION

The district court was divested of jurisdiction when Beverlin perfected his appeal of the first sentence. It had no jurisdiction to vacate the first sentence and resentence. The Court of Appeals did not have jurisdiction to consider an appeal of the second sentence. We therefore dismiss the appeal for lack of jurisdiction.

APPEAL DISMISSED.

WHITE, J., participating on briefs.
SHANAHAN, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. DENNIS SELL, APPELLANT.
508 N.W.2d 273

Filed November 24, 1993. Nos. S-93-213, S-93-214, S-93-215.

1. **Statutes: Appeal and Error.** Statutory interpretation is a question of law, in connection with which an appellate court is obligated to reach conclusions independent of those reached by the trial court.
2. **Convicted Sex Offender.** The Convicted Sex Offender Act does not apply to persons classified as untreatable or presently untreatable.

Appeal from the District Court for Dawson County: DONALD E. ROWLANDS II, Judge. Affirmed.

Scott H. Trusdale, of Trusdale & Trusdale, P.C., for appellant.

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

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

WHITE, J.

Dennis Sell appeals from a district court order denying his motion for resentencing in accordance with the Convicted Sex Offender Act, Neb. Rev. Stat. §§ 29-2922 to 29-2936 (Cum. Supp. 1992).

Appellant is currently serving three separate sentences. In sentencing appellant in each of those cases, the court applied the sexual sociopath law and found appellant to be an untreatable sexual sociopath. In 1983, the Legislature repealed the sexual sociopath law and enacted the mentally disordered sex offender act, Neb. Rev. Stat. §§ 29-2911 to 29-2921 (Reissue 1989). Appellant was resentenced and found to be a "Mentally Disordered Sex Offender, presently untreatable." His current sentences range from 3 1/3 years' imprisonment to life imprisonment, and he has been incarcerated for the past 17 years.

In 1992, the Legislature enacted the Convicted Sex Offender Act. The Convicted Sex Offender Act repealed the laws under which appellant was last sentenced, the mentally disordered sex offender act. Appellant filed a motion for resentencing on January 4, 1993. Appellant contends that he should be resentenced pursuant to the Convicted Sex Offender Act.

The district court denied appellant's motion. The court stated that although the new law did not expressly exclude appellant from the effects of the statute, a review of the legislative history and the various sections supported the conclusion that appellant was not entitled to be resentenced. The court stated that only two classes of persons who had been sentenced before the new statute was enacted were affected by its passage: those persons already receiving treatment and those persons awaiting treatment. See § 29-2934. The court found that appellant fell into neither category because he is neither receiving nor awaiting treatment.

Appellant argues that the district court erred when it failed to find that the Convicted Sex Offender Act applied to appellant, when it did not resentence appellant pursuant to the act, and when it did not find that the act violated the due process clause of both the state and federal Constitutions because it fails to provide for persons classified as untreatable.

Statutory interpretation is a question of law, in connection with which an appellate court is obligated to reach conclusions independent of those reached by the trial court. *Universal Assurors Life Ins. Co. v. Hohnstein*, 243 Neb. 359, 500 N.W.2d 811 (1993); *State v. Saulsbury*, 243 Neb. 227, 498 N.W.2d 338 (1993); *Sorensen v. City of Omaha*, 230 Neb. 286, 430 N.W.2d 696 (1988). However, we agree with the district court and affirm the order denying appellant's motion for resentencing. The new statute does not apply to persons classified as untreatable or presently untreatable. Moreover, the fact that the statute fails to address the category of inmates to which appellant has been found to belong does not give rise to the relief that he seeks.

We do agree, however, that appellant's status as "presently untreatable" may be subject to review. However, the Convicted Sex Offender Act is not the appropriate means of attaining such relief. See *State v. Little*, 199 Neb. 772, 261 N.W.2d 847 (1978).

AFFIRMED.

SHANAHAN, J., not participating.

METROPOLITAN LIFE INSURANCE COMPANY, A NEW YORK CORPORATION, APPELLEE, V. KISSINGER FARMS, INC., A NEBRASKA CORPORATION, ET AL., APPELLEES, AND DEWITT FARMS, INC., A NEBRASKA CORPORATION, APPELLANT.

508 N.W.2d 568

Filed December 3, 1993. No. S-90-521.

1. **Mortgages: Real Estate: Foreclosure: Equity.** A proceeding to foreclose a real estate mortgage is an equitable action.
2. **Equity: Appeal and Error.** In an action in equity, an appellate court tries the factual issues de novo on the record and reaches a conclusion independent of the findings of the trial court.
3. **Statutes: Appeal and Error.** Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below.
4. **Statutes: Legislature: Intent.** In settling upon the meaning of a statute, the components of a series or collection of statutes pertaining to a certain subject matter may be conjunctively considered and construed to determine the intent of

the Legislature so that different provisions of the act are consistent, harmonious, and sensible.

5. **Statutes.** If there is a conflict, the special provisions of a statute prevail over the general provisions in the same or other statutes.
6. **Corporations: Property: Mortgages.** The provisions of Neb. Rev. Stat. § 21-2077 (Reissue 1991) exempt the mortgaging of all or substantially all of a corporation's property and assets, whether in the usual course of business or otherwise, from the operation of Neb. Rev. Stat. § 21-2078 (Reissue 1991).

Appeal from the District Court for Clay County: STEPHEN ILLINGWORTH, Judge. Affirmed.

Stephen H. Nelsen and Richard P. Garden, Jr., of Cline, Williams, Wright, Johnson & Oldfather, for appellant.

Arend R. Baack, of Luebs, Beltzer, Leininger, Smith & Busick, for appellee Metropolitan Life Insurance Co.

BOSLAUGH, WHITE, CAPORALE, FAHRNBRUCH, and LANPHIER, JJ., and RONIN, D.J., Retired.

CAPORALE, J.

I. STATEMENT OF CASE

In order to secure a promissory note drawn by the defendants-appellees Kissinger Farms, Inc., Kissinger Feed Lots, Inc., and Ralph Kissinger, Jr., the two corporations executed a mortgage in favor of the plaintiff-appellee, Metropolitan Life Insurance Company, thereby encumbering the separate land owned by each of the aforenamed corporations. Following the borrowers' default on the underlying loan, Metropolitan instituted this foreclosure action, and the district court enforced the mortgage. The defendant-appellant DeWitt Farms, Inc., the successor owner of a portion of the land mortgaged by Kissinger Farms, asserts that the district court erred in decreeing foreclosure of the mortgage, claiming, in summary, that Kissinger Farms did not effectively authorize execution of the mortgage and that the mortgage is not enforceable on any other basis. We affirm.

II. SCOPE OF REVIEW

A proceeding to foreclose a real estate mortgage is an equitable action. *McCook Nat. Bank v. Myers*, 243 Neb. 853, 503 N.W.2d 200 (1993). While in such an action an appellate

court tries the factual issues de novo on the record and reaches a conclusion independent of the findings of the trial court, this case is controlled by statute. Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below. *AMISUB v. Board of Cty. Comrs. of Douglas Cty.*, *post* p. 657, 508 N.W.2d 827 (1993); *In re Application of City of Lincoln*, 243 Neb. 458, 500 N.W.2d 183 (1993). See, also, *Wilson v. Misko*, *ante* p. 526, 508 N.W.2d 238 (1993).

III. FACTS

Prior to the creation of Kissinger Farms, Ralph Kissinger, Jr., and his father had farmed together. In 1967, the aforementioned son and his wife incorporated Kissinger Feed Lots, and the son at all relevant times remained a shareholder of that corporation. After its incorporation, Kissinger Feed Lots rented land from Ralph Kissinger, Jr.'s father and mother.

The father and mother incorporated Kissinger Farms in March 1968 and later began making gifts of the corporate stock to their two children, the said son and their daughter, Miriam DeWitt. Upon the mother's death in 1977, the shares of stock remaining in her name were held for the benefit of the father and two children in a trust, for which the son served as sole trustee. All of the shares of stock apparently passed to the two children upon the father's death in 1981.

For many years, the board of directors of Kissinger Farms included the father, mother, and son. Jack DeWitt, the daughter's child, became a member of the board in 1975. However, the board held no annual or special meetings; rather, its standard practice was to affirm and ratify the actions taken by the corporation's officers and directors by documents designated as "actions in writing." The corporation also used such documents rather than holding regular meetings of its shareholders.

At times, Kissinger Feed Lots and Kissinger Farms transferred funds from one to the other. On one occasion, when Kissinger Farms needed money to pay salaries to the father, mother, and daughter, Kissinger Feed Lots funds were

transferred to Kissinger Farms. At other times, when Kissinger Feed Lots loans from Fairfield State Bank were at the lending limit, funds were borrowed from the bank in the name of Kissinger Farms for the use of Kissinger Feed Lots.

As a shareholder of Kissinger Farms, the daughter knew of its lack of compliance with corporate formalities and, until her father's death, never sought to influence its operations, permitting the father and son to conduct business as they saw fit.

In 1968, Kissinger Feed Lots leased all of the 1,123 acres of land owned by Kissinger Farms. Later, Kissinger Feed Lots began to experience financial difficulties. Its short-term debt had increased and exceeded the corporation's current assets. Fairfield State Bank loaned Kissinger Feed Lots operating funds up to the bank's lending limit, and additional funds were lent by the Production Credit Association (PCA).

As reflected by an action in writing dated June 27, 1977, all the directors of Kissinger Farms consented to a resolution authorizing the corporate president or treasurer to "sign a continuing guarantee to the [PCA] for the payment at maturity of any or all indebtedness . . . of Kissinger Feed Lots Inc. . . . in connection with the loan or loans hereafter to be made."

At some point the PCA notified Kissinger Feed Lots that it would no longer continue financing the operation because of the excessive amount of short-term debt. Kissinger Feed Lots was thus faced with liquidating its operation to satisfy the debt or finding suitable long-term financing.

On May 30, 1978, Kissinger Feed Lots and Kissinger Farms executed a promissory note payable to the U.S. Small Business Administration (SBA) for $163,600, secured by a mortgage on approximately 351 acres of land owned by Kissinger Farms. Kissinger Farms held no formal meeting to approve this loan, but a directors' action in writing dated May 30, 1978, executed by the father and son as directors authorizes the loan and recites that it was to be made by Kissinger Feed Lots, which was to be responsible for repayment of the loan. Jack DeWitt did not sign this document.

Nonetheless, the father as president and the son as

secretary-treasurer executed an SBA directors' resolution form, authorizing the loan on behalf of Kissinger Farms. According to the son, $25,000 of the SBA loan funds were utilized by Kissinger Farms; the balance of the loan proceeds were used by Kissinger Feed Lots. The daughter did not recall signing a shareholder consent for this loan, but does remember acting as a guarantor to the extent of $15,000.

In January 1978, the son traveled to California and told the daughter that he would probably have to mortgage the real estate of both Kissinger Feed Lots and Kissinger Farms. The daughter vehemently objected to mortgaging Kissinger Farms' land, which was then unencumbered. Nonetheless, in May 1978, the son applied for a $1,100,000 loan from Metropolitan to refinance Kissinger Feed Lots' short-term debt, utilizing as mortgage security all of the land owned by Kissinger Feed Lots and Kissinger Farms.

The father and son, as directors of Kissinger Farms, executed an action in writing dated June 24, 1978, reading, in relevant part:

> The undersigned, constituting all the Directors of the Corporation entitled to vote at the annual meeting, have waived notice of said meeting, have dispensed with holding of said meeting, and have . . . taken the following action by this writing:
>
> . . . .
>
> 3. Authorize and approve the proposed action of the President [the father] to grant a security interest in the property of Kissinger Farms, Inc. to [Metropolitan] as collateral for a mortgage loan by that company to Kissinger Feed Lots Inc., for the sum of [$1,100,000]. All costs, fees, interest and repayments on said loan are to be borne by Kissinger Feed Lots, Inc.

Jack DeWitt, the other Kissinger Farms director, did not execute that document; however, he later executed an action in writing of the board of directors of Kissinger Farms dated September 15, 1978, by which the board at a special meeting decided to: "1. Ratify and approve the action in writing of the annual meeting of the Board of Directors on 2[unreadable] June, 1978."

In the meantime, Metropolitan had, on August 31, 1978, made its loan. The promissory note was executed by the son as president and attested to by his daughter-in-law as secretary on behalf of Kissinger Feed Lots and executed by the father as president and attested to by the son as secretary on behalf of Kissinger Farms. The son also signed the note in his individual capacity. Having no interest in the land, the son did not execute the mortgage securing the note in his individual capacity, but the same officers signed it and the related financing statement on behalf of Kissinger Feed Lots and Kissinger Farms.

Prior to execution of the loan documents, Metropolitan had been provided with a "Corporate Stock Certification" signed by the son as secretary-treasurer representing that there were 1,900 total outstanding shares of Kissinger Farms stock. Metropolitan was also provided with a document executed by the father and the son in his individual and trust capacities and again in his capacity as secretary of Kissinger Farms that more than two-thirds of the shareholders consented to the transaction. The record shows that 1,315 shares consented to the transaction; the father owned 360 of those shares and the son owned or controlled the remaining 955 shares.

The loan funds were disbursed to Kissinger Feed Lots and its creditors pursuant to an authorization to disburse dated July 26, 1978, signed by the father on behalf of Kissinger Farms and the son on behalf of Kissinger Feed Lots.

The daughter claims that she did not learn of the mortgage to Metropolitan until the son called and told her after the loan had been completed. The son confirms that he did not specifically mention a mortgage with Metropolitan when he visited the daughter in California, but claims that he did so prior to completing the loan.

After the father's death, the relationship between the son and daughter deteriorated, and in November 1983, the son proposed a division of the land held by Kissinger Farms. As a consequence, in order to divide the assets between the two, approximately 440 acres of land were deeded in 1984 from Kissinger Farms to DeWitt Farms, which was incorporated by the daughter. DeWitt Farms then leased its land to Kissinger Feed Lots on a share lease continuing through the time of trial.

IV. ANALYSIS

Because the record establishes that Kissinger Farms properly authorized execution of the Metropolitan mortgage, we do not reach the issue of whether the mortgage would have been enforceable on any other ground.

DeWitt Farms' assertion that execution of the mortgage was ineffective rests on the claims that, given the son's conflicting financial interest, (1) the requisite shareholder approval was lacking and (2) the board of directors' authorization of the transaction was inoperative.

1. Shareholder Approval

The method through which a corporation may authorize the execution of a mortgage encumbering all or substantially all of its property and assets is set forth in Neb. Rev. Stat. § 21-2077 (Reissue 1991), which provides, in relevant part:

> The sale, lease, exchange, or other disposition of all, or substantially all, the property and assets of a corporation, in the usual and regular course of its business, and the mortgage or pledge of any or all property and assets of a corporation whether or not in the usual course of business may be made upon such terms and conditions and for such consideration . . . as shall be authorized by its board of directors; and in any such case no authorization or consent of the shareholders shall be required.

However, DeWitt Farms calls attention to Neb. Rev. Stat. § 21-2078 (Reissue 1991), which reads, so far as is relevant:

> A sale, lease, exchange, or other disposition of all, or substantially all, the property and assets . . . of a corporation, if not made in the usual and regular course of its business, may be made upon such terms and conditions and for such consideration . . . as may be authorized in the following manner:
>
> (1) The board of directors shall adopt a resolution recommending such sale, lease, exchange, mortgage, pledge, or other disposition and directing the submission thereof to a vote at a meeting of shareholders, which may be either an annual or a special meeting;
>
> (2) Written or printed notice shall be given to each

> shareholder of record entitled to vote at such meeting within the time and in the manner provided . . . for the giving of notice of meetings of shareholders, and, whether the meeting be an annual or a special meeting, shall state that the purpose, or one of the purposes of such meeting is to consider the proposed sale, lease, exchange, mortgage, pledge, or other disposition;
>
> (3) At such meeting the shareholders may authorize such sale, lease, exchange, mortgage, pledge, or other disposition and may fix, or may authorize the board of directors to fix, any or all of the terms and conditions thereof and the consideration to be received by the corporation therefor. Each outstanding share of the corporation shall be entitled to vote thereon, whether or not entitled to vote thereon by the provisions of the articles of incorporation. Such authorization shall require the affirmative vote of the holders of at least two-thirds of the outstanding shares of the corporation . . . .

DeWitt Farms urges, in effect, that the mortgaging of all or substantially all of a corporation's property and assets in other than the usual and ordinary course of business is another disposition contemplated by § 21-2078 and thus requires shareholder approval.

However, in settling upon the meaning of a statute, the components of a series or collection of statutes pertaining to a certain subject matter may be conjunctively considered and construed to determine the intent of the Legislature so that different provisions of the act are consistent, harmonious, and sensible. *In re Application of City of Lincoln*, 243 Neb. 458, 500 N.W.2d 183 (1993). If there is a conflict, the special provisions of a statute prevail over the general provisions in the same or other statutes on the same subject. *AMISUB v. Board of Cty. Comrs. of Douglas Cty., post* p. 657, 508 N.W.2d 827 (1993); *In re Application of City of Lincoln, supra*.

Applying those principles, we conclude that the more specific provisions of § 21-2077 exempt the mortgaging of all or substantially all of a corporation's property and assets, whether in the usual course of business or otherwise, and thus, such may be done by a corporation's board without stockholder

approval. See *Carroll v. Wyo. Production Credit Ass'n*, 755 P.2d 869 (Wyo. 1988).

2. BOARD AUTHORIZATION

Notwithstanding that shareholder approval was unnecessary, because the son is the only shareholder and director of Kissinger Farms holding an ownership interest in Kissinger Feed Lots, the entity which benefited from the Metropolitan loan, we must consider the extent of any conflicting financial interest that he had in the loan and that Kissinger Feed Lots had in executing the mortgage.

In this regard several factors are worthy of note. First, Kissinger Farms had previously authorized an ongoing guarantee of Kissinger Feed Lots' debt with the PCA, which represented $770,504.15 of the debts refinanced by the Metropolitan loan. Second, the balance of the Metropolitan loan proceeds was used to refinance debts which were owed to the Federal Land Bank and Fairfield State Bank and secured by mortgages which were released as the result of the Metropolitan loan. Since the only mortgage on Kissinger Farms land prior to the Metropolitan loan was the SBA mortgage made in May 1978, it would seem that the prior Federal Land Bank and Fairfield State Bank mortgages had been secured by the Kissinger Feed Lots land, which was again pledged for the Metropolitan loan.

As a result, it is apparent Kissinger Farms benefited from the mortgage. Since it was already liable for the PCA debt of over $770,000 as a guarantor and the other debts refinanced were already secured by Kissinger Farms land, the net result was to refinance the debt of Kissinger Feed Lots into one long-term loan.

Whatever benefit Kissinger Farms may have achieved via the Metropolitan loan, it is clear that the son as a shareholder in Kissinger Feed Lots had a substantial direct benefit and personal motivation above and beyond any benefit reaped by Kissinger Farms. As a consequence, the son, in acting as a director of Kissinger Farms, had a conflicting financial interest.

We thus turn our attention to Neb. Rev. Stat. § 21-2040.01

(Reissue 1991), which declares, in pertinent part:

> No contract or other transaction between a corporation and one or more of its directors or any other corporation, firm, association or entity in which one or more of its directors are directors or officers or are financially interested, shall be either void or voidable because of such relationship or interest or because such director or directors are present at the meeting of the board of directors or a committee thereof which authorizes, approves or ratifies such contract or transaction or because his or their votes are counted for such purpose if:
>
> (1) The fact of such relationship or interest is disclosed or known to the board of directors or committee which authorizes, approves or ratifies the contract or transaction by a vote or consent sufficient for the purpose without counting the votes or consents of such interested directors;
>
> (2) The fact of such relationship or interest is disclosed or known to the shareholders entitled to vote and they authorize, approve or ratify such contract or transaction by vote or written consent . . . [.]
>
> . . . .
>
> Common or interested directors may be counted in determining the presence of a quorum at a meeting of the board of directors or a committee thereof which authorizes, approves or ratifies such contract or transaction.

Article IV, § 11, of the bylaws of Kissinger Farms implements those statutory provisions by providing that a

> contract or transaction shall not be invalidated or in any wise affected by the fact that such director or directors have or may have an interest therein which is or might be adverse to the interests of this corporation, so long as full disclosure of the adverse interest is made to the Board of Directors by the directors having such interest, and if the Board of Directors unanimously authorizes, affirms, ratifies, or approves such contract or transaction.

It is apparent from the close family relationships between the directors of Kissinger Farms, and the lack of any claim to the contrary, that the son's interest in Kissinger Feed Lots was

known to the other directors. Thus, the disclosure requirements of § 21-2040.01(1) and (2) and of article IV, § 11, of the bylaws of Kissinger Farms were met. However, since that provision of the bylaws requires unanimous director consent when any one director has a conflict, the action in writing of less than all the directors dated June 24, 1978, failed to authorize execution of the Metropolitan mortgage.

But the holdout director, Jack DeWitt, did join in the board's September 15, 1978, action in writing purporting to ratify the action reflected in the June 24 document.

Such a procedure is permitted by Neb. Rev. Stat. § 21-2042 (Reissue 1991), which provides, in relevant part:

> Unless otherwise provided by the articles of incorporation or bylaws, any action required by [law] to be taken at a meeting of the directors . . . may be taken without a meeting, if a consent in writing setting forth the action so taken shall be signed by all of the directors. . . . Such consent shall have the same effect as a unanimous vote.

In accordance with that statutory provision, article IV, § 7, of the bylaws of Kissinger Farms permits the board to act, without the holding of a meeting, through a unanimous consent in writing.

Thus, the September 15, 1978, document effectively authorizes the transaction in question if it can be said that it refers to the action reflected in the June 24, 1978, action in writing.

Article IV, § 3, of the bylaws of Kissinger Farms provides that the annual meeting of the board of directors shall be held immediately after the annual meeting of the shareholders, which, according to article III, § 1, is to occur at 9 a.m. on the last Monday in June of each year. Thus, even though the date of the June action is incomplete or unclear on the copy of the ratification contained in the record and the last Monday of that month occurred on the 26th day, it is nonetheless clear that the September document can only refer to the action in writing dated June 24, 1978. Nor is there any claim that the case is otherwise.

In the absence of any evidence that Jack DeWitt himself had

a conflict or otherwise violated his fiduciary duty to Kissinger Farms, the September 15, 1978, document effectively ratified the action taken on June 24, 1978, by making the board of directors' consent to the execution of the Metropolitan mortgage unanimous, as permitted by §§ 21-2040.01 and 21-2042 and required by article IV, § 11, of Kissinger Farms' bylaws.

V. JUDGMENT

Accordingly, the judgment of the district court is affirmed.

AFFIRMED.

HASTINGS, C.J., and SHANAHAN, J., not participating.

LYLE H. DIEFENBAUGH AND MAXINE DIEFENBAUGH, APPELLANTS, V. BUFORD RACHOW AND VIRGINIA RACHOW, APPELLEES.

508 N.W.2d 575

Filed December 3, 1993. No. S-91-543.

1. **Judgments: Appeal and Error.** In a bench trial of a law action, a trial court's factual findings have the effect of a verdict and will not be set aside unless clearly erroneous.
2. _____: _____. In reviewing a judgment awarded in a bench trial of a law action, an appellate court does not reweigh evidence, but considers the evidence in the light most favorable to the successful party, who is entitled to every reasonable inference deducible from the evidence.
3. **Pleadings.** An affirmative defense must be specifically pled to be considered.
4. _____. It is not necessary to state a defense in any particular form as long as the facts supporting the assertion are stated.
5. **Actions: Pleadings.** Under the code system of pleading, it is not necessary to state a cause of action or a defense in any particular form.
6. **Pleadings: Words and Phrases.** Use of specific language asserting a defense is not required as long as sufficient facts are pled to constitute the raising of the alleged defense.
7. **Waiver: Words and Phrases.** Waiver is a voluntary and intentional relinquishment or abandonment of a known existing legal right, advantage, benefit, claim, or privilege, which except for such waiver, the party would have enjoyed; the voluntary abandonment or surrender, by a capable person, of a right known by him to exist, with the intent that such right shall be surrendered and such person forever deprived of its benefits; or such conduct as warrants an

inference of the relinquishment of such right; or the intentional doing of an act inconsistent with claiming it.

8. **Security Interests: Notice: Waiver: Intent.** In order to constitute waiver, there must be a sufficient manifestation of the debtor's intent to waive his right to notice. Such manifestation may take the form of conduct which evidences a voluntary, intentional, and complete rejection of any interest in the subject collateral.
9. _____: _____: _____: _____. Evidence that the debtor relinquished his interest in the collateral with the intent and knowledge that the collateral be sold by the secured party is appropriate to determine whether or not he waived his right to notice.

Appeal from the District Court for Sherman County: JOHN P. ICENOGLE, Judge. Affirmed.

Greg C. Harris for appellants.

Larry W. Beucke, of Parker, Grossart, Bahensky & Beucke, for appellees.

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

LANPHIER, J.

This is an action for the collection of two debts. The first cause of action is based on an unsecured, written promissory note. The second regards plaintiffs' attempt to recover a deficiency judgment for the balance due on a secured note after repossession of the collateral. The district court found plaintiffs were entitled to enforce the unsecured promissory note, but defendants were entitled to a partial setoff against plaintiffs' claims. The district court dismissed the cause of action for the alleged deficiency due on the secured note because of plaintiffs' failure to give defendants notice of the sale as required under Neb. U.C.C. § 9-504(3) (Reissue 1980). We affirm.

FACTS

In March 1983, plaintiffs, Lyle H. Diefenbaugh and Maxine Diefenbaugh, acquired a bar and restaurant known as Little Nashville. Plaintiffs managed the establishment until July 1983, when they hired defendants, Buford Rachow and Virginia Rachow, to manage the establishment. In December 1983, defendants agreed to purchase the business for $16,000.

On December 16, defendants executed a note, a security agreement, and a financing statement to finance their purchase of the bar and restaurant. Under the note, defendants would make 60 installment payments of $377.06 each, beginning January 20, 1984, and continuing on the same day of each month until the maturity date, December 20, 1988.

Defendants made four payments under the note, but by March 1984, defendants were in default of the note. After several discussions between the two parties, defendants returned the property and plaintiffs accepted it. An inventory was taken of the items in the bar and restaurant, and plaintiffs applied the inventory's value against the balance due under the note. Defendants never received written notice regarding the disposition of the property. Plaintiffs sought a deficiency judgment based on the remaining balance of the secured promissory note executed by defendants. The trial court dismissed the cause of action for the balance due on the secured note because of the failure to give notice required by § 9-504(3).

The unsecured note for $1,191.09 was signed by defendants on July 9, 1985. This unsecured note was the basis of plaintiffs' first cause of action. However, in January 1984, defendants paid federal taxes in the amount of $746.45. The taxes were for months in 1983 when plaintiffs were still owners of Little Nashville. After entering judgment on that note, the trial court setoff the judgment by the amount representing employee withholding taxes which defendants paid on behalf of plaintiffs.

Plaintiffs assert the trial court erred in finding that (1) defendants were entitled to a setoff for withholding taxes paid on the cause of action based on the unsecured note and (2) defendants had not waived their right to notice under § 9-504(3) regarding the secured note.

STANDARD OF REVIEW

In a bench trial of a law action, a trial court's factual findings have the effect of a verdict and will not be set aside unless clearly erroneous. In reviewing a judgment awarded in a bench trial of a law action, an appellate court does not reweigh evidence, but considers the evidence in the light most favorable to the

successful party, who is entitled to every reasonable inference deducible from the evidence. *Bell Abstract & Title v. Caro, Inc.*, 243 Neb. 576, 500 N.W.2d 834 (1993); *FirsTier Bank v. Triplett*, 242 Neb. 614, 497 N.W.2d 339 (1993).

ANALYSIS

SETOFF

Neb. Rev. Stat. §§ 25-812 and 25-816 (Reissue 1989) permit setoff under stated circumstances. Defendants purchased the business in December 1983. On January 10, 1984, defendants paid $746.45 for employee withholding taxes. Although plaintiffs no longer owned the establishment at that time, the taxes were for the months of July, August, and September 1983, when plaintiffs owned the business. During this time, defendants were only managing the establishment, and defendants stated that all the bills were paid by them from the account of plaintiffs. Furthermore, plaintiff Maxine Diefenbaugh listed the establishment on her 1983 income taxes. The trial court was therefore correct in reducing the amount owed by defendants to plaintiffs on the unsecured note by the amount paid by defendants to extinguish plaintiffs' tax obligation.

WAIVER OF NOTICE

At the outset, we address defendants' claim that plaintiffs were estopped from introducing evidence of waiver because plaintiffs did not plead waiver in response to defendants' claim that plaintiffs failed to provide them with notice under § 9-504(3). Under § 9-504(3), plaintiffs were required to give notice to defendants of the sale or disposition of the collateral. In their answer, defendants asserted plaintiffs failed to provide them with notice of the disposition or sale of the collateral.

For the purpose of analyzing the sufficiency of plaintiffs' pleading facts responsive to defendants' claim of lack of notice, the issue is analogous to pleading affirmative defenses. We have previously stated that an affirmative defense must be specifically pled to be considered. *Lease Northwest v. Davis*, 224 Neb. 617, 400 N.W.2d 220 (1987); *Columbus Bank & Trust Co. v. High Country Stable*, 202 Neb. 724, 277 N.W.2d 81

(1979). We have also stated that it is not necessary to state a defense in any particular form as long as the facts supporting the assertion are stated. *Cass Constr. Co. v. Brennan*, 222 Neb. 69, 382 N.W.2d 313 (1986); *Blaha GMC-Jeep, Inc. v. Frerichs*, 211 Neb. 103, 317 N.W.2d 894 (1982). Under the code system of pleading, it is not necessary to state a cause of action or a defense in any particular form. *Id.* In the cited cases, this court did not require the use of specific language asserting defenses as long as sufficient facts were pled to constitute the raising of the alleged defense. Facts pled are sufficient if they put the plaintiff on notice of the issues. Pleadings frame the issues upon which the cause is to be tried and advise the adversary as to what the adversary must meet. *Ruwe v. Farmers Mut. United Ins. Co.*, 238 Neb. 67, 469 N.W.2d 129 (1991).

In *Blaha GMC-Jeep, Inc.*, the defendant alleged in his answer that the consideration for issuing a check was the repair of his tractor, which was not properly repaired, and the defendant provided examples of the plaintiff's failure to repair the tractor. This court found such allegations sufficient to constitute raising the defense of total failure of consideration. In *Cass Constr. Co.*, we stated that, at a minimum, the defense of accord and satisfaction requires a pleading of payment and acceptance on a mutual agreement, express or implied, of a certain sum of money in full settlement of a preexisting and previously disputed obligation. We then concluded that the defendants' answers, alleging that Cass settled any claims it may have had against the defendants when it cashed the conditional check, sufficiently alleged the defense of accord and satisfaction. *Id.*

"Waiver," in reference to § 9-504(3), was defined in *City Bank & Trust Co. v. Van Andel*, 220 Neb. 152, 158-59, 368 N.W.2d 789, 794 (1985), as

> " 'a voluntary and intentional relinquishment or abandonment of a known existing legal right, advantage, benefit, claim, or privilege, which except for such waiver the party would have enjoyed; the voluntary abandonment or surrender, by a capable person, of a right known by him to exist, with the intent that such right shall be surrendered and such person forever deprived of its

> benefits; *or such conduct as warrants an inference of the relinquishment of such right*; or the intentional doing of an act inconsistent with claiming it.' "

(Emphasis in original.)

In the present case, plaintiffs' amended petition alleges in paragraph 8 that

> on or about the 1st day of March, 1985, *defendants voluntarily turned over to plaintiffs collateral*, securing said promissory note, in the amount of ONE THOUSAND FOUR HUNDRED FIFTEEN DOLLARS AND 48/100 ($1,415.48) *and that plaintiffs applied, with the knowledge and consent of defendants, the total value of said collateral against said promissory note.*

(Emphasis supplied.)

In the above-quoted paragraph, plaintiffs specifically allege that defendants voluntarily surrendered the collateral and not only knew about, but consented to, the application of the total value of the collateral against the promissory note. These allegations were sufficient to raise the issue of whether defendants' conduct constituted a waiver of their right to notice of the disposition of the collateral.

WAS THERE A WAIVER?

We now turn to the issue raised by plaintiffs on appeal, whether the trial court erred in finding plaintiffs did not waive their right to notice under § 9-504(3). The law applicable at the time provided that compliance with the Uniform Commercial Code for notification as to the disposition of collateral is a condition precedent to a secured creditor's right to recover a deficiency. *City Bank & Trust Co. v. Van Andel, supra.* The burden of proof is on the secured party to prove compliance with the statutory requirements of notice and reasonableness of notice. Failure to give notice is an absolute bar to the recovery of a deficiency. *Id.*

Generally, the question of whether there was a waiver is a question left to the trier of fact. *Naftzger v. Naftzger & Kuhe, Inc.*, 26 Conn. App. 521, 602 A.2d 606 (1992) (waiver of arbitration provision); *Hanover Ins. Co. v. Fireman's Fund Ins. Co.*, 217 Conn. 340, 586 A.2d 567 (1991) (waiver of right to

assert statutory limitation of suit clause).

Courts have held that a voluntary surrender of the collateral for repossession does not automatically extinguish the debtor's right to notice. *Gavin v. Washington Post Emp., etc.*, 397 A.2d 968 (D.C. App. 1979); *Union Trust Co. of Ellsworth v. Hardy*, 400 A.2d 384 (Me. 1979). See, also, *Simmons Mach. Co. v. M & M Brokerage, Inc.*, 409 So. 2d 743 (Ala. 1981) (written waiver required). Such a concept would undercut article 9's policy of promoting "peaceful repossessions and . . . safeguard[ing] the rights of debtors to redeem, as well as to participate in public sales or otherwise to insist upon 'commercial reasonableness' in the course of other dispositions of collateral." *Union Trust Co. of Ellsworth v. Hardy*, 400 A.2d at 388.

Other courts require that the debtor must have been aware of his right to notice before finding he intentionally waived the right. A debtor must have known of his right to prior notice of sale and must have realized he was renouncing that right. Such knowledge cannot be imputed. In cases where the circumstances do not establish that the debtors knew of their right to notice or that they intentionally waived their right, courts have found the agreements do not amount to valid waivers. See *Western Nat. Bank of Casper v. Harrison*, 577 P.2d 635 (Wyo. 1978). See, also, *In re Winer*, 39 B.R. 504 (S.D.N.Y. 1984) (signed statement did not show intent to waive).

In *City Bank & Trust Co. v. Van Andel*, 220 Neb. 152, 368 N.W.2d 789 (1985), we held that a debtor's right to notice under § 9-504(3) could be waived by his conduct. Although not deciding the case on the merits, we held there was sufficient evidence of the debtor's waiver of notice to overcome a motion for summary judgment. In support of our decision, we cited in the opinion two cases which presented facts where the debtor's conduct amounted to an implicit waiver of the right to notice. In *Commercial Credit v. Wollgast*, 11 Wash. App. 117, 521 P.2d 1191 (1974), the debtor had voluntarily relinquished possession of the collateral with the intent that the secured party would sell it. In addition, the debtor had notice of the secured party's intent to sell the collateral and was unable to take any action financially. In *Nelson v. Monarch Invest. Plan of Henderson, Inc.*, 452 S.W.2d 375 (Ky. 1970), the debtor transferred the

property to the secured party with instructions that the secured party should sell at the best price. The debtor also indicated no further interest in the property and no future intent to bid on it. The court noted that the debtor presented no evidence that notice to him would have resulted in a higher sale price, and it concluded that the evidence established an intentional relinquishment of the right to notice. In *Citizens State Bank v. Sparks*, 202 Neb. 661, 276 N.W.2d 661 (1979), this court found there was no waiver by the debtor of the right to notice, because the debtor had not intentionally transferred possession of the collateral or title to it, and the debtor had expressed an interest in retaining the collateral.

In reviewing cases from other jurisdictions as well as the limited number in our own, it appears that in order to constitute waiver, there must be a sufficient manifestation of the debtor's intent to waive his right to notice. *Simmons Mach. Co. v. M & M Brokerage, Inc., supra*. See, also, *Citizens State Bank v. Sparks, supra*; *Nelson v. Monarch Invest. Plan of Henderson, Inc., supra*. Such manifestation may take the form of conduct which evidences a voluntary, intentional, and complete rejection of any interest in the subject collateral. Evidence that the debtor relinquished his interest in the collateral with the intent and knowledge that the collateral be sold by the secured party is appropriate to determine whether or not he waived his right to notice. See, *id.*; *James Talcott, Inc. v. Reynolds*, 165 Mont. 404, 529 P.2d 352 (1974); *Commercial Credit Corporation v. Wollgast*, 11 Wash. App. 117, 521 P.2d 1191 (1974).

Applying the foregoing principles to the facts before us, we cannot say the trial court's finding that there was no waiver of the right to notice was erroneous. Although the actions of defendants constituted a voluntary surrender of the collateral, there is no further evidence provided by plaintiffs that defendants intended to waive their right to be notified of the disposition of the collateral. Plaintiffs maintain that defendants' participation in the inventory of the bar and restaurant served to waive their right to notice under § 9-504(3). However, the court found that although Buford Rachow, along with Maxine Diefenbaugh, participated in the inventory, it was

unclear who assigned the values to the items in the bar and restaurant and whether valuation was based on wholesale or retail. The evidence is unclear. Regardless, Buford Rachow's participation alone does not evidence an intent to waive notice because it is not clear that his intent in participating in the inventory process was to relinquish any further rights he had as a debtor. Under these circumstances, we find that plaintiffs failed to establish that defendants' conduct resulted in a waiver of their right to notice of the disposition of the collateral under § 9-504(3).

CONCLUSION

The trial court was correct in finding that defendants were entitled to a setoff and that plaintiffs' claim for deficiency was barred because they failed to comply with the notice provisions of § 9-504(3).

AFFIRMED.

SHANAHAN, J., not participating.

STATE OF NEBRASKA ON BEHALF OF WHITNEY MATCHETT, A MINOR CHILD, APPELLEE, AND PEGGY MATCHETT, APPELLEE AND CROSS-APPELLANT, V. SCOTT A. DUNKLE, APPELLANT AND CROSS-APPELLEE.

508 N.W.2d 580

Filed December 3, 1993. No. S-91-1159.

1. **Statutes: Appeal and Error.** Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below.
2. **Child Support: Paternity.** The father of a child whose paternity is established either by judicial proceedings or by acknowledgment shall be liable for its support to the same extent and in the same manner as the father of a child born in lawful wedlock is liable for its support.
3. **Statutes.** In the absence of anything indicating to the contrary, statutory language is to be given its plain and ordinary meaning; when the words of a statute are plain, direct, and unambiguous, no interpretation is necessary or will be indulged to ascertain their meaning.

4. **Parent and Child.** A parent is required to provide his or her child with the basic necessities of life.

Petition for further review from the Nebraska Court of Appeals, SIEVERS, Chief Judge, and IRWIN and WRIGHT, Judges, on appeal thereto from the District Court for Douglas County, JOHN E. CLARK, Judge. Judgment of Court of Appeals affirmed in part and in part reversed, and cause remanded with direction.

Ronald L. Brown, of Brown & Tripp, Attorneys, P.C., for appellant.

Patrick M. Heng, of Raynor, Rensch & Pfeiffer, for appellee Peggy Matchett.

HASTINGS, C.J., BOSLAUGH, CAPORALE, FAHRNBRUCH, and LANPHIER, JJ.

PER CURIAM.

The sole issue in this appeal is whether under Neb. Rev. Stat. § 43-1402 (Reissue 1988) a trial court has authority to grant child support retroactive to the date that the mother began supporting a minor child who was born out of wedlock.

This court granted Peggy Matchett, mother of the minor child involved here, further review of the Nebraska Court of Appeals' decision affirming the judgment of the district court which held that it did not have the authority to grant retroactive child support in a paternity action.

We reverse the holding of the Court of Appeals as to that issue and remand the cause to that court with direction to remand the cause to the district court for Douglas County for further proceedings not inconsistent with this opinion.

FACTS

On February 21, 1990, the State of Nebraska, on behalf of Matchett's minor child, filed a petition in the district court for Douglas County to establish that the appellant, Scott A. Dunkle, is the minor child's natural father. The petition also sought to require Dunkle to pay support for the minor child, who was born March 9, 1988. On her own motion, Matchett was added as a party plaintiff on January 29, 1991. Trial was

had on October 30, 1991. On that date, Dunkle filed an "Objection to Certificate of Readiness for Trial and Trial" and also made an oral motion for a continuance. Both were overruled by the trial court.

At trial, genetic blood-testing results entered into evidence established with 99.84-percent certainty that Dunkle is the child's father. On appeal, Dunkle has not contested the trial court's finding that he is the father of Matchett's child.

Matchett testified at trial that she was requesting child support retroactively to the birth of her child and child-care expenses commencing January 4, 1991. In its decree dated December 26, 1991, the trial court ordered Dunkle to pay $390 per month in child support and $175 per month for child-care expenses commencing November 1, 1991, and to provide health insurance for the child from the date of the decree forward. Dunkle has not challenged these awards on appeal. The trial court specifically declined to award retroactive child support. The court did not award retroactive child-care expenses.

The trial court's overruling of Dunkle's objection to the certificate of readiness for trial and his oral motion for a continuance was appealed by Dunkle to the Court of Appeals. Matchett cross-appealed and assigned as error the trial court's failure to award retroactive child support and child-care expenses. The State did not file a cross-appeal. The Court of Appeals affirmed the judgment of the district court in all respects.

Matchett successfully petitioned this court for further review on the issue of retroactive child support. She has not assigned or argued as error the issue of retroactive child-care expenses, and that issue is not before this court. Dunkle has not petitioned for further review, and therefore, the issues raised by Dunkle in the Court of Appeals are also not before this court.

MATCHETT'S ASSIGNMENT OF ERROR

In her assignment of error in the Court of Appeals and in this court, Matchett claims that the Court of Appeals and the district court erred in finding that the district court had no authority to award retroactive child support in paternity cases.

STANDARD OF REVIEW

Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below. *Malzahn v. Transit Authority, ante* p. 425, 507 N.W.2d 289 (1993); *Douglas Cty. Bank & Trust v. Stamper, ante* p. 226, 505 N.W.2d 693 (1993).

RETROACTIVE CHILD SUPPORT

Matchett claims in her brief on cross-appeal and in her petition for further review that she is entitled to retroactive child support from the time of her child's birth, March 9, 1988. The petition filed by the State on behalf of Matchett's child in the trial court prayed for "prenatal, delivery and postnatal medical expenses incurred pursuant to the birth of the child in interest" and "the cost of providing for the physical needs of the child in interest since birth."

The record reflects that the State provided public assistance to Matchett from August 1987 through October 1989, in the amount of $5,094. However, the State did not cross-appeal the district court's failure to award retroactive child support for the period of August 1987 through October 1989. As a matter of fact, the State filed no cross-appeal in the Court of Appeals. At oral argument before the Court of Appeals and also before this court, counsel for Matchett stated that she was requesting child support retroactively only to November 1989, the time when Matchett was no longer on public assistance. See *State on behalf of Matchett v. Dunkle*, 3 NCA 912 (1993). That being true, whether retroactive child support should be granted for the period of March 9, 1988, through October 1989 is not before this court.

On Matchett's motion, the district court ordered that Dunkle pay temporary support for Matchett's minor child during the pendency of Dunkle's appeal, commencing January 1, 1992, in the same monthly amounts as awarded in the decree. Therefore, the period of time at issue in this appeal is only November 1989 through December 1991, a period of 26 months.

Matchett bases her claim to retroactive child support on the

provisions of § 43-1402, which states in part, "The father of a child whose paternity is established either by judicial proceedings or by acknowledgment as hereinafter provided shall be liable for its support *to the same extent and in the same manner* as the father of a child born in lawful wedlock is liable for its support." (Emphasis supplied.)

In affirming the district court's refusal to award retroactive child support, the Court of Appeals stated:

> We believe it is difficult to quibble with the notion that one who fathers a child is the father from the moment of the child's actual birth, not just when a court so decrees. It likewise seems difficult to quibble with the fundamental fairness of the broad concept that fathers should support their out-of-wedlock children from birth. After all, § 43-1402 already *philosophizes* that in-wedlock and out-of-wedlock children are to be supported equally. . . .
>
> However, without a statutory framework such as the [Uniform Parentage Act] to provide guidance, we believe we would be moving out of the judicial sphere and into the legislative realm were we to begin laying down rules for retroactive child support. In our view, the *expression of legislative philosophy* of equal support of in-wedlock and out-of-wedlock children, as found in § 43-1402, requires the passage of "nuts-and-bolts" legislation to implement the *philosophy*.

(Emphasis supplied.) *State on behalf of Matchett v. Dunkle*, 3 NCA at 923-24.

Section 43-1402 is statutory law, not merely an expression of legislative philosophy. "In the absence of anything indicating to the contrary, statutory language is to be given its plain and ordinary meaning; when the words of a statute are plain, direct, and unambiguous, no interpretation is necessary or will be indulged to ascertain their meaning." *In re Application of City of Lexington, ante* p. 62, 67, 504 N.W.2d 532, 536 (1993).

The plain words of § 43-1402 require that an out-of-wedlock child be supported by its father "to the same extent and in the same manner" as a child born in wedlock. A parent is required to provide his or her child with the basic necessities of life. See *In re Interest of C.D.C.*, 235 Neb. 496, 455 N.W.2d 801 (1990).

It is obvious that such a requirement must begin at the time of the child's birth, for it is at that time that a child is most helpless and most dependent upon its parents for the child's very survival. This is true for any child, not just for a child born in wedlock.

When paternity is legally established, there is no rational basis to distinguish the support obligations of a father to a child born out-of-wedlock from the support obligations of a father to a child born in wedlock, and an out-of-wedlock child should be entitled to support from its father from the time of birth under the provisions of § 43-1402. We can perceive of no other way in which an out-of-wedlock child whose paternity is legally established could be supported by its father "to the same extent and in the same manner" as a child born in wedlock.

Matchett, having limited her request for retroactive child support to the time period after her public assistance ceased, is thus entitled to retroactive child support commencing November 1, 1989, and ending December 31, 1991, less credit for any temporary child support Dunkle has paid for that period.

There is some evidence from which Dunkle's gross income for the period from November 1, 1989, to December 31, 1991, can be calculated. The record fails to reflect any evidence for the period of November 1, 1989, to December 31, 1991, from which it can be determined what deductions should be made from Dunkle's gross income before determining the amount of child support Dunkle should pay for the period in question. So that the trial court may comply with Neb. Rev. Stat. § 42-364.16 (Reissue 1988) and the Supreme Court's child support guidelines, this cause should be remanded to the Court of Appeals with direction to remand the cause to the district court for Douglas County for further proceedings solely on the issue of the amount of child support Dunkle should pay for the period of November 1, 1989, to December 31, 1991. Such proceedings shall not be inconsistent with this opinion.

CONCLUSION

Having concluded that Matchett is entitled to retroactive child support for the period commencing November 1, 1989,

and ending December 31, 1991, less credit for any temporary child support Dunkle has paid for that period, we reverse the decision of the Court of Appeals as to Matchett's right to retroactive child support for the 26-month period. In all other respects, the decision of the Court of Appeals is affirmed. We remand this cause to the Court of Appeals with direction to remand the cause to the district court for further proceedings not inconsistent with this opinion.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTION.

WHITE, J., participating on briefs.
SHANAHAN, J., not participating.

LINDSAY INSURANCE AGENCY, APPELLANT, V. RALPH MEAD, APPELLEE.

508 N.W.2d 820

Filed December 3, 1993. No. S-92-029.

1. **Courts: Rules of the Supreme Court: Jurisdiction: Appeal and Error.** Compliance with the requirements of Neb. Ct. R. of Cty. Cts. 52(I)(G) (rev. 1992) is not a prerequisite to the district court's or an appellate court's jurisdiction over an appeal of a decision rendered by the county court.
2. **Courts: Rules of the Supreme Court: Appeal and Error.** When an appellant fails to file a statement of errors in compliance with Neb. Ct. R. of Cty. Cts. 52(I)(G) (rev. 1992), an appellate court may at its discretion consider errors assigned in the appellate court, provided that the record shows that those errors were also assigned in the district court.
3. **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.
4. **Contracts: Parties.** To create a contract, there must be both an offer and an acceptance; there must also be a meeting of the minds or a binding mutual understanding between the parties to the contract.
5. **Contracts: Insurance.** A temporary contract of insurance may be in writing or may be oral, or partly in writing and partly oral.
6. _____: _____. The issuance of an insurance policy is merely an offer and must be accepted to have contractual effect.

7. **Parties: Estoppel: Negligence.** An estoppel cannot arise where the party claiming estoppel is equally negligent or at fault.

Petition for further review from the Nebraska Court of Appeals, HANNON, IRWIN, and WRIGHT, Judges, on appeal thereto from the District Court for Madison County, RICHARD P. GARDEN, Judge, on appeal thereto from the County Court for Madison County, STEPHEN P. FINN, Judge. Judgment of Court of Appeals reversed, and cause remanded with direction.

Ross A. Stoffer, of Mueting and Stoffer, for appellant.

Mark D. Albin, of Albin Law Office, for appellee.

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

BOSLAUGH, J.

Plaintiff-appellant, Lindsay Insurance Agency (Lindsay), brought this action to recover $9,209.28 in insurance premiums and accrued interest from defendant-appellee, Ralph Mead. The county court ruled in favor of Mead and dismissed Lindsay's petition; the district court affirmed the judgment. The Nebraska Court of Appeals dismissed the appeal to that court; this court then granted Lindsay's petition for further review.

In dismissing Lindsay's appeal to the Court of Appeals, that court listed Lindsay's eight assignments of error, then stated:

> In reviewing decisions of the district court which affirm, reverse, or modify decisions of the county court, an appellate 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. Erlewine*, 234 Neb. 855, 452 N.W.2d 764 (1990). This rule of practice was adopted by the Supreme Court, see Neb. Ct. R. of Cty. Cts. 52(I)(G) (rev. 1992), and became effective so as to apply to all county court decisions appealed to the district court after March 23, 1990. The case herein was appealed to the district court in June 1991. . . .
>
> While the district court's order indicates that Lindsay assigned eight errors, the specific errors are not in the

> record before this court. Therefore, we must dismiss this appeal.

Lindsay Ins. Agency v. Mead, 1 NCA 2276, 2277-78 (1992). In its sole assignment of error in its petition for further review to this court, Lindsay asserts that the Court of Appeals erred in dismissing the appeal on the ground that the errors assigned in the appeal to the district court were not in the record before the Court of Appeals.

The record on which the Court of Appeals based its dismissal of the case shows that on October 23, 1991, the county court ruled in favor of Mead and dismissed Lindsay's petition. The district court affirmed the judgment on December 13, 1991, and Lindsay filed a timely appeal. The district court's "Order Affirming Judgment of Dismissal" states in part: "Appellant's Statement of Errors consisting of 8 specific assignments of error can be reduced to one basic assignment of error, that is, that the trial court's findings were not supported by the evidence." Then, on February 3, 1992, Lindsay filed a "Statement of the Issues" in the district court. That document lists eight issues which correspond to errors assigned on appeal to the Court of Appeals.

The rule cited by the Court of Appeals in dismissing Lindsay's appeal, Neb. Ct. R. of Cty. Cts. 52(I)(G) (rev. 1992), stated in part:

> Within 10 days of filing a notice of appeal, the appellant shall file with the district court a statement of errors, which shall consist of a separate, concise statement of each error a party contends was made by the trial court. Each assignment of error shall be separately numbered and paragraphed. Consideration of the case will be limited to errors assigned and discussed. The district court may, at its option, notice a plain error not assigned.

In addition, *State v. Erlewine*, 234 Neb. 855, 857, 452 N.W.2d 764, 767 (1990), cited by the Court of Appeals, states in part:

> 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 [March 23, 1990].

After considering *Erlewine* and rule 52(I)(G) with reference to the circumstances of this case, the Court of Appeals apparently concluded that it had no jurisdiction over the case because the record failed to show that Lindsay timely filed the statement of errors within 10 days of filing a notice of appeal as required by rule 52(I)(G), and, in fact, Lindsay did not file such a statement of errors until after the district court affirmed the county court's decision. The Court of Appeals may have also concluded that because Lindsay filed the statement of errors after the district court decided the appeal, the record did not show that those eight errors which Lindsay listed were the same ones reviewed by the district court. In any event, we hold that Lindsay's appeal should not be dismissed.

Notwithstanding language contained within *State v. Hanger*, 241 Neb. 812, 491 N.W.2d 55 (1992), compliance with the requirements of rule 52(I)(G) is not a prerequisite to the district court's or an appellate court's jurisdiction over an appeal of a decision rendered by the county court. That rule is simply a procedural tool designed to frame the issues to be addressed in the appeal to the district court.

Furthermore, *Erlewine* does not limit appellate review to the issues set forth in the statement of errors which is filed by an appellant pursuant to rule 52(I)(G). Instead, *Erlewine* limits appellate review to those errors specifically assigned in the appeal to the district court and again assigned as error in an appeal to a higher appellate court. The district court may limit its consideration of assignments of error to those set forth in rule 52(I)(G). However, when no such statement is filed, an appellate court may at its discretion consider errors assigned in the appellate court, provided that the record shows that those errors were also assigned in the district court. An appellate court may also consider plain error not assigned. See, Neb. Rev. Stat. § 25-1919 (Cum. Supp. 1992); Neb. Ct. R. of Prac. 9D(1)d (rev. 1992); rule 52(I)(G). See, also, *Schmidt v. Richman Gordman, Inc.*, 191 Neb. 345, 215 N.W.2d 105

(1974).

In this instance, the record is sufficient to warrant consideration of Lindsay's consolidated assignment of error. The eight errors which Lindsay assigned in the Court of Appeals, when consolidated, assert that the county court's findings were not supported by the evidence. The district court's statement that Lindsay's eight specific assignments of error could be reduced to "one basic assignment of error, that is, that the trial court's findings were not supported by the evidence," was sufficient to permit consideration of that consolidated assignment of error in the appeal of the district court's affirmance of the decision of the county court. We now address plain error appearing in the record, keeping in mind the appropriate standard of review.

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. *Properties Inv. Group v. Applied Communications*, 242 Neb. 464, 495 N.W.2d 483 (1993); *Dowd v. First Omaha Sec. Corp.*, 242 Neb. 347, 495 N.W.2d 36 (1993).

Viewing the evidence in a light most favorable to the appellee, Mead, we find the record shows the following: Prior to 1988, Mead had purchased insurance coverage through Elden Anderson, who was the manager of Lindsay. Anderson described his business relationship with Mead as "quite informal" and testified that "when [Mead] needed coverage . . . I would go to his place of business and I would discuss his needs and at that point in time I would . . . ask the company to insure a specific item."

While Mead would orally request coverage and Anderson would orally bind coverage with an insurer which Lindsay represented, apparently Lindsay did not send Mead written binders to document the fact that he was insured. Instead, Lindsay simply sent the insurance policy to Mead after the insurer issued the policy. In addition, Lindsay normally paid the premiums on the policies that had been issued, then, in turn, billed Mead for the amount of the premiums.

The policies which Mead had purchased afforded him coverage for property damage, general liability, and workers' compensation claims in connection with his business properties. Those properties included a convenience store in Pierce, Nebraska, and a restaurant and lounge in Newman Grove, Nebraska. On April 28, 1988, Mead requested $5,000 of additional coverage on the contents of a newly constructed convenience store near Burwell, Nebraska. Lindsay, through the insurer, Cornhusker Casualty Company, added such coverage at the Burwell location to the single property and liability policy which covered Mead's properties in Pierce and Newman Grove. While Mead raises a question concerning the parties insured under the policy, the record shows that Mead was a named insured under the policy and that he did have an insurable interest in each of the properties.

On May 28, 1988, property and liability coverage was added to the Burwell property, and coverage on the contents of the Burwell property was increased to $40,000. While Lindsay contends that Mead requested such coverage, Mead asserts that he only requested a quotation of the cost of such coverage. On June 15, 1988, the policy covering Mead's three business properties expired, and at some point in time, the insurer issued a 1-year renewal policy covering the three business properties. However, Lindsay did not deliver the renewal policy or bill Mead for the coverage until September 1989, more than 14 months after the effective date of the renewal policy and more than 2 months after the expiration of that policy. Mead made payments for such coverage, and testified that he thought he had paid the entire cost of coverage on his Pierce and Newman Grove properties. However, Mead testified at trial and argues in this appeal that he did not request coverage on the Burwell property and that he therefore does not owe any premiums for such coverage.

Although Mead argues that he merely requested a quotation of the cost of coverage on the Burwell property, the record shows that in July 1988, Mead telephoned Lindsay to report that an individual had fallen at his Burwell convenience store. During that telephone conversation, Mead discussed insurance coverage on the Burwell property with Anderson. Regarding

that conversation, Mead provided the following testimony:

> Q. What was your understanding after talking to Elden Anderson about insurance coverage?
>
> A. My understanding . . . from Elden was the fact that if anything happens you'll be covered and I assumed it was a binder but no one said that. . . .
>
> Q. Do you recall specifically what . . . Anderson said to you?
>
> A. I — you know the exact words I'm not positive of but I think he assured me that I didn't have any worries because he would cover me.
>
> Q. So after your conversation with Elden Anderson in July of 1988 did you think that you had insurance coverage in force and effect?
>
> A. No, sir.
>
> Q. Why is that?
>
> A. Because I asked Elden the same day . . . if he had any idea what insurance would cost and he said no that some rating hadn't came [sic] down yet.

Mead also testified that he contacted Anderson the following month to ask what insurance would cost on the Burwell property. According to Mead, Anderson "still didn't give [him] an answer." Apparently Anderson never did inform Mead of the cost of coverage on the Burwell property until after the June 15, 1988, renewal policy had expired, as Mead testified that he did not know that insurance had been in force on the Burwell property until September 1989, when he was billed for such coverage. Mead then told Anderson that he would not accept such coverage. According to Mead, Anderson nevertheless offered to bind coverage on the Burwell property at that time. Mead then asked Anderson what such a binder would cost, and Anderson replied that he did not know but would "get back to" Mead regarding the cost of the binder. Mead was later billed $1,885 for the cost of a binder for the period from June 15 through December 12, 1989. A written binder was issued regarding this coverage; however, the issue date shown on the binder is January 3, 1990, more than 3 weeks after the binder coverage expired.

In addition to the foregoing, other evidence shows that Mead

apparently believed that he had no coverage, in that Mead's Burwell property suffered storm damage in June 1988, but Mead submitted no insurance claim for such damage. When asked why he had submitted no claim, Mead testified: "Because I didn't have any insurance."

After hearing such evidence, the county court found that Mead had not entered into an oral contract for insurance and dismissed Lindsay's petition. This finding is, in part, supported by the evidence. However, Mead's actions in reporting to Lindsay that someone had fallen at the Burwell convenience store and Mead's acquiescence after being told that he was insured require a finding that Mead did enter into a temporary contract of insurance. Consequently, we find plain error in the district court's affirmance of the county court's decision to dismiss Lindsay's petition.

To create a contract, there must be both an offer and an acceptance; there must also be a meeting of the minds or a binding mutual understanding between the parties to the contract. *Overmier v. Parks*, 242 Neb. 458, 495 N.W.2d 620 (1993).

> A binding mutual understanding or meeting of the minds sufficient to establish a contract requires no precise formality or express utterance from the parties themselves as to all of the details of the proposed agreement; it may be implied from conduct and the surrounding circumstances. . . . Likewise, the acceptance of an offer may be shown by words, conduct, or acquiescence indicating agreement.

Atokad Ag. & Racing v. Governors of Knts. of Ak-Sar-Ben, 237 Neb. 317, 322, 466 N.W.2d 73, 78 (1991), *overruled on other grounds, Eccleston v. Chait*, 241 Neb. 961, 492 N.W.2d 860 (1992).

> [A]n agreement exists between the parties when a reasonable man would believe that there was an agreement. . . . In determining whether an oral contract of insurance was made by an agent of the insurance company, the trial court may construe conversations between the agent and the insured in connection with the surrounding circumstances and previous dealings.

2 George J. Couch, Cyclopedia of Insurance Law § 14:14 at 25

(rev. 2d ed. 1984).

Furthermore, a temporary contract of insurance may be in writing or may be oral, or partly in writing and partly oral. *Rankin v. Northern Assurance Co.*, 98 Neb. 172, 152 N.W. 324 (1915). As stated in 2 Couch, *supra*, § 14:1 at 3-4:

> An insurer may make a temporary contract of insurance in the form of a provisional policy, a rider attached to a policy, or a binding slip or receipt. The latter is the most frequent form in which temporary insurance is expressed. Temporary insurance may be provided by oral or parol contracts entered into by an insurance company acting through an officer or authorized agent . . . .

We also note that a parol contract of insurance, in order to be valid, must be fairly entered into, for good consideration, by parties competent to contract, whose minds have met in a mutual agreement as to all of the essential elements of the contract, such as subject matter, the amount of the insurance, the risks insured against, the time the insurance goes into effect, and the amount of premium paid for a definite duration of time. *Whitehall v. Commonwealth Casualty Co.*, 125 Neb. 16, 248 N.W. 692 (1933). However,

> [i]t is not necessary that every term of the contract be expressed; some terms may be implied as from previous dealings between the parties and surrounding circumstances. . . . [W]here the terms are not expressly agreed upon, it will be presumed that the parties contemplated such terms, conditions, and limitations as are usual in policies issued to cover like risks, or in policies previously used by the parties. . . . [T]he failure to agree upon and state the rate of premium to govern an oral contract of fire insurance does not invalidate the contract, where the rates are standard in the community on the specific property covered, since the law will imply a promise to pay the standard rate.

2 Couch, *supra*, § 14:16 at 31-33.

Although it cannot be said that the record totally fails to support the county court's finding that Mead did not enter into a contract of insurance for the full period for which he was billed, the record nevertheless compels a finding that Mead

entered into a temporary contract of insurance. When Mead telephoned Lindsay in July 1988 to report that a person had fallen at his Burwell convenience store, Lindsay's manager, Anderson, informed Mead that he did have coverage. Mead acquiesced in the understanding that such coverage was in effect. According to Mead's own testimony, he assumed that a binder covered the Burwell property. While Black's Law Dictionary 169 (6th ed. 1990) defines a binder as a "written memorandum of the important terms of [a] contract of insurance which gives temporary protection to insured pending investigation of risk by insurance company or until a formal policy is issued," Mead's testimony that he "assumed it was a binder," in light of the parties' existing business relationship, requires a finding that Mead did enter into a temporary contract of insurance. Mead is therefore liable for temporary coverage on that property.

As stated in 2 Couch, *supra*, § 14:3 at 5:

> Generally a contract of temporary present insurance is terminated by the issuance, delivery, and acceptance of a policy, or by a rejection of the application, but if no policy is issued, delivered, and accepted, and the contract is not otherwise terminated, it continues until the time fixed thereby for its termination *or a reasonable time has expired.*

(Emphasis supplied.)

The determination of the period constituting a "reasonable time" in this instance is a question of fact for the trial court to determine upon remand. We note, however, that limitations on the duration of binders have been viewed as a protection for the benefit of those insured rather than as a means to void coverage being relied upon by the insurance consumer. See *Restaurant Enterprises, Inc. v. Sussex Mutual Ins. Co.*, 52 N.J. 73, 243 A.2d 808 (1968) (after being told by agent that he was insured, insured's coverage remained in effect despite the statutory 60-day limitation on the duration of a binder, since the purpose of such a statute was to protect the consumer).

While the record compels a finding that in July 1988, Mead had entered into a temporary contract of insurance which expired after a reasonable period of time, the record

nevertheless supports the county court's implicit finding that coverage did not exist for the full term for which Mead was billed with respect to the Burwell property. In reaching this conclusion, we note that an insured has a right to inspect a policy to see whether it conforms to the terms proposed in the preliminary negotiations. If the policy conforms to the application, the contract becomes complete on delivery, but, if not, then it constitutes a mere counterproposal. *Haas v. Mutual Life Ins. Co.*, 90 Neb. 808, 134 N.W. 937 (1912). The tender of a policy substantially different from that ordered will not, unless accepted by the assured, entitle the insurer to recover premiums for the policy. *Farmers Mutual Hail Ins. Ass'n v. Hainer*, 118 Neb. 116, 223 N.W. 655 (1929).

In this instance, Anderson delivered the policy, and the trial court found that Mead rejected the policy because of the high cost of coverage on the Burwell property. While the amount of the premium may be based upon standardized rates, an insurance consumer will not ordinarily be familiar with those rates. The premium payable for the coverage provided is an important term in the contract, and it is reasonable to expect disclosure of the premium within a reasonable time after the coverage is bound.

The issuance of an insurance policy is merely an offer and must be accepted to have contractual effect. *Dahlke v. Goebel*, 278 Minn. 318, 154 N.W.2d 401 (1967). See, also, *Chappelear v. Grange & Farmers Ins. Co.*, 190 Neb. 589, 210 N.W.2d 921 (1973) (an insurance policy is a contract which requires an offer and acceptance to be effective). Although a policy of insurance which included the Burwell property was issued in this instance, that policy was never accepted by Mead.

Lindsay points to Mead's conduct and his ongoing business relationship with Lindsay and argues that principles of equitable estoppel prevent Mead from avoiding liability for insurance coverage on the Burwell property. However, an estoppel cannot arise where the party claiming estoppel is equally negligent or at fault. *Scottsbluff Nat. Bank v. Blue J Feeds, Inc.*, 156 Neb. 65, 54 N.W.2d 392 (1952).

Here, it was largely Lindsay's own negligence in failing to deliver the policy which led to the dispute regarding coverage of

the Burwell property. As previously noted, the policy covering Mead's business properties for the period from June 15, 1988, through June 15, 1989, was not delivered until some time in September 1989, more than 2 months after the policy had expired. Anderson testified: "Somehow or other — I'm not sure I handled Mr. Mead's file myself, the policy ended up in the file and it was just never billed." If the policy had instead been billed and delivered within a reasonable time, then the disagreement and confusion regarding coverage of the Burwell property could have been resolved in a timely fashion, thereby preventing both the accrual of the disputed premiums and the resulting litigation. Consequently, Lindsay's own negligence precludes it from asserting that Mead is bound by principles of equitable estoppel in this instance.

In addition to the foregoing, we note that $1,885 of the total which Lindsay seeks to recover represents binder coverage on the Burwell property for the period from June 15 through December 12, 1989. The parties dispute whether such coverage was requested or merely discussed. Again, however, the evidence is sufficient to support a finding that Mead did not contract for that coverage.

Finally, we note that during the trial, Mead confessed that he had contracted for coverage of his Pierce and Newman Grove properties, and acknowledged that he is liable for any premium which may remain due with respect to those properties. However, we cannot determine from the record whether Mead continues to owe such premiums.

To summarize, then, we hold that in July 1988, Mead was bound by a temporary contract of insurance with respect to the Burwell property, but that the temporary contract expired after a reasonable period of time. We reverse the Court of Appeals' judgment and remand this action to that court with direction to remand the cause for determination of the reasonable duration of the temporary contract of insurance and the premium applicable thereto, and for a determination of the premiums remaining due, if any, with respect to the Pierce and Newman Grove properties.

REVERSED AND REMANDED WITH DIRECTION.

AMISUB (SAINT JOSEPH HOSPITAL), INC., APPELLANT, V. BOARD OF COUNTY COMMISSIONERS OF DOUGLAS COUNTY, NEBRASKA, APPELLEE.

508 N.W.2d 827

Filed December 3, 1993. No. S-92-263.

1. **Statutes: Appeal and Error.** Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below.
2. **Statutes: Legislature: Intent.** When considering a series or collection of statutes pertaining to a certain subject matter which are in pari materia, they may be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions of the act are consistent and sensible.
3. **Statutes.** To the extent there is a conflict between two statutes on the same subject, a specific statute prevails over a general statute.
4. **Constitutional Law: Taxation.** A claim for refund of payments made as a result of alleged unconstitutional taxes must be made under Neb. Rev. Stat. § 77-1736.04 (Cum. Supp. 1992).
5. **Pleadings.** A petition will be sufficient if, under the facts alleged, the law entitles a plaintiff to recover.
6. **Property: Taxation.** At most, under Neb. Rev. Stat. § 77-1736.04 (Cum. Supp. 1992), a taxpayer would be entitled to a refund of the difference between the taxes levied against the property and the taxes which the taxpayer would have been required to pay if all of the property treated as exempt had been placed on the tax rolls and taxed.

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

William R. Johnson and Raymond E. Walden, of Kennedy, Holland, DeLacy & Svoboda, for appellant.

James S. Jansen, Douglas County Attorney, and Edwin T. Lowndes for appellee.

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

HASTINGS, C.J.

AMISUB (Saint Joseph Hospital), Inc., brought this action pursuant to Neb. Rev. Stat. § 77-1735 (Reissue 1990), to recover real and personal property taxes paid for the year 1989. The district court dismissed the plaintiff's third amended petition and overruled the plaintiff's motion for a new trial.

Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below. *In re Application of City of Lexington, ante* p. 62, 504 N.W.2d 532 (1993); *In re Application of City of Lincoln*, 243 Neb. 458, 500 N.W.2d 183 (1993).

The plaintiff-appellant, AMISUB, owns and operates Saint Joseph Hospital in Omaha and owns real and personal property at the hospital and elsewhere in Douglas County. The plaintiff's personal property in Douglas County was valued, assessed, and levied upon, with a total tax for 1989 of $246,326.26. The plaintiff's real property was valued, assessed, and levied upon, with a total tax for 1989 of $1,709,193.24. Payments for both the first and second half property taxes were made under protest. American Medical International demanded a refund of the personal property taxes paid by AMISUB, a wholly owned subsidiary, by a letter to the Douglas County treasurer dated December 28, 1989. The claim was denied by the Douglas County Board of County Commissioners on January 16, 1990. AMISUB demanded refund of its second half real property taxes by letter dated August 13. The board denied this claim on August 21.

AMISUB filed suit in the district court, seeking refund of all 1989 real and personal property taxes. A trial was held on November 27, 1991, and the court decided the matter upon the plaintiff's third amended petition, filed with leave of court on December 10, after close of all the evidence. That petition asserted that the action was brought pursuant to § 77-1735 (Reissue 1990) and that the taxes assessed, levied, and paid by AMISUB for the year 1989 were unconstitutional. It was alleged that the taxes violated both the uniformity requirements of article VIII, § 1, of the Nebraska Constitution and the Equal Protection Clause of the 14th Amendment to the U.S. Constitution in that the rolling stock of certain railroads was "unlawfully exempted" from taxation, in that certain pipeline companies and airlines "will pay no taxes on their personal property in Douglas County for tax year 1989," and in that by an agreement with the State of Nebraska certain railroads were

taxed on the basis of 25 percent of the actual value of their property. This petition prayed for an order by the court that the taxes for the year 1989 levied and assessed and paid by AMISUB be refunded in full.

On January 22, 1992, the district court entered its order, finding generally for the defendant and dismissing the plaintiff's third amended petition. The court noted that the plaintiff had limited its cause of action to an action brought under § 77-1735 (Reissue 1990). The court concluded:

> Section 77-1735 sets forth a procedure for claiming a refund of taxes paid which the payor claims to be illegal "for any reason other than the valuation of the property." As the Court stated in its prior decision overruling defendant's demurrer, plaintiff's claim is not one of illegal valuation but is based on uniformity. Plaintiff claims that its assessment is illegal because other owners of personal and real property have been illegally exempted in whole or in part.
>
> Section 77-1735 defines what an illegal tax is which may be refunded pursuant to the statute. It states that "Illegal shall mean a tax levied for an unauthorized purpose or as a result of fraudulent conduct on the part of the taxing officials." Plaintiff seems to contend that a tax levy that is not uniform is illegal. Without deciding that contention, a tax illegal for that reason cannot be found to be within the plain meaning of the definition of "illegal". There is no evidence that the tax involved was levied for an unauthorized purpose or as a result of fraudulent conduct on the part of the tax officials and, therefore, plaintiff may not utilize said section to claim a refund for the tax it claims is illegal.

On appeal, AMISUB asserts that the district court erred in finding a lack of jurisdiction under § 77-1735 (Reissue 1990), based on the court's interpretation that the statute's scope did not allow for a challenge to the uniformity of taxes imposed on the plaintiff.

This court recently addressed the requirements for a cause of action under § 77-1735 (Reissue 1986) in *First Data Resources v. Howell*, 242 Neb. 248, 494 N.W.2d 542 (1993). We found that

a cause of action is stated under § 77-1735 for the payment of an invalid tax when the petition filed by the taxpayer alleges that the taxes assessed and levied were unconstitutional and void.

The version of § 77-1735 operative at the time of *First Data Resources* stated:

> If a person who claims a tax or any part thereof to be *invalid* for any reason other than the valuation of the property shall have paid the same to the treasurer or other proper authority in all respects as though the same was legal and valid, he or she may . . . demand the same in writing from the county treasurer to whom paid.

(Emphasis supplied.)

However, the section at issue has since been amended by 1989 Neb. Laws, L.B. 762, which became effective on August 25, 1989, and 1991 Neb. Laws, L.B. 829, which became effective on June 11, 1991. L.B. 762 provided as follows:

> (1) Except as provided in subsection (2) of this section, if a person makes a payment to any county or other political subdivision of any tax upon real or personal property or any payment in lieu of tax with respect to property and ~~who~~ claims ~~a~~ the tax or any part thereof ~~to be invalid~~ is illegal for any reason other than the valuation the property . . . he or she may, at any time within thirty days after such payment, make a written claim for refund of the payment . . . . For purposes of this section, illegal shall mean a tax levied for an unauthorized purpose or as a result of fraudulent conduct on the part of the taxing officials.

(Emphasis and overstrikes in original.)

L.B. 829 provided in pertinent part:

> (1) Except as provided in subsection (2) of this section, if a person makes a payment to any county or other political subdivision of any property tax ~~upon real or personal property~~ or any payment in lieu of tax with respect to property and claims the tax or any part thereof is illegal for any reason other than the valuation or equalization of the property, he or she may, at any time within thirty days after such payment, make a written claim for refund of the payment from the county treasurer to whom paid.

(Emphasis and overstrikes in original.)

Although AMISUB asserts in its brief that the action originally was filed February 15, 1990, the record before us contains only the third amended petition, filed December 10, 1991, which alleged that recovery was sought "pursuant to § 77-1735 R.R.S. 1943 (Reissue of 1990)." Nevertheless, it seems apparent that this lawsuit was tried and decided on the basis of § 77-1735 as amended by L.B. 762 and codified as § 77-1735 (Reissue 1990), and this appeal will be determined on the theory upon which the parties and the trial court relied.

As may be seen, § 77-1735 applicable at the time of *First Data Resources, supra*, is quite different from the section as amended by L.B. 762 in that "invalid" has been changed to "illegal" and illegal has been defined as "a tax levied for an unauthorized purpose or as a result of fraudulent conduct on the part of the taxing officials." § 77-1735 (Reissue 1990). Therefore, we are not free to apply the general dictionary definition of "illegal" in resolving this matter, but must apply the more limited definition contained in the statutes.

Nowhere in AMISUB's petition is it alleged that the tax complained of was "levied for an unauthorized purpose or as a result of fraudulent conduct on the part of the taxing officials," as required by § 77-1735 (Reissue 1990), nor do any of the allegations support such conclusion. However, AMISUB asserts that a tax levied in violation of the Constitution not only is illegal, but also has an unauthorized purpose, and contends that, despite the change in language, § 77-1735 always has been and still is a vehicle for constitutional challenges. As previously stated, the thrust of the allegations made in the third amended petition is that the tax levied against AMISUB was unconstitutional and illegal because certain " 'machinery and equipment used for business purposes' " was exempted from taxation, that certain railroad rolling stock was "unlawfully exempted from taxation," that Northern Natural Gas Company and other centrally assessed taxpayers would pay no taxes on personal property under the existing or previously existing tax laws, and that other taxpayers were taxed on only 25 percent of their actual value. AMISUB concluded by praying for a refund of all taxes paid in 1989. However, as discussed

below, § 4 of L.B. 762 also made changes to Neb. Rev. Stat. § 77-1736.04 (Reissue 1986). These changes reflect the Legislature's intent to separately treat challenges to the constitutionality of a tax.

The more important changes in the "refund" law were brought about by L.B. 762 and L.B. 829 as they amended § 77-1736.04 (Reissue 1986). That section, at the time of *First Data Resources, supra*, read in part as follows:

> If, by judgment or final order of any court of competent jurisdiction in this state, in an action not pending on appeal or error, it has been or shall be adjudged and determined that any personal property or real estate tax, assessment, or penalty or any part thereof was *illegal* and such judgment or order has not been made or shall not be made in time to prevent the collection or payment of such tax, assessment, or penalty, then such tax, assessment, or penalty, whether expended or not, which has been collected pursuant to such *illegal* tax, assessment, or penalty for the year such tax, assessment or penalty is determined to be *illegal* shall, without the necessity of filing a claim therefor, be repaid and refunded in the county where originally paid to the person paying such tax, assessment or penalty.

(Emphasis supplied.) § 77-1736.04 (Reissue 1986).

Section 4 of L.B. 762, codified as § 77-1736.04 (Reissue 1990), provided:

> If . . . by judgment or final order of any court of competent jurisdiction in this state, in an action not pending on appeal or error, it *has been or shall be adjudged* and determined that any real or personal property . . . tax, assessment, or penalty or any part thereof was unconstitutional for any reason other than the valuation of the property . . . and such judgment or order has not been made . . . in time to prevent the collection or payment of such tax, assessment, or penalty, then such tax, assessment, or penalty, whether expended or not, which has been collected pursuant to such . . . unconstitutional tax, assessment, or penalty for the year such tax, assessment, or penalty is determined to be . . .

> unconstitutional shall, without the necessity of filing a claim therefor, be repaid and refunded in the county where originally paid to the person paying such tax, assessment, or penalty.

(First emphasis supplied.) (Other emphasis in original.) (Emphasis omitted.)

The provisions of L.B. 829, codified as § 77-1736.04 (Cum. Supp. 1992), also specifically address the unconstitutionality of a tax:

> (1) If a court of competent jurisdiction by final nonappealable order determines that any property tax or penalty . . . is unconstitutional for any reason other than the valuation or equalization of the property, the tax or penalty shall be refunded to the person paying the tax . . . without the necessity of filing a claim therefor. . . .
>
> . . . .
>
> (3) An action seeking the declaration that a tax or penalty is unconstitutional shall be brought within the year that the tax or penalty is levied or assessed. A refund shall be provided only to a person who has instituted legal proceedings to declare the tax or penalty unconstitutional.

(Emphasis omitted.)

When considering a series or collection of statutes pertaining to a certain subject matter, which statutes are in pari materia, they may be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions of the act are consistent and sensible. *Curry v. State ex rel. Stenberg*, 242 Neb. 695, 496 N.W.2d 512 (1993); *In re Interest of Powers*, 242 Neb. 19, 493 N.W.2d 166 (1992).

To the extent there is a conflict between two statutes on the same subject, a specific statute prevails over a general statute. *Maack v. School Dist. of Lincoln*, 241 Neb. 847, 491 N.W.2d 341 (1992); *Cole v. Kilgore*, 241 Neb. 620, 489 N.W.2d 843 (1992).

Thus, while "unconstitutionality" generally may be encompassed under the term "illegality," in this instance it is clear that by the changes to §§ 77-1735 and 77-1736.04 effectuated by L.B. 762, the Legislature intended unconstitutionality to be treated separately from allegations of

illegality due to an unauthorized purpose or fraudulent conduct on the part of taxing officials. A claim for refund of payments made as a result of alleged unconstitutional taxes must be made under § 77-1736.04 (Cum. Supp. 1992).

However, this does not end our inquiry. "A petition will be sufficient if, under the facts alleged, the law entitles a plaintiff to recover." *First Nat. Bank of Omaha v. State*, 241 Neb. 267, 271, 488 N.W.2d 343, 346 (1992). Therefore, we examine § 77-1736.04 (Reissue 1990) to determine whether AMISUB has alleged and proved facts sufficient to support a cause of action under that section, the provisions of which we have previously set forth.

AMISUB's theory of recovery seems to be that because the exemptions granted to certain taxpayers were unconstitutional, AMISUB is to be placed in the same position as those taxpayers which escaped taxation by receiving a full refund of the taxes paid. That is not the rule to come out of any of the recent tax cases beginning with *Northern Natural Gas Co. v. State Bd. of Equal.*, 232 Neb. 806, 443 N.W.2d 249 (1989), *cert. denied* 493 U.S. 1078, 110 S. Ct. 1130, 107 L. Ed. 2d 1036 (1990), and culminating in *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 242 Neb. 263, 494 N.W.2d 535 (1993). At most, AMISUB would be entitled to a refund of the difference between the taxes levied against the property of AMISUB and the taxes which AMISUB would have been required to pay if all of the property treated as exempt had been placed on the tax rolls and taxed. See *id.* Contrary to the facts developed in *MAPCO Ammonia Pipeline* as to the ratio between property which was treated as exempt plus the value of property of the railroads and the value of all tangible property in Nebraska, the record here contains no evidence upon which such a determination could be made. Therefore, AMISUB has failed to meet its burden of establishing these facts, and its petition was properly dismissed.

The judgment of the district court is affirmed.

AFFIRMED.

SCHOOL DISTRICT OF WATERLOO IN THE COUNTY OF DOUGLAS IN THE STATE OF NEBRASKA, ALSO KNOWN AS DOUGLAS COUNTY SCHOOL DISTRICT 0011, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLANT, V. DREW HUTCHINSON AND JUDY HUTCHINSON, HUSBAND AND WIFE, APPELLEES.

508 N.W.2d 832

Filed December 10, 1993. No. S-91-601.

1. **Statutes: Appeal and Error.** Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below.
2. **Schools and School Districts: Statutes: Legislature.** School boards are creatures of statute, and their powers are limited. They can bind the district only within the limits fixed by the Legislature; beyond that, their acts are void.
3. **Schools and School Districts: Legislature.** Any action taken by a school board must be through either an express or implied power conferred by legislative grant.
4. **Schools and School Districts: Statutes.** Neb. Rev. Stat. § 79-443 (Reissue 1987) requires school boards to devise such means as may seem best to secure the regular attendance and progress of children at school. A school board may choose to provide bus transportation as a means of securing its students' attendance.
5. **Schools and School Districts: Statutes: Contracts: Time.** School boards have statutory authority to enter into contracts under such terms and conditions as the board deems appropriate for a period not to exceed 4 years for the provision of transportation services.
6. **Schools and School Districts.** School boards have the power to purchase buses for transporting students to and from school or school-related activities.
7. _____. The power to determine the means of providing transportation for school attendance is discretionary with the school board of each school district.
8. **Schools and School Districts: Legislature: Courts: Jurisdiction.** If a school board acts within the power conferred upon it by the Legislature, the courts cannot question the manner in which a board has exercised its discretion in regard to a subject matter over which it has jurisdiction, unless such action is so unreasonable and arbitrary as to amount to an abuse of the discretion reposed in it.

Appeal from the District Court for Douglas County, KEITH HOWARD, Judge, on appeal thereto from the County Court for Douglas County, ROBERT C. VONDRASEK, Judge. Judgment of District Court reversed, and cause remanded with direction.

John F. Recknor and Danene J. Tushar, of Barlow, Johnson, DeMars & Flodman, for appellant.

Jay L. Welch and Gary F. Smolen, of Rickerson, Welch & Kruger, for appellees.

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

FAHRNBRUCH, J.

The appellant, School District of Waterloo (Waterloo), claims that the district court erred when it affirmed a county court ruling that Waterloo had no authority to charge a fee for bus transportation provided to students who live more than 4 miles from their school.

We reverse the affirmance of the district court for Douglas County and remand this cause to that court with direction to remand the cause to the Douglas County Court with instruction to enter judgment in favor of Waterloo.

STANDARD OF REVIEW

Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below. *Malzahn v. Transit Authority, ante* p. 425, 507 N.W.2d 289 (1993); *Douglas Cty. Bank & Trust v. Stamper, ante* p. 226, 505 N.W.2d 693 (1993).

ASSIGNMENTS OF ERROR

Waterloo claims that the district court erred in affirming the decision of the county court and in failing to find that (1) Waterloo can charge a fee for providing bus transportation to those students who live more than 4 miles from the school they attend and who request the service; (2) under principles of res judicata, a federal district court's dismissal of the Hutchinsons' 42 U.S.C. § 1983 (1988) action supports a judgment in favor of the school district; and (3) the appellees, by accepting the benefit of the bus transportation, are estopped from claiming that the school district had no authority to charge transportation fees.

FACTS

Before 1985, Waterloo offered free bus transportation to all of its students. In the 1985-86 school year, Waterloo began

charging a fee to those parents who requested bus service for their children. Waterloo pays about 50 percent of the total cost of the bus service, while fees from the parents pay for the balance. Waterloo charges the same rates to all families who request the service, regardless of how far they live from the school.

The parties stipulated, inter alia, to the following facts:

From the school years 1985-86 through 1989-90, Drew and Judy Hutchinson, who live more than 4 miles from the Waterloo school, requested and received from Waterloo school bus transportation for their three children. The Hutchinsons were charged a total of $2,115 for bus transportation during those years. Although their children continued to use the transportation, the Hutchinsons refused to pay the fees, claiming that Waterloo had no legal authority to charge a fee for the transportation provided to students living more than 4 miles from their school.

After trial on Waterloo's claim for the Hutchinsons' uncollected fees, the county court found "generally in favor of the defendants." On appeal, the district court affirmed that ruling.

In a related action, the appellees filed suit against Waterloo in federal district court, claiming that under § 1983, Waterloo's assessment of transportation fees against the Hutchinsons violated the U.S. Constitution. Appellees' federal suit was dismissed because it failed to state a claim upon which relief could be granted. The dismissal was not appealed.

ANALYSIS

School boards are creatures of statute, and their powers are limited. They can bind the district only within the limits fixed by the Legislature; beyond that, their acts are void. *Fulk v. School District*, 155 Neb. 630, 53 N.W.2d 56 (1952). Any action taken by a school board must be through either an express or implied power conferred by legislative grant. *Id.*

Neb. Rev. Stat. § 79-443 (Reissue 1987) sets forth the general governing powers and duties conferred upon school boards. One of the enumerated duties under § 79-443 requires school boards to "devise such means as may seem best to secure the

regular attendance and progress of children at school." A school board may choose to provide bus transportation as a means of securing its students' attendance. However, a school board is under no statutory duty to do so. *Warren v. Papillion School Dist. No. 27*, 199 Neb. 410, 259 N.W.2d 281 (1977).

School boards also have several specific powers related to transportation. For example, school boards have statutory authority to "enter into contracts under such terms and conditions as the board deems appropriate for a period not to exceed four years for the provision of . . . transportation services . . . ." Neb. Rev. Stat. § 79-4,154.01 (Reissue 1987). School boards also have the power to purchase buses for transporting students to and from school or school-related activities. Neb. Rev. Stat. § 79-487 (Reissue 1987).

A mandatory duty relating to transportation is also imposed on school boards. Neb. Rev. Stat. § 79-490 (Cum. Supp. 1992) provides:

> When no other means of free transportation is provided to a student attending a public school, [a mileage] allowance for transportation shall be made to the family of such student by the [school] district in which such family resides as follows:
>
> (1) When a student attends an elementary school in his or her own district and lives more than four miles from the public schoolhouse in such district . . . .

Implicit in § 79-490 is a school board's authority to provide free transportation to students if it chooses to do so. To the extent that *Galstan v. School Dist. of Omaha*, 177 Neb. 319, 128 N.W.2d 790 (1964), holds that school boards have no authority to provide free transportation, it is overruled.

Since this litigation was commenced, the Legislature amended § 79-490 to explicitly authorize school boards to provide transportation to students who live within a 4-mile radius of their schools and to charge a fee for those services. As amended, the statute does not address whether school boards may charge for transportation provided to students who reside more than 4 miles from their schools.

Under the foregoing statutes and case law, Waterloo clearly has the power to offer transportation services to its students, to

contract with a bus company to provide those services, and to charge a fee to students living within a 4-mile radius of the schools.

The issue here is whether Waterloo, during the relevant period under consideration, could charge a fee for the bus transportation it provided to students living beyond the 4-mile radius.

This court has stated that the power to determine the means of providing transportation for school attendance is discretionary with the school board of each school district. *Warren, supra*; *Connot v. Monroe*, 193 Neb. 453, 227 N.W.2d 827 (1975). If a school board acts within the power conferred upon it by the Legislature, the courts cannot question the manner in which a board has exercised its discretion in regard to a subject matter over which it has jurisdiction, unless such action is so unreasonable and arbitrary as to amount to an abuse of the discretion reposed in it. See *Galstan, supra*.

We find that a school board's discretionary power to determine the means of providing transportation carries with it the implied power to decide whether to charge a fee for transportation provided to students living outside a 4-mile radius of their schools. As its means of providing transportation, Waterloo chose to contract with a bus company and charge the users of the service a fee to help pay for the service. Waterloo's decision to charge a fee for this bus service, which it was under no statutory duty to provide, falls within its discretion. The fees charged by Waterloo covered only half the cost of the bus service and were the same for those students living within and without the 4-mile radius of the school. As such, Waterloo's fees for students living outside the 4-mile radius were not so unreasonable or arbitrary as to amount to an abuse of discretion.

Because we find that Waterloo's discretionary power includes the power to decide whether to charge fees for transportation provided to students outside the 4-mile radius, we need not address Waterloo's two remaining assignments of error.

We reverse the district court's affirmance and remand the cause to that court with direction to remand the cause to the

county court with instruction to enter judgment in favor of Waterloo.

REVERSED AND REMANDED WITH DIRECTION.

LANPHIER, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. FRANK TLAMKA, APPELLANT.

508 N.W.2d 846

Filed December 10, 1993. No. S-91-664.

1. **Trial: Rules of Evidence.** In all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by the Nebraska Evidence Rules, not judicial discretion, except in those instances under the Nebraska Evidence Rules when judicial discretion is a factor involved in admissibility of evidence.
2. **Trial: Rules of Evidence: Hearsay: Words and Phrases.** Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Neb. Evid. R. 801(3).
3. **Rules of Evidence: Hearsay.** A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition, although hearsay, is admissible under the "excited utterance" exception to the hearsay rule.
4. _____: _____. For a statement to qualify as an excited utterance, the following criteria must be established: (1) There must have been a startling event, (2) the statement must relate to the event, and (3) the statement must have been made by the declarant while under the stress of the event.
5. **Rules of Evidence: Hearsay: Time.** For hearsay to be admissible under the excited utterance exception, statements need not be made contemporaneously with the exciting cause but may be made subsequent to it, provided there has not been time for the exciting influence to lose its sway and to be dissipated. The key requirement is spontaneity, a showing that the statement was made without time for conscious reflection.
6. **Rules of Evidence: Hearsay.** The true test in spontaneous exclamations is not when the exclamation was made, but whether under all the circumstances of the particular exclamation the speaker may be considered as speaking under the stress of nervous excitement and shock produced by the act in issue.
7. **Trial: Rules of Evidence: Hearsay.** A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and if the statement is consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive.

8. **Judgments: Appeal and Error.** Where the record adequately demonstrates that the decision of a trial court is correct, although such correctness is based on a ground or reason different from that assigned by the trial court, an appellate court will affirm.

Petition for further review from the Nebraska Court of Appeals, SIEVERS, Chief Judge, and CONNOLLY and WRIGHT, Judges, on appeal thereto from the District Court for Lancaster County, PAUL D. MERRITT, JR., Judge. Judgment of Court of Appeals affirmed.

Bradley J. Montag, of Moyer, Moyer, Egley, Fullner & Warnemunde, for appellant.

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

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, FAHRNBRUCH, and LANPHIER, JJ., and MORAN, D.J., Retired.

MORAN, D.J., Retired.

Frank Tlamka was convicted in a jury trial of first degree sexual assault on a child and sentenced to prison for not less than 2 nor more than 5 years. Tlamka appealed to the Nebraska Court of Appeals, which affirmed the conviction. *State v. Tlamka*, 3 NCA 28 (1993). We granted Tlamka's petition for further review to consider the admissibility of the victim's statements made to an investigating officer 3 days after the assault.

The assault occurred in Lincoln at the home of the victim, J.H., on Sunday afternoon, July 22, 1990, while Tlamka was babysitting J.H. and her younger sister. At the time, Tlamka was 61 years old and J.H. was nearly 5 years old. That day, the victim's grandmother, Arlene, and the victim's mother went shopping and the victim's father worked his part-time job.

Tlamka knew J.H.'s family well because he lived with Arlene and often saw J.H. and her family during their visits to Tlamka and Arlene's home in Morse Bluff, Nebraska, and during Tlamka and Arlene's visits to J.H.'s home in Lincoln. Tlamka had a good relationship with Arlene's sons and J.H.'s family. Tlamka often babysat J.H. and her younger sister. Witnesses described J.H. and Tlamka as "very friendly, very close," and

"inseparable." Tlamka regarded the victim as a natural granddaughter, giving her gifts and spending time with her when they were together. J.H. referred to him as "Po-po."

After J.H.'s parents returned home that day, at approximately 5:30 p.m., Tlamka took J.H.'s father aside to talk with him. Tlamka told the father that the parents should keep their bedroom door closed "when [they] were making love because [J.H.] is starting to talk about what [the parents] were doing in there." Tlamka also told J.H.'s father that J.H. had told Tlamka she " 'saw mommy putting daddy's weiner in her mouth.' " After Tlamka and Arlene left J.H.'s home to return to Morse Bluff, J.H's father told J.H.'s mother what Tlamka had said. The father testified that J.H. unexpectedly came "around the corner and she told me, 'I saw Po-po's weiner.' " When questioned by her parents, J.H. indicated by pointing her finger that Tlamka's penis had been placed in her mouth.

The next day, J.H. came to her mother with a naked "Ken doll" and told her mother, " 'This is what Po-po looked like when you were shopping, mama.' " According to her mother, J.H. had never reported similar sexual contact prior to July 22 and never identified anyone other than "Po-po" as being responsible.

After discussing the matter with their pastor, the parents decided to seek police assistance. On the evening of July 25, Mark Lantis, a sergeant of the Lincoln Police Department, visited J.H.'s home, bringing with him anatomically illustrative dolls.

When Officer Lantis arrived, he observed J.H. running about her home. On cross-examination, he was asked about J.H.'s demeanor the evening he interviewed her. Officer Lantis testified that J.H. was "overly shy when I first got there, however . . . after I'd been with her for a while she was real — real easygoing and was able to talk to me and seemed real comfortable with me." During the interview, when Officer Lantis would ask a question, J.H. would look to her parents standing in her bedroom doorway to see if it was okay to answer. Officer Lantis acknowledged on cross-examination that he would expect a 4-year-old girl to be shy.

Over Tlamka's hearsay objection, Officer Lantis testified to

the conversation he had with J.H. The officer stated that he asked J.H. what happened, having her use the dolls to show him what occurred and asking her to use the adult male doll as Tlamka. J.H. related that Tlamka had taken her clothes off. Officer Lantis asked her if Tlamka had kept his clothes on, and J.H. told him, " 'No.' " She proceeded to undress the male doll with the exception of the doll's underwear. Officer Lantis asked J.H., "Is that how he was dressed?" J.H. hesitated and then told the officer, " 'No.' " He asked her to show him how Tlamka was dressed. J.H. then pulled the doll's underwear down until the penis on the doll was exposed.

In response to J.H.'s hesitancy to use the dolls at this point in the interview, Officer Lantis asked her to use the male doll with herself to show him what had happened. J.H. then placed the male doll between her legs, rubbing its penis against her vaginal area and then over her stomach and both her nipples. She then turned over, lay on her stomach, and rubbed the male doll against her buttocks.

In addition to the interview using the dolls, Officer Lantis questioned J.H. further. J.H. told him that vaginal penetration occurred, but not anal penetration, and that Tlamka had placed his penis in her mouth. When questioned whether this had happened anywhere else, J.H. held up two fingers and told Officer Lantis that it had happened when " 'we stayed at grandma's.' "

J.H. was examined by Dr. Kristen Johnson on July 26. J.H. told the doctor that Tlamka had sexual contact with her, and she gave the doctor an account consistent with the one given to the officer. The physical examination indicated no physical evidence of sexual abuse. J.H.'s genital area was normal for a female her age. Her hymen was intact and measured 3 mm, also normal for her age. In an exam the month before, Dr. Johnson had examined J.H.'s genital area, and J.H. did not hesitate to let the doctor do the exam on that occasion. During the exam on July 26, however, the doctor noted that J.H. was hesitant to let the doctor check her genitals closely, that J.H. "kept closing her legs," and that J.H. looked to her mother for reassurance. Despite the lack of physical evidence of sexual abuse, Dr. Johnson was not surprised no physical evidence was found,

considering J.H.'s account.

At trial, J.H. testified and was cross-examined concerning the assault. She testified on direct examination that Tlamka had had sexual contact with her and that at the time his penis was "hard" and pointed downward. On cross-examination, defendant's counsel reminded J.H. of her previous deposition testimony and asked her whether her mother had taught her to say "private," "wee wee," or "rock hard." J.H. answered, "No." J.H.'s testimony was consistent with the reports she gave to Officer Lantis and Dr. Johnson.

In his defense, Tlamka denied having sexual contact with J.H. He testified that on July 22, he was left with J.H. and her sister while Arlene and J.H.'s mother went shopping. After putting J.H.'s sister down for a nap, Tlamka sat down and read the paper. Tlamka related that after a period of time, J.H. told him she was tired and wanted to take a nap. Since J.H. wanted him to come with her to her bedroom, Tlamka accompanied J.H. to her bedroom. Tlamka testified that J.H. lay in her bed for about "three, four minutes" and that J.H. then came to lie next to him on the floor next to her bed. Tlamka stated that after some time, J.H. brushed her hand across his groin, bent over, and "made a kissing sound." Tlamka was surprised and asked J.H. what she was doing. J.H. told Tlamka that she had seen her parents doing what she had done, and Tlamka explained that her parents did that because they were married. According to Tlamka, the conversation ended when Tlamka and J.H heard Arlene and J.H.'s mother return home.

Additionally, Tlamka offered in his defense testimony by Dr. Rodney Taylor, a urologic surgeon from Omaha. Dr. Taylor examined Tlamka, took his medical history, and conducted a nocturnal penial tumescence study in a sleep laboratory to monitor Tlamka's ability to have an erection during sleep. The sleep study revealed that Tlamka had one partial erection, or tumescence, one night and no erection the second night of the study. Normal men Tlamka's age are expected to have four to six adequate erections, adequate being described as sufficient for vaginal penetration, at night during sleep. From his examination and study, Dr. Taylor testified that Tlamka suffered from organic erectile dysfunction, making Tlamka

incapable of having an erection and impotent. Tlamka's medical history disclosed that he had been impotent, that is, unable to have an erection adequate for vaginal penetration, for 10 years.

Dr. Taylor further testified that Tlamka could not have had an erection adequate for vaginal penetration on July 22. However, the doctor stated that loss of sensation to the penis or loss of sexual desire would not necessarily occur despite impotence. In Dr. Taylor's opinion, Tlamka was still capable of achieving orgasm.

In addition to Dr. Taylor's testimony, Tlamka also offered the testimony of his priest, banker, and physician as character witnesses.

The Court of Appeals affirmed Tlamka's conviction, citing *State v. Plant*, 236 Neb. 317, 461 N.W.2d 253 (1990), and other Nebraska decisions for the proposition that the requirements of spontaneity and contemporaneousness for the excited utterance exception to the hearsay rule are relaxed for child-declarants. The Court of Appeals stated that *Plant* and other Nebraska decisions replaced the spontaneity and contemporaneousness requirements of the excited utterance exception by a test of time and the capacity of the child for fabrication. We granted Tlamka's petition for further review, but limited our review to the admissibility of J.H.'s statement or statements to Officer Lantis.

"[I]n all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by the Nebraska Evidence Rules, not judicial discretion, except in those instances under the Nebraska Evidence Rules when judicial discretion is a factor involved in admissibility of evidence . . . ." *State v. Messersmith*, 238 Neb. 924, 936, 473 N.W.2d 83, 92 (1991). Accord, *State v. Toney*, 243 Neb. 237, 498 N.W.2d 544 (1993); *State v. Jacob*, 242 Neb. 176, 494 N.W.2d 109 (1993). "In a jury trial of a criminal case, whether an error in admitting or excluding evidence reaches a constitutional dimension or not, an erroneous evidential ruling results in prejudice to a defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt." *State v. Cox*, 231 Neb. 495, 504, 437 N.W.2d 134, 140 (1989). Accord, *State v. Toney*,

supra; *State v. Salamon*, 241 Neb. 878, 491 N.W.2d 690 (1992); *State v. Messersmith, supra*. See *State v. Watkins*, 227 Neb. 677, 419 N.W.2d 660 (1988).

"Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted . . . ." Neb. Evid. R. 801(3). Hearsay is not admissible except as provided in the Nebraska Evidence Rules or other rules adopted by statute. See Neb. Evid. R. 802. Granting for the sake of argument that J.H.'s out-of-court statements to Officer Lantis were hearsay, we examine whether the statements were admissible under the excited utterance exception to the hearsay rule.

"A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition," although hearsay, is admissible under the "excited utterance" exception to the hearsay rule. Neb. Evid. R. 803(1).

> "For a statement to qualify as an excited utterance, the following criteria must be established: (1) There must have been a startling event, (2) the statement must relate to the event, and (3) the statement must have been made by the declarant while under the stress of the event. . . . The key requirement is spontaneity, which 'requires a showing the statements were made without time for conscious reflection.' "

State v. Smith, 241 Neb. 311, 316-17, 488 N.W.2d 33, 37 (1992) (quoting *In re Interest of D.P.Y. and J.L.Y.*, 239 Neb. 647, 477 N.W.2d 573 (1991)). See, also, 2 McCormick on Evidence § 272 (John W. Strong ed. 1992).

For hearsay to be admissible under the excited utterance exception, "[s]tatements need not be made contemporaneously with the exciting cause but 'may be subsequent to it, provided there has not been time for the exciting influence to lose its sway and to be dissipated.' " *State v. Jacob*, 242 Neb. at 188, 494 N.W.2d at 118 (quoting 6 John H. Wigmore, Evidence in Trials at Common Law § 1750 (James H. Chadbourn rev. 1976)). "[T]he key requirement is spontaneity, a showing that the statement was made without time for conscious reflection." *State v. Boppre*, 243 Neb. 908, 927, 503 N.W.2d 526, 538

(1993). Accord, *State v. Jacob, supra*; *In re Interest of D.P.Y. and J.L.Y., supra*; *State v. Plant, supra*. However, the time interval between the startling event and the statements in question is not "of itself dispositive of the spontaneity issue." *State v. Boppre*, 243 Neb. at 927, 503 N.W.2d at 538. Accord, *In re Interest of D.P.Y. and J.L.Y., supra*; *State v. Roy*, 214 Neb. 204, 333 N.W.2d 398 (1983). The permissible length of time between the statement and the startling event is determined on the unique facts of each case. *State v. Boppre, supra*; *State v. Jacob, supra*.

Granting that the first two elements of the exception are met, namely, the existence of a startling event and a statement relating to the event, the sole issue is whether J.H.'s statements were made "under the stress of the event."

In the investigative interview at issue here, Officer Lantis spoke with J.H. 3 days after the alleged assault. During that interview, when Officer Lantis arrived, he saw J.H. running about her home. Officer Lantis testified that J.H. behaved in a manner he would expect of any normal 4-year-old girl. While J.H. answered questions in a "somewhat shy" way, looking to her parents for reassurance, as the interview proceeded, Officer Lantis observed that J.H. was "real easygoing" with him, "was able to talk" to him, and "seemed real comfortable with" him.

As stated in *State v. Plant*, 236 Neb. 317, 329, 461 N.W.2d 253, 264 (1990): "While it is not necessary to show that the declarant was visibly excited in order to qualify under the excited utterance exception, [citations omitted], a declarant's nervous state is relevant to the issue of whether the statement was made by the declarant while under the stress of the event." " ' "[T]he true test in spontaneous exclamations is not when the exclamation was made, but whether under all the circumstances of the particular exclamation the speaker may be considered as speaking under the stress of nervous excitement and shock produced by the act in issue . . . ." ' " *State v. Jacob*, 242 Neb. 176, 188, 494 N.W.2d 109, 118 (1993) (quoting 6 Wigmore, *supra*, § 1745).

In *Plant*, we held that the statements a 4-year-old made to a police investigator 2 days after the startling event, which her statements related, were admissible under the excited utterance

exception of rule 803(1). Cindy Plant witnessed her father throw Christopher Bartlett, her 18-month-old stepbrother, at James Bartlett, her 4-year-old stepbrother, and also saw her father throw Christopher on the floor, causing the head injuries from which Christopher later died. After the abuse of the children occurred, Cindy was placed in foster care.

In a taped interview conducted 2 days after the incident, Cindy told the officer what had occurred. The interview was admitted into evidence over the defendant's hearsay objection. The interviewing officer testified that at the time of the interview, Cindy was extremely shy and apprehensive. She "sucked on a finger, clung to her foster mother, and buried her head into her foster mother." *State v. Plant*, 236 Neb. at 330, 461 N.W.2d at 264. Cindy was not very verbal, and the officer spoke to her for 20 minutes before she would respond. This court held that the taped interview was admissible under the excited utterance exception, rule 803(1), further holding that the interview was also admissible under the residual exceptions to the hearsay rule.

Plant is distinguishable from the case at bar. Cindy was taken from her parents and placed in the custody of foster parents after she witnessed a brutal incident of child abuse. Here, J.H. remained in the care of her parents from the time of the assault to the time of the interview with Officer Lantis. Where Cindy witnessed an outrageous assault on her siblings, was uprooted from familiar surroundings, and was placed in the custody of caring strangers, J.H. remained in her parents' care, providing her an opportunity to talk with them concerning the assault. While J.H. appeared hesitant to relate the incident to Officer Lantis, he observed nothing out of the ordinary in J.H.'s behavior.

We think, under the unique circumstances of this case, that J.H. did not make her statements to Officer Lantis while under the stress of excitement caused by the assault. While evidence or lack of evidence of a declarant's visible state of excitement is not dispositive, see *State v. Jacob, supra*, and *State v. Plant, supra*, J.H.'s nervous state at the time of the interview on Wednesday evening is certainly relevant to determine whether her statement was made under the stress of what happened to her the previous Sunday afternoon when Tlamka babysat. Given that J.H. had

the opportunity to talk with her parents about what had happened to her and that approximately 72 hours had passed, there was time for conscious reflection on what occurred. Because she seemed to behave as normally as any other 4-year-old girl, J.H. did not make her statements under the stress of the event. Therefore, the requirements of rule 803(1) are not met, and the statements were inadmissible under the excited utterance exception.

It is true that in *Plant* and other Nebraska decisions cited in *Plant*, we "loosened the spontaneity requirement" of the excited utterance exception and acknowledged that for cases involving young children, our inquiry considers a child's lack of capacity to fabricate rather than lack of time to fabricate. However, in *Plant*, we also considered the nervous state the child-declarant was in when the out-of-court statements were made. We think the declarant's nervous state at the time the statement is made, no matter what the declarant's age, is relevant and should be considered in determining the admissibility under rule 803(1). While visible signs of emotional upset are only one factor to consider, the absence of such visible signs weighs against admitting the statements under rule 803(1). See *In re Interest of R.A. and V.A.*, 225 Neb. 157, 403 N.W.2d 357 (1987), *overruled on other grounds, State v. Jacob*, 242 Neb. 176, 494 N.W.2d 109 (1993).

Under the circumstances here, the statements were not made under the stress of the event, and, therefore, J.H.'s statements made to the officer were inadmissible under the excited utterance exception.

However, J.H.'s statements made to Officer Lantis cannot be properly characterized as hearsay at all because the statements fall within Neb. Evid. R. 801(4)(a)(ii):

> A statement is not hearsay if:
>
> (a) The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . (ii) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive . . . .

See, *In re Interest of D.J. et al.*, 224 Neb. 226, 397 N.W.2d 616 (1986); *State v. Johnson*, 220 Neb. 392, 370 N.W.2d 136 (1985); *State v. Packett*, 206 Neb. 548, 294 N.W.2d 605 (1980).

Here, J.H. testified at trial and was subject to cross-examination concerning the statement she made to Officer Lantis. On cross-examination, Tlamka's counsel questioned J.H. concerning statements she had made in a pretrial deposition. Tlamka's counsel asked her who had taught her to say "private," "wee wee," and "rock hard," the implication being that someone had coached J.H. in articulating the assault. By this line of questioning, Tlamka's counsel implied that J.H.'s testimony was the product of improper influence. J.H.'s statement on the stand was consistent with what she told Officer Lantis. Therefore, J.H.'s statements to the officer could have been properly admitted under rule 801(4)(a)(ii).

" 'Where the record adequately demonstrates that the decision of a trial court is correct, although such correctness is based on a ground or reason different from that assigned by the trial court, the Supreme Court will affirm.' " *State v. Dixon*, 223 Neb. 316, 322, 389 N.W.2d 307, 311 (1986). "If in fact the ruling was correct there could not have been any prejudice to the defendant. A judgment will not be reversed because a lower court gave an incorrect reason for its decision if the result reached was correct." *State v. Highly*, 195 Neb. 498, 500, 238 N.W.2d 909, 911 (1976). Accord *State v. Morrow*, 237 Neb. 653, 467 N.W.2d 63 (1991). Because the trial court could have properly admitted J.H.'s statements to Officer Lantis under rule 801(4)(a)(ii), we find no prejudice to Tlamka and, therefore, affirm the judgment of the Court of Appeals which affirmed Tlamka's conviction of first degree sexual assault on a child.

AFFIRMED.

GLOBAL CREDIT SERVICES, INC., APPELLANT, V. AMISUB (SAINT JOSEPH HOSPITAL), INC., ET AL., APPELLEES.

508 N.W.2d 836

Filed December 10, 1993. No. S-91-759.

1. **Corporations.** A corporation will be looked upon as a legal entity separate and apart from its shareholders and officers unless and until sufficient reason to the contrary appears, but when the notion of a legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons.
2. _____. The corporate identity is disregarded only where a corporation has been used to commit fraud, violate a legal duty, or perpetrate a dishonest or unjust act in contravention of the rights of another.
3. **Corporations: Proof.** A plaintiff seeking to pierce the corporate veil must allege and prove that the corporation was under the actual control of the shareholder and that the shareholder exercised such control to commit a fraud or other wrong in contravention of the plaintiff's rights.
4. **Corporations.** Among the factors relevant in determining whether to disregard the corporate entity are grossly inadequate capitalization, insolvency of the debtor corporation at the time the debt is incurred, diversion by the shareholder or shareholders of corporate funds or assets to their own or other improper uses, that the corporation is a mere facade for the personal dealings of the shareholder, and that the operations of the corporation are carried on by the shareholder in disregard of the corporate entity.
5. _____. The doctrine of separate corporate existence does not break down merely because a corporation is a subsidiary, even if wholly owned by the parent.
6. **Corporations: Stock.** Ownership of all the stock of a corporation by one person, in and of itself, is an insufficient basis upon which to disregard the corporate form.
7. **Corporations: Proof.** To pierce the corporate veil between a parent and a subsidiary, a plaintiff must show more than the mere sharing of services between the two corporations.
8. **Corporations.** Standing behind another's debts does not require that the corporate forms of the organizations be disregarded.
9. **Corporations: Words and Phrases.** Inadequate capitalization means capitalization very small in relation to the nature of the business of the corporation and the risks the business entails measured at the time of formation.
10. **Corporations.** The existence of interlocking directors is not, in and of itself, sufficient without direct evidence of specific manipulative conduct to warrant the piercing of the corporate veil.
11. _____. Merely taking an active part in the management of a corporation does not automatically constitute control sufficient to pierce the corporate veil.
12. **Joint Ventures.** A joint venture can exist only by voluntary agreement of the parties and cannot arise by operation of law.
13. _____. In order for a joint venture to exist, there must be an agreement to enter into an undertaking, the parties must have a community of interest in the object

of the undertaking and a common purpose in performance, and each of the parties must have an equal voice in the manner of performance and control over the agencies used.

14. _____. The mere pooling of property, money, assets, skill, or knowledge does not create a joint venture relationship.
15. _____. In order for a joint venture to exist, there must be something more than mere sharing of profits; there must be some active participation in the enterprise and some control of the subject matter thereof or property engaged therein.
16. **Joint Ventures: Partnerships.** The absence of mutual interest in the profits or benefits is conclusive that a partnership or joint venture does not exist.
17. **Leases: Contracts.** If a lease is intended to stand as security, a lease agreement can be considered a contract of sale.
18. **Joint Ventures.** Pooled labor and skill is insufficient to establish a joint venture.

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

James H. Monahan for appellant.

Neil B. Danberg, Jr., and James L. Schneider, of Kennedy, Holland, DeLacy & Svoboda, for appellees AMISUB et al.

David A. Blagg and Terry J. Grennan, of Cassem, Tierney, Adams, Gotch & Douglas, and Gerald Friedrichsen, of Fitzgerald, Schorr, Barmettler & Brennan, for appellee Creighton University.

HASTINGS, C.J., BOSLAUGH, CAPORALE, FAHRNBRUCH, and LANPHIER, JJ.

CAPORALE, J.

I. STATEMENT OF CASE

Plaintiff-appellant, Global Credit Services, Inc., asserts that the defendant-appellee AMISUB (Saint Joseph Hospital), Inc., the operator of Saint Joseph Hospital, breached its contract with Global and that the other defendants-appellees, and each of them, jointly and severally, tortiously interfered with and destroyed Global's business relationship with AMISUB. Global seeks an accounting and damages.

Four of the other defendants-appellees are corporate entities: American Medical International, Inc., Creighton Omaha Regional Health Care Corporation, Creighton University, and The Health Future Foundation. The remaining defendants, Judy Franksen, Leigh Jean Koinzan, and Thomas

Tokheim, are individuals working at the hospital, whose allegedly wrongful acts Global asserts are to be attributed to each of the corporate defendants.

All of the defendants moved for summary judgment of dismissal; the district court sustained the motions of all the corporate defendants except AMISUB and partially sustained the motions of the individual defendants. Global has appealed only the judgments of dismissal entered in favor of the four corporate defendants last named above.

Global's operative assignments of error claim, in summary, that the district court erred in failing to (1) pierce the veils of the four dismissed corporate defendants and hold that they all jointly operated the hospital and are each responsible for the actions of the other corporate defendants, or (2) find that the corporate defendants were joint venturers and, for that reason, each was responsible for the actions of the others. We affirm.

II. SCOPE OF REVIEW

Proceedings seeking disregard of the corporate entity to impose liability on a shareholder for a corporation's debt or other obligation are equitable actions. An appeal of such a matter is tried de novo on the record, and the appellate court is required to reach factual findings independent of the trial court. *Southern Lumber & Coal v. M. P. Olson Real Est.*, 229 Neb. 249, 426 N.W.2d 504 (1988); *ServiceMaster Indus. v. J.R.L. Enterprises*, 223 Neb. 39, 388 N.W.2d 83 (1986). See, also, *Metropolitan Life Ins. Co. v. Kissinger Farms, ante* p. 620, 508 N.W.2d 568 (1993). In view of the rule that if a court of equity has properly acquired jurisdiction in a suit for equitable relief, it may make complete adjudication of all matters properly presented and involved in the case and grant relief, legal or equitable, as may be required and thus avoid unnecessary litigation, we need not concern ourselves with whether other aspects of this case sound in law rather than equity. See, *Trump, Inc. v. Sapp Bros. Ford Center, Inc.*, 210 Neb. 824, 317 N.W.2d 372 (1982); *Daugherty v. Ashton Feed and Grain Co., Inc.*, 208 Neb. 159, 303 N.W.2d 64 (1981); *Hull v. Bahensky*, 196 Neb. 648, 244 N.W.2d 293 (1976).

It must be borne in mind, however, that this matter arises on

the grant of summary judgments. Such a 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 that may be drawn from such fact or facts and the moving party is entitled to judgment as a matter of law. *VonSeggern v. Willman, ante* p. 565, 508 N.W.2d 261 (1993); *Gould v. Orr, ante* p. 163, 506 N.W.2d 349 (1993); *Design Data Corp. v. Maryland Cas. Co.*, 243 Neb. 945, 503 N.W.2d 552 (1993); *Metropolitan Life Ins. Co. v. Beaty*, 242 Neb. 169, 493 N.W.2d 627 (1993).

In appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Abdullah v. Gunter*, 242 Neb. 854, 497 N.W.2d 12 (1993); *Design Data Corp., supra*; *Abboud v. Michals*, 241 Neb. 747, 491 N.W.2d 34 (1992).

Moreover, as to questions of law, an appellate court has an obligation to reach independent, correct conclusions irrespective of the determinations made by the courts below. *AMISUB v. Board of Cty. Comrs. of Douglas Cty., ante* p. 657, 508 N.W.2d 827 (1993); *Metropolitan Life Ins. Co. v. Kissinger Farms, ante* p. 620, 508 N.W.2d 568 (1993); *Wilson v. Misko, ante* p. 526, 508 N.W.2d 238 (1993).

III. BACKGROUND

On January 7, 1983, Global, doing business as Creditors Collection Bureau, signed a contract with Creighton Omaha Regional, then owner of Saint Joseph Hospital, for collection of its overdue patient accounts.

On November 19, 1984, Creighton Omaha Regional transferred the assets of the hospital to AMISUB pursuant to an August 24, 1984, agreement among Creighton Omaha Regional, American Medical, and AMISUB, American Medical's wholly owned subsidiary. AMISUB agreed to assume all of Creighton Omaha Regional's obligations, and with Global's consent, its collection agreement with Creighton Omaha Regional was assigned to AMISUB.

At the time of the transfer, Creighton Omaha Regional had several affiliation agreements, including one with the university, which was identified in the transfer as a third-party beneficiary entitled to enforce those provisions of the contract which obligated Creighton Omaha Regional and AMISUB to provide the university with specified benefits.

The August 24, 1984, agreement specifies that both American Medical and AMISUB will discharge certain specified obligations in connection with the operation of the hospital, with a "view toward establishing the HOSPITAL as [American Medical's] flagship and hub facility in the midwestern United States," and American Medical unconditionally guaranteed AMISUB's obligations. In addition, the agreement requires the university to participate in the long-range planning of the hospital and to designate university members to sit on the hospital's governing boards.

Also transferred was Creighton Omaha Regional's affiliation agreement with the university, requiring AMISUB and the university to maintain the hospital as a teaching facility, and under which the university was given control over all the health sciences taught at the hospital. It was agreed that the university would make recommendations concerning the selection of certain high-level administrative officers and be allowed to request that any director of pharmacy or nursing or any chief of clinical sections be removed if such person interferes with the teaching, research, and service functions of the university. AMISUB has similar rights with regard to the chairpersons of the clinical academic departments. In addition, there is a general provision declaring that the parties recognize and intend to preserve the separate existence of the two institutions and the independence of their financial resources and obligations.

The Health Future Foundation was established at about the time the hospital was transferred to support the university's mission and specifically its health sciences schools, which are described as an "integral part" of the medical center. The foundation, the university, and Creighton Omaha Regional share or have in the past shared common officers and directors.

On October 26, 1987, AMISUB terminated its contract with

Global, recalling and asking for the immediate return of all accounts which had been assigned to the latter and were then in its possession. In essence, Global claims the termination of its contract came about because the three individual defendants mischaracterized Global's handling of the accounts assigned to it for collection and made wrongful disclosures of that mischaracterization.

IV. ANALYSIS

With that background, we turn our attention to Global's claims that the corporate defendants are either to have their protective veils as such entities pierced or to be treated as joint venturers.

1. Corporate Veils

As a general rule, a corporation will be looked upon as a legal entity separate and apart from its shareholders and officers unless and until sufficient reason to the contrary appears, but when the notion of a legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons. *Southern Lumber & Coal v. M. P. Olson Real Est.*, 229 Neb. 249, 426 N.W.2d 504 (1988); *J. L. Brock Bldrs., Inc. v. Dahlbeck*, 223 Neb. 493, 391 N.W.2d 110 (1986); *ServiceMaster Indus. v. J.R.L. Enterprises*, 223 Neb. 39, 388 N.W.2d 83 (1986); *Scribner Grain & Lumber Co. v. Wortman*, 204 Neb. 92, 281 N.W.2d 394 (1979). The corporate identity is disregarded only where the corporation has been used to commit fraud, violate a legal duty, or perpetrate a dishonest or unjust act in contravention of the rights of another. *J. L. Brock Bldrs., Inc., supra*; *Slusarski v. American Confinement Sys.*, 218 Neb. 576, 357 N.W.2d 450 (1984); *George v. Board of Education*, 210 Neb. 127, 313 N.W.2d 259 (1981). A plaintiff seeking to pierce the corporate veil must allege and prove that the corporation was under the actual control of the shareholder and that the shareholder exercised such control to commit a fraud or other wrong in contravention of the plaintiff's rights. See, *Krivo Industrial Sup. Co. v. National Distill. & Chem. Corp.*, 483 F.2d 1098 (5th Cir. 1973), *reh'g denied* 490 F.2d 916 (5th Cir. 1974); *Berger v. Columbia Broadcasting System, Inc.*,

453 F.2d 991 (5th Cir. 1972), *cert. denied* 409 U.S. 848, 93 S. Ct. 54, 34 L. Ed. 2d 89; *Gatecliff v. Great Republic Life Ins.*, 170 Ariz. 34, 821 P.2d 725 (1991); *Vuitch v. Furr*, 482 A.2d 811 (D.C. 1984).

Among the factors relevant in determining whether to disregard the corporate entity are grossly inadequate capitalization, insolvency of the debtor corporation at the time the debt is incurred, diversion by the shareholder or shareholders of corporate funds or assets to their own or other improper uses, that the corporation is a mere facade for the personal dealings of the shareholder, and that the operations of the corporation are carried on by the shareholder in disregard of the corporate entity. *United States Nat. Bank of Omaha v. Rupe*, 207 Neb. 131, 296 N.W.2d 474 (1980).

Global argues that AMISUB is American Medical's alter ego because the former is a wholly owned subsidiary of the latter, and cites to various agreements between AMISUB and American Medical and the commonality of some of their officers and directors, alleging that "the operations of [AMISUB and American Medical] overlap, so that it is impossible to tell what business of AMISUB . . . is separate from business of American Medical." However, the doctrine of separate corporate existence does not break down merely because a corporation is a subsidiary, even if wholly owned by the parent. *SFN Shareholders v. Dept. of State Rev.*, 603 N.E.2d 194 (Ind. 1992); *Peoples Energy Corp. v. Ill. Commerce Com.*, 142 Ill. App. 3d 917, 492 N.E.2d 551 (1986). Nor is ownership of all the stock of the corporation by one person, in and of itself, a sufficient basis upon which to disregard the corporate form of AMISUB. See, *Krivo Industrial Sup. Co., supra*; *Volkswagenwerk, A. G. v. Klippan, GmbH*, 611 P.2d 498 (Alaska 1980), *cert. denied* 449 U.S. 974, 101 S. Ct. 385, 66 L. Ed. 2d 236; *Inst. of Veterinary Pathology v. Cal. Health*, 116 Cal. App. 3d 111, 172 Cal. Rptr. 74 (1981); *Amfac Foods v. Int'l Systems*, 294 Or. 94, 654 P.2d 1092 (1982); *Wakeman v. Paulson*, 257 Or. 542, 480 P.2d 434 (1971).

To pierce the corporate veil between a parent and a subsidiary, a plaintiff must show more than the mere sharing of services between the two corporations. In *Boafo v. Hosp.*

Corp. of America, 177 Ga. App. 75, 338 S.E.2d 477 (1985), a patient who allegedly suffered a severe injury while being administered anesthesia at a facility operated by the subsidiary brought an action against the parent corporation, alleging that the facility was run, operated, and managed by the parent corporation and the subsidiary. The *Boafo* court refused to pierce the corporate veil despite the fact that the corporations shared some officers and had jointly purchased the hospital property from bankruptcy receivership, the fact that some officers of the subsidiary were paid by the parent, and the existence of other facts showing a commonality between them. What was significant to the court was that the subsidiary was a fully capitalized and insured entity which owned the hospital property, autonomously managed and operated the hospital on a day-to-day basis, maintained its own payrolls, and employed its own employees.

For Global to pierce the corporate veil of AMISUB, it must show that American Medical totally dominated AMISUB to such extent that AMISUB had no separate corporate existence and functioned solely to achieve the purposes of the dominant corporation. See, *J. L. Brock Bldrs., Inc. v. Dahlbeck*, 223 Neb. 493, 391 N.W.2d 110 (1986); *Krivo Industrial Sup. Co., supra*; *Scott v. AZL Resources, Inc.*, 107 N.M. 118, 753 P.2d 897 (1988); *Unijax, Inc. v. Factory Insurance Association*, 328 So. 2d 448 (Fla. App. 1976), *cert. denied* 341 So. 2d 1086. Without more, the fact that AMISUB is a subsidiary of American Medical fails to establish that American Medical controls AMISUB.

Nor does American Medical's unconditional guarantee of AMISUB's performance in the transfer of the hospital extend its liability beyond the strict terms of that contract to make AMISUB an alter ego of American Medical. See *Federal Deposit Ins. Corp. v. Heyne*, 227 Neb. 291, 417 N.W.2d 162 (1987). Standing behind another's debts does not require that the corporate forms of the organizations be disregarded. *Krivo Industrial Sup. Co., supra*. See, also, *Frazier v. Bryan Memorial Hosp. Authority*, 775 P.2d 281 (Okla. 1989); *Amfac Foods, supra*.

Global asserts that the inadequate capitalization of

AMISUB requires the piercing of its corporate veil. The claim is based on the fact that at the time of its incorporation, issuance of 1,000 shares of capital stock at the par value of $1 was authorized. Inadequate capitalization means capitalization very small in relation to the nature of the business of the corporation and the risks the business entails measured at the time of formation. *J-R Grain Co. v. FAC, Inc.*, 627 F.2d 129 (8th Cir. 1980); *Southern Lumber & Coal v. M. P. Olson Real Est.*, 229 Neb. 249, 426 N.W.2d 504 (1988); *J. L. Brock Bldrs., Inc., supra.*

The authorization to issue capital stock in AMISUB's charter should not be confused with formal minimum paid-in capital requirements and, more importantly, does not reflect the ability of AMISUB to conduct its business. See, *J-R Grain Co., supra*; 11 William M. Fletcher, Fletcher Cyclopedia of the Law of Private Corporations § 5124 (rev. perm. ed. 1986).

However, even assuming without deciding that AMISUB is inadequately capitalized, it is only one factor to be considered in determining whether to disregard its corporate nature. See, *J. L. Brock Bldrs., Inc., supra*; *Scott, supra.* Under all the circumstances, that factor falls far short of providing grounds to ignore AMISUB's corporate form.

Global also claims that Creighton Omaha Regional and the foundation are wholly owned and controlled alter egos of the university. In so doing, Global points to the articles of incorporation of Creighton Omaha Regional, the foundation, and the university, which reflect that the three corporations share, or have shared in the past, common officers and directors. Indeed, one of the incorporators and directors of the foundation had served as the university's president. Hence, Global argues that the existence of common officers and directors provides a financial interest in Creighton Omaha Regional and the university by "direction and participation."

As uniformly held, the existence of interlocking directors is not, in and of itself, sufficient without direct evidence of specific manipulative conduct to warrant the piercing of the corporate veil. *Jabczenski v. Southern Pac. Memorial Hospitals*, 119 Ariz. 15, 579 P.2d 53 (1978); *Inst. of Veterinary Pathology v. Cal. Health*, 116 Cal. App. 3d 111, 172 Cal. Rptr.

74 (1981); *Unijax, Inc., supra*; *Pederson v. Paragon Pool Enterprises*, 214 Ill. App. 3d 815, 574 N.E.2d 165 (1991). Merely taking an active part in the management of a corporation does not automatically constitute control sufficient to pierce the corporate veil. In *Chicago Mill & Lumber Co. v. Boatmen's Bank*, 234 F. 41 (8th Cir. 1916), a bank had its assistant cashier elected president of the company to protect its investment of money to a mill and land company. In refusing to pierce the corporate veil, the court stated that the creditor's oversight of the operations of a debtor business did not warrant a finding that the bank was carrying on the business of the debtor as a part of the bank's business.

The uncontradicted evidence is that both the foundation and Creighton Omaha Regional are separate and distinct corporations from all the other defendants. The foundation is not a subsidiary of any corporation, maintains its own separate corporate and financial records, and conducts its own business and meetings. In short, there is no evidence that any corporation has such a financial interest in, or total domination over, the other as to permit the corporate existence of any corporation to be ignored.

2. JOINT VENTURES

Global also claims that all five corporate defendants are liable for the actions of the individual defendants because they engaged in a joint operation of the hospital.

A joint venture can exist only by voluntary agreement of the parties and cannot arise by operation of law. *Evertson v. Cannon*, 226 Neb. 370, 411 N.W.2d 612 (1987). There must be an agreement to enter into an undertaking; the parties must have a community of interest in the object of the undertaking and a common purpose in performance; each of the parties must have an equal voice in the manner of performance and control over the agencies used. *Fangmeyer v. Reinwald*, 200 Neb. 120, 263 N.W.2d 428 (1978). The mere pooling of property, money, assets, skill, or knowledge does not create the relationship. *Id.* And there must be something more than mere sharing of profits; there must be some active participation in the enterprise and some control of the subject matter thereof or

property engaged therein. *Id.* See, also, *Strother v. Herold*, 230 Neb. 801, 433 N.W.2d 535 (1989); *Evertson, supra*. The absence of mutual interest in the profits or benefits is conclusive that a partnership or joint venture does not exist. *Frisch v. Svoboda*, 182 Neb. 825, 157 N.W.2d 774 (1968). See *Strother, supra*. The primary criterion is that the parties enter into an agreement as owners or principals in the endeavor. *Evertson, supra*. Therefore, even a close relationship between two parties does not create an implied joint venture. See *id.*

As evidence of the joint operation of the corporate defendants, Global relies upon the affiliation agreement originally between the university and Creighton Omaha Regional, and later transferred to AMISUB. It also argues that a suit by the university against American Medical and AMISUB for breach of that agreement evidences an intent to jointly operate the hospital.

However, although facilities are shared for mutual benefit, an affiliation agreement, without more, does not create the relationship of joint venturer between hospital and university. In *Dillard v. Rowland*, 520 S.W.2d 81 (Mo. App. 1974), in a situation similar to the one now before us, an infirmary physician who was discharged by a medical school employee brought suit against the infirmary, seeking damages and reinstatement to the infirmary's medical staff, alleging that a joint venture existed between the medical school and the infirmary. The *Dillard* court ruled that no joint venture existed despite the existence of a contract between the infirmary and the medical school providing that medical staffing for the infirmary would consist solely of medical school faculty members, the existence of a joint medical advisory board, and the fact that net earnings and losses would be split equally between the two organizations. The *Dillard* court found that the agreement between the two institutions gave neither of them the right to control any of the operations of the other and that the direction and management of each organization were completely separate from the other.

Such is the situation here. At the time the affiliation agreement in question was assigned to AMISUB, the university had 18 affiliation agreements with hospitals other than Saint

Joseph, and AMISUB had 9 such affiliations. Despite Global's allegations of a joint venture, the subject affiliation agreement makes clear that the parties recognize and intend to preserve the separate existence of the two institutions and the independence of their financial resources and obligations.

Global appears to contend that the agreement between Creighton Omaha Regional and American Medical for transfer of the hospital's assets constitutes not a sale, but a lease, evidencing a joint venture. According to the agreement, AMISUB would pay Creighton Omaha Regional $79,120,000 in cash for the lease of assets, plus an additional $20,180,000 payable at such time as Creighton Omaha Regional discharged certain liabilities, together with an undetermined amount adjusted against net working capital. In return, Creighton Omaha Regional would execute a lease to AMISUB for a period of 14 years with an option permitting AMISUB to purchase the assets at the end of the lease term for $1,000.

If a lease is intended to stand as security, a lease agreement can be considered a contract of sale. In *Reyna Financial Corp. v. Lewis Serv. Ctr.*, 229 Neb. 878, 429 N.W.2d 380 (1988), a dispute arose out of an agreement which provided for the lease of computer equipment and programming for 84 monthly installments of $1,724.77. The agreement further provided an option to the defendant to purchase the equipment for $1 at the expiration of the lease term. We held that the agreement created a contract of sale, the lease clearly being intended as security. The lease in *Crowder v. Allied Investment Co.*, 190 Neb. 487, 209 N.W.2d 141 (1973), which called for only a 4-percent additional consideration should the option to purchase be exercised, was also considered to be a contract of sale. In reaching that determination, the *Crowder* court distinguished that amount of consideration from the more substantial amount required to exercise the option to purchase at the end of the term in the lease involved in *Gibreal Auto Sales, Inc. v. Missouri Valley Machinery Co.*, 186 Neb. 763, 186 N.W.2d 719 (1971), which was held not to be a contract of sale. Here, the amount to be paid to exercise the option to purchase at the end of the lease term pales into nonexistence when compared to the total consideration involved. The transfer of the hospital's

assets was indeed a sale.

Global also contends that a joint venture exists between Creighton Omaha Regional, the foundation, and the university. This assertion is based on the facts that a provision in the foundation's articles provides that its funds may be distributed for the use of the university and the medical center as an "integral component" of the university; that money from the transfer of the hospital went to the foundation; that, as previously noted in part IV(1) above, one of the foundation's incorporators also once served as the president of the university and as a director-trustee of Creighton Omaha Regional; and that there exists a news article in which an attorney for Creighton Omaha Regional is reported to have said that about $38 million in assets from the transfer of the hospital went to the foundation. But none of these circumstances establishes the existence of any of the elements required to create a joint venture.

Quite simply, Global failed to make a prima facie case that the corporate defendants are engaged in a joint venture. There was no evidence that any of the corporations had an equal voice in controlling the manner in which the hospital was run; no evidence that American Medical, the foundation, or the university has ever exercised any control over the day-to-day operations or collection activities of the hospital; and most importantly, no evidence that any of the corporations shared in the profits of the hospital, other than American Medical as a stockholder. Pooled labor and skill is insufficient to establish a joint venture. *Fangmeyer v. Reinwald*, 200 Neb. 120, 263 N.W.2d 428 (1978).

V. JUDGMENT

The record establishes that there exist no genuine issues concerning any material facts or the ultimate inferences that may be drawn from those facts and that the corporate defendants are entitled to judgment as a matter of law. Accordingly, the judgment of the district court is affirmed.

AFFIRMED.

WHITE and SHANAHAN, JJ., not participating.

RICHDALE DEVELOPMENT COMPANY, A NEBRASKA PARTNERSHIP, APPELLANT, V. MCNEIL COMPANY, INC., A NEBRASKA CORPORATION, APPELLEE.

508 N.W.2d 853

Filed December 10, 1993. No. S-91-814.

1. **Injunction: Equity: Appeal and Error.** An injunction is a remedy available through an equity action. In an appeal of an equity action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court; provided, where credible evidence is in conflict on a material issue of fact, an 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.
2. **Federal Acts: States: Statutes.** State laws are subject to federal preemption under 17 U.S.C. § 301 (1988) of the Copyright Act of 1976 only when the subject matter of the action is governed by copyright law and the scope of the state law is equivalent to the act's exclusive rights as specified by 17 U.S.C. § 106 (1988) of the act.
3. **Federal Acts: States: Statutes: Architects.** Architectural drawings and plans come within the subject matter of copyright as defined in 17 U.S.C. § 102(a)(5) (1988) of the Copyright Act of 1976, regarding pictorial, graphic, and sculptural works, which in turn are defined in § 101 of that act, as amended in 1989, to include diagrams, models, and technical drawings, including architectural plans, which inclusion preempts their coverage by state law.
4. **Federal Acts: Architects.** Original works of authorship, including architectural plans, are within the subject matter of copyright under the Copyright Act of 1976 even if the material is not or could not be copyrighted.
5. **Trade Secrets: Actions.** The elements necessary to establish a cause of action for misappropriation of a trade secret are (1) the existence of a trade secret or secret manufacturing process, (2) the value and importance of the trade secret to the employer in the conduct of his business, (3) the employer's right by reason of discovery or ownership to the use and enjoyment of the secret, and (4) the communication of the secret to the employee while he was employed in a position of trust and confidence and under circumstances making it inequitable and unjust for him to disclose it to others or to use it himself to the employer's prejudice.
6. **Pleadings.** A petition will be sufficient if, under the facts alleged, the law entitles a plaintiff to recover.
7. **Actions: States: Statutes.** Plaintiffs may not by miscasting their causes of action secure the equivalent of copyright protection under the guise of state law.
8. **Jurisdiction.** Litigants cannot confer subject matter jurisdiction on a judicial tribunal by either acquiescence or consent.
9. **Jurisdiction: Appeal and Error.** When a trial court lacks the power, that is, jurisdiction, to adjudicate the merits of a claim, an appellate court also lacks the power to adjudicate the merits of the claim.

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Affirmed in part, and in part reversed and remanded with direction.

Jeffrey A. Silver for appellant.

David D. Ernst and Lisa M. Meyer, of Gaines, Mullen, Pansing & Hogan, for appellee.

HASTINGS, C.J., BOSLAUGH, CAPORALE, FAHRNBRUCH, and LANPHIER, JJ.

HASTINGS, C.J.

Richdale Development Company brought this action against McNeil Company, Inc., seeking injunctive relief and monetary damages based on deceptive trade practices, misappropriation of trade secrets, unjust enrichment, and conversion. Richdale appeals the order of the district court in which the court granted injunctive relief but dismissed Richdale's claims for damages.

An injunction is a remedy available through an equity action. In an appeal of an equity action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court; provided, where credible evidence is in conflict on a material issue of fact, an 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. *K N Energy, Inc. v. Cities of Broken Bow et al., ante* p. 113, 505 N.W.2d 102 (1993); *Chambers-Dobson, Inc. v. Squier*, 238 Neb. 748, 472 N.W.2d 391 (1991).

McNeil is a Nebraska corporation engaged in the construction of residential and commercial projects in Omaha. Patrick McNeil testified that he was the owner of McNeil and that in 1989 he was approached about the possibility of building an apartment complex at 144th and F Streets. McNeil had not previously constructed an apartment complex, and Patrick McNeil felt it necessary to gather information about the costs involved in this type of project. In late September 1989, he went to the Vanderbilt apartment complex, which was under

construction, in order to do research on construction costs of multifamily units. Patrick McNeil stated that when he went into the Vanderbilt complex, he looked around and saw a set of plans in one of the units. He picked the plans up and took them back to his office. At the time, he did not know who was building the complex and did not ask permission of anyone to take the plans. Patrick McNeil testified: "I shouldn't have taken the plans. It was an error in judgment. I was walking through. There was a plan sitting there; probably shouldn't have been there and I probably shouldn't have taken it."

Patrick McNeil subsequently removed the names of the architects from the Vanderbilt plan, made changes to the window design, and had 20 photocopies made of 9 pages of the plan. He then sent those copies out to subcontractors for preliminary numbers, indicating to them that the project was to be built on Fort Street. Patrick McNeil testified that he never arrived at any conclusion about what it would cost to construct an apartment complex similar to the Vanderbilt. When he heard that he was being sued, he gathered up all the plans and destroyed whatever he had. He tried to contact David Slosburg, a partner in Richdale, the builder of the Vanderbilt complex. Patrick McNeil stated that he believed that Slosburg thought McNeil was going to build from the Vanderbilt plan and that he wanted to tell Slosburg that he was not using the plan in that manner.

Slosburg testified that in 1985, he contacted architect Terry Molik for the purpose of developing plans for an apartment complex in Omaha. Molik designed the plans for Richdale's Lion's Head complex and was paid approximately $37,000 for his services. Based on marketing exposure and feedback from tenants, Richdale revised those plans for the construction of its Vanderbilt complex. Molik was paid an additional $37,000 for his architectural services with respect to the Vanderbilt complex. Slosburg testified that in his opinion, the total cost for the Vanderbilt plans would be $250,000, based on "the input that went into it, the time that went into it, and the competitive advantage as far as — not only has that community been a success but the predecessor design was a success." Slosburg also stated that he would not sell the plans to someone who intended

to use them in the same marketplace as Richdale, but if he sold them to someone in a different marketplace, it would be at a cost of $125,000. He stated that Richdale had taken steps to protect the integrity of its plans, including numbering each set and requiring deposits and the return of the plans from subcontractors. Although the city of Omaha required a set of plans to be filed in order to issue construction permits, Slosburg stated that he did not intend to place his plans and specifications into the public domain by complying with the city ordinance. Richdale did not attempt to copyright the plans.

The district court found that McNeil's misappropriation of the plans constituted a deceptive trade practice entitling Richdale to injunctive relief, but that Richdale's claims for misappropriation of trade secrets, unjust enrichment, and conversion were preempted by the federal Copyright Act of 1976, 17 U.S.C. § 101 et seq. (1988). Richdale appeals, asserting that the court erred in (1) finding that McNeil's misappropriation of Richdale's plans was preempted by the federal Copyright Act of 1976 and (2) finding that Richdale had not sustained any damages by way of misappropriation, unfair competition, conversion, or unjust enrichment.

Richdale alleges in its amended petition filed January 9, 1990, generally that it is engaged in the design and construction of residential properties in the Omaha area and, to accomplish that end, had retained an architectural firm to prepare blueprints, plans, and specifications for a particular type of apartment building, which items it refers to generally as its "plans." It is further alleged that Richdale took steps to keep the plans in the strictest of confidence and that the plans are valuable trade secrets. Richdale goes on to assert that McNeil, without authority, came into possession of a copy of the plans, erased certain identifying characteristics, and misappropriated the plans with the intent to use them for its own benefit or that of a third party.

The amended petition goes on to state that as a result of the facts alleged, it requests the issuance of an injunction and prays for damages for misappropriation of trade secrets, unjust enrichment as a result of the violation of Richdale's proprietary rights, and conversion.

Neb. Rev. Stat. § 87-302 (Cum. Supp. 1992) of Nebraska's Uniform Deceptive Trade Practices Act provides in pertinent part:

> (a) A person engages in a deceptive trade practice when, in the course of his or her business, vocation, or occupation, he or she:
>
> (1) Passes off goods or services as those of another;
>
> (2) Causes likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services.

Under the provisions of Nebraska's Trade Secrets Act, Neb. Rev. Stat. § 87-501 et seq. (Cum. Supp. 1992), a trade secret is defined as follows:

> (4) Trade secret shall mean information, including, but not limited to, a drawing, formula, pattern, compilation, program, device, method, technique, code, or process that:
>
> (a) Derives independent economic value, actual or potential, from not being known to, and not being ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
>
> (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

§ 87-502. Section 87-503 provides for injunctive relief, and § 87-504 allows damages under certain circumstances because of misappropriation under the terms of the Trade Secrets Act.

On the other hand, § 301(a) of the Copyright Act of 1976 provides:

> On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.

Section 102(a) of the copyright act extends copyright protection to "(5) pictorial, graphic, and sculptural works," which works are in turn defined by that act's § 101, as amended by Pub. L. No. 100-568, § 4(a)(1), October 31, 1988, effective March 1, 1989, which provides: " 'Pictorial, graphic, and sculptural works' include . . . diagrams, models, and technical drawings, including architectural plans."

Thus, state laws are subject to federal preemption under § 301 of the copyright act only when the subject matter of the action is governed by copyright law *and* the scope of the state law is equivalent to the copyright act's exclusive rights as specified by § 106. Architectural drawings and plans clearly "come within the subject matter of copyright" of § 102(a)(5) regarding "pictorial, graphic, and sculptural works," which in turn are defined in § 101, as amended in 1989, to include "diagrams, models, and technical drawings, including architectural plans," which inclusion preempts their coverage by state law.

Original works of authorship, including architectural plans, are within the subject matter of copyright even if the material is not or could not be copyrighted. *Ehat v. Tanner*, 780 F.2d 876 (10th Cir. 1985), *cert. denied* 479 U.S. 820, 107 S. Ct. 86, 93 L. Ed. 2d 39 (1986).

The remaining question is whether the appellant's claims for deceptive trade practices, unfair competition, misappropriation of trade secrets, unjust enrichment, and conversion are equivalent to rights governed exclusively by § 106 of the copyright act. As explained in 1 Melville B. Nimmer and David Nimmer, Nimmer on Copyright § 1.01[B] at 1-12 to 1-14 (1991):

> [T]he reference to Section 106 in the Section 301 phrase "equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106" is by way of identification and not limitation. If a state created right is "within the general scope of copyright" it is subject to preemption, even if the precise contours of the right differ from any of those contained in Section 106. Still, Section 106 may be said to identify the general nature of the rights which fall "within the general scope of

> copyright." Such a right must inhere in a work of authorship. It consists of a right to prohibit reproduction . . . , performance, distribution or display of such a work. Thus, in essence a right which is "equivalent to copyright" is one which is infringed by the mere act of reproduction, performance, distribution or display. The fact that the state created right is either broader or narrower than its federal counterpart will not save it from preemption. . . . If under state law the act of reproduction, performance, distribution or display, no matter whether the law includes all such acts or only some, will *in itself* infringe the state created right, then such right is preempted. But if other elements are required, in addition to or instead of, the acts of reproduction, performance, distribution or display, in order to constitute a state created cause of action, then the right does not lie "within the general scope of copyright," and there is no preemption.

(Emphasis in original.) Courts must therefore determine if an additional element exists in the state law which "changes the nature of the action so that it is *qualitatively* different from a copyright infringement claim." *Mayer v. Josiah Wedgwood & Sons, Ltd.*, 601 F. Supp. 1523, 1535 (S.D.N.Y. 1985). As noted in *Editorial Photocolor v Granger*, 61 N.Y.2d 517, 522, 463 N.E.2d 365, 367, 474 N.Y.S.2d 964, 966 (1984):

> The Copyright Act of 1976 (Pub L 94-553) worked a fundamental change in this Nation's copyright laws. After the effective date of that act, all legal and equitable rights equivalent to copyrights are governed exclusively by that act. States may not, by statute or common law, provide equivalent rights, and State courts are divested of jurisdiction to consider claims to enforce those rights.

Cited in *Editorial Photocolor* was a portion of 28 U.S.C. § 1338(a) (1988), which provides as follows: "The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, plant variety protection, copyrights and trade-marks. Such jurisdiction shall be exclusive of the courts of the states in patent, plant variety protection and copyright cases."

In the instant case, the essence of appellant's claims is the

reproduction and distribution of its architectural plans. Although the appellant here makes a claim for conversion, it is not the appellant's being physically deprived of the plans, but, rather, the appellant's damage resulting from reproduction and distribution which is essential to the claim. Thus, the district court correctly found under the facts of this case that the claim for conversion was preempted by the copyright act.

The district court also correctly found that the appellant's claim for unfair competition was preempted. The appellant cites *Intown Enterprises, Inc. v. Barnes*, 721 F. Supp. 1263 (N.D. Ga. 1989), for the proposition that a state law unfair competition claim is not preempted by the copyright act. In *Barnes*, the plaintiff commissioned a series of architectural drawings and obtained a copyright registration for them. The defendant allegedly made several unauthorized copies of the drawings and subsequently used the copies to construct a house, which he then sold. The plaintiff brought claims for copyright infringement, misappropriation, conversion, intentional interference with business relations, and unfair competition. The court found that the state law claims for misappropriation, conversion, and intentional interference with business relations were preempted. However, the court further found that

> [b]ecause plaintiff's unfair competition claim (Count 4(b)) alleges that the marketing of the house Barnes built from the infringed plans was likely to confuse potential buyers as to whether plaintiff built the house, the court finds that the unfair competition claim is not preempted. *See Donald Frederick Evans* [*v. Continental Homes, Inc.*], 785 F.2d [897,] 914 [(11th Cir. 1986)]; *B.H. Bunn Co. v. AAA Replacement Parts Co.*, 451 F.2d 1254, 1263 (5th Cir. 1971) (unfair competition claim goes to marketing, not copying).

721 F. Supp. at 1267.

In the instant case, the appellee did not *construct* or *market* a building from the appellant's plans, and thus the case may readily be distinguished from *Barnes*. There is no element of consumer confusion in this case which would qualitatively distinguish an unfair competition claim from a claim within the

scope of the copyright act. See, also, *M.G.B. Homes, Inc. v. Ameron Homes, Inc.*, 903 F.2d 1486 (11th Cir. 1990) (Florida law requires that plaintiff establish deceptive or fraudulent conduct of a competitor and likelihood of consumer confusion in order to prevail on unfair competition claim; in the absence of proof of any element of unfair competition other than copying, claim for unfair competition is clearly preempted).

Some courts have found claims for misappropriation of trade secrets to be exempt from preemption by the federal act. See, e.g., *Southern Miss. Planning & Dev. Dist. v. Robertson*, 660 F. Supp. 1057 (S.D. Miss. 1986) (in case involving computer software, court found that analysis of the interests secured by copyright and trade secret law reveals that claims are not equivalent; protection provided by common law of trade secret misappropriation extends to original, undisclosed ideas of the author, while copyright protection extends not to an idea itself, but, rather, to the author's particular expression of it); *Warrington Assoc. v. Real-Time Eng. Systems*, 522 F. Supp. 367 (N.D. Ill. 1981) (copyright act does not preempt common-law tort claim; common law of both Minnesota and Wisconsin stresses that trade secrets tort is premised on concepts of breach of trust and confidentiality, and not copying).

However, to state a claim for misappropriation of a trade secret, the claimant must allege elements outside the scope of copyright protection: a relationship of secrecy and an actual *trade secret*. In *Selection Research, Inc. v. Murman*, 230 Neb. 786, 795, 433 N.W.2d 526, 532 (1989), this court examined the elements necessary to establish a cause of action for misappropriation of a trade secret, which elements are:

> (1) the existence of a trade secret or secret manufacturing process; (2) the value and importance of the trade secret to the employer in the conduct of his business; (3) the employer's right by reason of discovery or ownership to the use and enjoyment of the secret; and (4) the communication of the secret to the employee while he was employed in a position of trust and confidence and under circumstances making it inequitable and unjust for him to disclose it to others or to use it himself to the employer's

prejudice.

We further noted that the subject matter of a trade secret must be *secret*, that matters of public knowledge or of general knowledge in an industry cannot be appropriated by one as its secret, and that a trade secret is something known to only a few and not susceptible of general knowledge.

Here, there is no employer-employee relationship between the appellant and the appellee. In regard to the nature of the information contained within the plans, Slosburg testified that he considered the Vanderbilt plans to be proprietary information and that the time and involvement that went into developing the concept was the reason the development could be marketed at the price it was. Architect Molik testified that the Vanderbilt plans were unique in that they utilized "open concepts" and included private balconies, private storage, large closets, "nice usable kitchens [and] a little bit different bathroom if at all possible." Even if at the time of their design these features were distinctive in the Omaha community, they are simply not so unique that they would qualify the Vanderbilt plans for "trade secret" status.

Although in its petition the appellant did not allege violation of Nebraska's Trade Secrets Act, § 87-501 et seq., on appeal it is argued that the plans satisfy the definition of trade secret as contained in that act. A petition will be sufficient if, under the facts alleged, the law entitles a plaintiff to recover. *AMISUB v. Board of Cty. Comrs. of Douglas Cty., ante* p. 657, 508 N.W.2d 827 (1993). Although the existence of an employer-employee relationship is not a required element for misappropriation of a trade secret under the Trade Secrets Act, § 87-502(4) defines a trade secret as

> information, including, but not limited to, a drawing, formula, pattern, compilation, program, device, method, technique, code, or process that:
>
> (a) Derives independent economic value, actual or potential, from not being known to, and not being ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
>
> (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Again, the Vanderbilt plans do not contain the type of information which is unascertainable by proper means. Knowledge of "open concepts," balconies, and even room sizes may be readily gained by observation. In failing to establish the existence of an actual trade secret, the appellant also fails to allege an element necessary to establish a claim outside the scope of copyright protection.

Plaintiffs may not by miscasting their causes of action secure the equivalent of copyright protection under the guise of state law. *James v. Delilah Films, Inc.*, 144 Misc. 2d 374, 544 N.Y.S.2d 447 (1989).

The district court found that "[d]efendant's misappropriation of plaintiff's plans constitutes a deceptive trade practice of the Nebraska Uniform Deceptive Trade Practices Act, Section 87-302, et seq., R.R.S. 1943, entitling the plaintiff to the injunctive relief prayed for in its first cause of action." Neb. Rev. Stat. § 87-302 (Cum. Supp. 1990), in effect at the time this action was filed, enumerated 14 deceptive trade practices. However, the district court did not specify which of these was implicated in the instant case. Presumably pertinent to our analysis is § 87-302 of the Uniform Deceptive Trade Practices Act, which provides that

> [a] person engages in a deceptive trade practice when, in the course of his or her business, vocation, or occupation, he or she:
>
> (1) Passes off goods or services as those of another;
>
> (2) Causes likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services;
>
> (3) Causes likelihood of confusion or of misunderstanding as to affiliation, connection, or association with, or certification by, another.

In *Nash v. CBS, Inc.*, 704 F. Supp. 823 (N.D. Ill. 1989), *aff'd* 899 F.2d 1537 (7th Cir. 1990), the court compared the goals of the Uniform Deceptive Trade Practices Act with those of the copyright act and found that the Uniform Deceptive Trade Practices Act sought to prevent unfair competition between suppliers and to protect consumers in the marketplace, while the purpose of the copyright act was to secure authors'

intellectual property rights. Although the court found that the goals of the two acts were similar, it concluded that the goal of consumer protection rendered the Uniform Deceptive Trade Practices Act sufficiently different from the copyright act to preclude preemption.

Protection of the consumer may also be the primary goal of the Uniform Deceptive Trade Practices Act, but the availability of protection from deception for both consumers and competitors may be inferred from the language of that act which states that "[i]n order to prevail in an action under sections 87-301 to 87-306, a complainant need not prove competition between the parties." § 87-302(14)(b). While the goal of consumer protection may provide the additional element necessary to set the claim apart from the rights afforded by the copyright act, that element is not at issue under the facts of this case, since no construction or marketing resulted from the reproduction of the plans. Here, McNeil did not "pass off" the plans as those of another, but did "pass off" the plans of Richdale as its own, at least to the extent that it removed the architects' names from the plans before they were distributed to subcontractors. However, even if architectural plans qualify as goods or services under § 87-302, factually they were only "passed off" to those subcontractors and not to any potential customer of either the appellant or the appellee. If protection of a customer is not implicated, then the rights which the law seeks to protect in this case are the same rights which are protected under the copyright act, which are the competitor's rights to control reproduction and distribution of the plans.

We refer here parenthetically to *Taco Cabana Intern., Inc. v. Two Pesos, Inc.*, 932 F.2d 1113 (5th Cir. 1991), which was cited to us by counsel for appellant during his oral arguments, presumably to demonstrate that a federal court had found that use of another's architectural drawings could be the subject of a claim for misappropriation of a trade secret. However, in that case, both the owner of the blueprints and the defendant misappropriating the same were engaged in competing businesses. The court pointedly referred to the likelihood of confusion created in the minds of consumers as to the identity of the two restaurants. Furthermore, the action was brought

under the federal Lanham Trade-Mark Act, and no question of federal preemption was raised or decided.

Here, without the element of preventing consumer confusion, the rights the appellant seeks to protect under the Uniform Deceptive Trade Practices Act are apparently coextensive with the rights protected by the copyright act, as evidenced by the order of the district court which stated:

> WHEREFORE, IT IS ORDERED, that defendant, its officers, agents, representatives and employees be and the same are permanently enjoined from utilizing, reviewing, reproducing or distributing in any manner or fashion plaintiff's plans as described in Paragraph 9 of plaintiff's petition and identified as Exhibit No. 1 in trial.

Accordingly, the injunctive relief ordered by the district court grants the same rights to Richdale as are afforded under the copyright act, and the federal statute preempts the state law. Thus Richdale was not entitled to an injunction despite the fact that McNeil did not contest the granting of that relief. Litigants cannot confer subject matter jurisdiction on a judicial tribunal by either acquiescence or consent. *Marshall v. Marshall*, 240 Neb. 322, 482 N.W.2d 1 (1992); *Nebraska State Bar Found. v. Lancaster Cty. Bd. of Equal.*, 237 Neb. 1, 465 N.W.2d 111 (1991).

When a trial court lacks the power, that is, jurisdiction, to adjudicate the merits of a claim, an appellate court also lacks the power to adjudicate the merits of the claim. *Id.*; *Andrews v. City of Lincoln*, 224 Neb. 748, 401 N.W.2d 467 (1987).

Richdale argues that the court erred in finding that no damages had been sustained and that it abused its discretion in refusing to award attorney fees under the Uniform Deceptive Trade Practices Act. Neb. Rev. Stat. § 87-303(b) (Reissue 1987) provides that "[t]he court *in its discretion may* award attorneys' fees to the prevailing party if . . . the party charged with a deceptive trade practice has willfully engaged in the trade practice knowing it to be deceptive."

However, it is not necessary to discuss these two alleged errors other than to point out that both of these claims are preempted by federal law. See, federal Copyright Act of 1976 § 502 (court may grant temporary and final injunctions); § 504

(copyright owner is entitled to actual damages and profits); and § 505 (court may award a reasonable attorney fee).

The judgment of the district court is affirmed in all respects except the portion providing for the issuance of a permanent injunction, which portion of the judgment is reversed, and the cause is remanded with direction to dissolve the injunction.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTION.

WHITE, J., participating on briefs.

SHANAHAN, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. LOUIE RODRIGUEZ, APPELLANT.
509 N.W.2d 1

Filed December 10, 1993. No. S-91-958.

1. **Trial: Witnesses.** Coaching of a witness is not, per se, grounds for a mistrial.
2. _____: _____. When the trial court's attention is drawn to the fact that a witness is being coached by a spectator at the trial, the trial court has a duty to take curative action. Ordinarily, permitting the issue to be raised on cross-examination will constitute an effective cure.
3. **Trial: Judges: Juries: Appeal and Error.** Generally, a claim of improper conduct on the part of the trial judge in the presence of the jury will not be reviewed on appeal in the absence of a timely objection.
4. **Trial: Judges: Appeal and Error.** One cannot gamble that improper judicial conduct will inure to his benefit and then complain that he guessed wrong.
5. **Trial: Judges: Witnesses: Testimony.** The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point. This rule does not apply only to formal testimony; it applies whenever the judge assumes the role of a witness.
6. **Trial: Courts: Proof: Appeal and Error.** To establish reversible error, a defendant must demonstrate that the trial court's action prejudiced or otherwise adversely affected a substantial right of the defendant.
7. **Trial: Judges: Evidence.** A trial judge should carefully refrain from expressing any opinion of or commenting on the evidence.
8. **Trial: Judges: Witnesses: Testimony.** Improper comments by the trial judge may be prejudicially erroneous when they tend to discredit a witness and his testimony, or when they tend to enhance a witness' credibility.

9. **Trial: Attorneys at Law: Evidence.** It is improper for counsel to comment, at closing argument, on matters unsupported by the evidence.

Petition for further review from the Nebraska Court of Appeals, HANNON, IRWIN, and MILLER-LERMAN, Judges, on appeal thereto from the District Court for Scotts Bluff County, ROBERT O. HIPPE, Judge. Judgment of Court of Appeals reversed, and cause remanded for a new trial.

Lawrence G. Whelan for appellant.

Don Stenberg, Attorney General, and Joseph P. Loudon for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, FAHRNBRUCH, and LANPHIER, JJ., and MORAN, D.J., Retired.

WHITE, J.

The defendant, Louie Rodriguez, was convicted by a jury on the charge of delivery of a controlled substance. Rodriguez appealed to the Nebraska Court of Appeals, which affirmed the conviction. We reverse, and remand for a new trial.

In August 1990, the Western Nebraska Intelligence Narcotics Group, a multiagency drug task force often referred to as "WING," arranged for a series of controlled purchases of controlled substances in Scottsbluff, Nebraska. To make the purchases, WING used a cooperating individual, Jesse Bravo.

On August 29, 1990, WING directed Bravo to attempt to purchase cocaine from August Valdez. Bravo was equipped with a body transmitter and was given "buy money." Followed by a surveillance unit, Bravo drove to Valdez' home. Bravo met with Valdez, but Valdez apparently did not have any cocaine at his home. Bravo, Valdez, and a third individual, Pablo Gutierrez, then drove to look for Valdez' brother, Joe, to see whether he had any cocaine. Eventually, still looking for cocaine, the men arrived at the Gambler Lounge.

Valdez testified that Rodriguez' gray van was parked in the parking lot of the lounge. Valdez testified that he left Bravo's car, walked halfway to the gray van, and then returned to Bravo's car to get the money from Bravo. Valdez testified that he approached the van and purchased two one-quarter gram packets of cocaine from Rodriguez. Valdez testified that he

returned to Bravo's car with the cocaine and the change.

Although the WING unit was able to continue surveillance during the purchase, no one except Valdez heard or saw Rodriguez. The WING unit lost audio contact with Valdez as soon as he left the car, because only Bravo had been wired with a body transmitter and Bravo remained in the car. Bravo testified that he was not able to see who was in the van. Michael Zitterkopf, a State Patrol investigator assigned to the WING unit, testified that he could see a person leave Bravo's car and approach the van, but that he could not see the driver's side of the van. Mark Overman, a Scottsbluff police detective assigned to the WING unit, testified that he could not see Valdez or the van and that he did not see Rodriguez.

Valdez was later arrested for delivery of a controlled substance. Valdez apparently implicated Rodriguez, who was then charged with delivery of a controlled substance. Rodriguez pled not guilty, and the case proceeded to trial.

At trial, the following exchange took place during the cross-examination of Valdez:

> [Defense counsel]: Your Honor, I'm going to object at this time. I'm — Detective Overman [seated at prosecution table] is nodding his head yes and no and helping the defendant [sic] with his answers.
>
> THE COURT: No, he wasn't. I was watching him.
>
> [Defense counsel]: So was I, Your Honor.
>
> THE COURT: Be seated, please. Go ahead.

Outside the presence of the jury, defense counsel moved for a mistrial on the ground that the prosecution had been coaching the witness. Still outside the presence of the jury, defense counsel questioned nine witnesses, each of whom testified that Overman had been coaching Valdez on the stand.

The district court found that whether Valdez had been coached was an issue of credibility and was not grounds for a mistrial. The district court allowed the defense to make a factual issue of the matter, permitting five defense witnesses to testify before the jury that they had seen Overman coaching Valdez. Overman and Valdez testified, also before the jury, that no coaching had occurred. The jury found Rodriguez guilty of delivering a controlled substance.

Rodriguez filed a motion for new trial, alleging in part that the court erred in not granting a mistrial. The district court held a hearing on the motion, at which defense counsel argued that a mistrial should have been granted because of the coaching itself and because of the judge's comments. The district court overruled the motion for new trial.

Rodriguez appealed. The Court of Appeals found that although the judge's statement was ill-advised, the judge removed any prejudicial effect that his statement might have had by allowing Rodriguez to make a factual issue out of the matter. *State v. Rodriguez*, 2 NCA 837 (1993). The Court of Appeals affirmed the conviction.

Rodriguez sought and was granted further review by this court. Rodriguez' assignments of error assert that the Court of Appeals (1) inaccurately stated the law regarding prejudicial statements made by a trial judge in the presence of the jury and (2) inaccurately stated the law regarding the coaching of witnesses. An appellate court has an obligation to reach an independent conclusion as to matters of law, regardless of the determination made by the lower court. *Wilson v. Misko, ante* p. 526, 508 N.W.2d 238 (1993); *Van DeWalle v. Albion Nat. Bank*, 243 Neb. 496, 500 N.W.2d 566 (1993).

Rodriguez first asserts that coaching a witness is grounds for a mistrial. We disagree. Rodriguez offers no support for his assertion. To the contrary, a number of state courts have held that coaching is a matter which bears upon a witness' credibility; the question of coaching is one for the jury. See, e.g., *State v. Edwards*, 420 So. 2d 663 (La. 1982); *State v. McCormick*, 298 N.C. 788, 259 S.E.2d 880 (1979); *State v. Schoolcraft*, 183 W. Va. 579, 396 S.E.2d 760 (1990).

In accord with these cases is our recent decision in *State v. Osborn*, 241 Neb. 424, 490 N.W.2d 160 (1992). In *Osborn*, the defendant claimed that C.T., a nonparty witness, had been coached by the prosecution during a recess. The defendant had failed to object to the direct examination of C.T. which occurred after the recess. The defendant had also cross-examined C.T. regarding the conversation with the prosecutor. Noting that cross-examination is usually an adequate weapon with which to combat the possibility of

coaching, see *Geders v. United States*, 425 U.S. 80, 96 S. Ct. 1330, 47 L. Ed. 2d 592 (1976), we held that the defendant was "precluded from a dismissal on the grounds that the witness may have been coached." *Osborn*, 241 Neb. at 430, 490 N.W.2d at 165.

We adhere to the reasoning of *Osborn*. Coaching of a witness is not, per se, grounds for a mistrial. See *Evers v. State*, 84 Neb. 708, 121 N.W. 1005 (1909). When the trial court's attention is drawn to the fact that a witness is being coached by a spectator at the trial, the trial court has a duty to take curative action. See *id.* (admonition to the coach may be sufficient). Ordinarily, permitting the issue to be raised on cross-examination will constitute an effective cure. *Geders, supra*; *Osborn, supra*. But see *Wamsley v. State*, 171 Neb. 197, 205, 106 N.W.2d 22, 27 (1960) (when witness' father said, " 'That's enough,' " and escorted witness from the stand during cross-examination, court had obligation to reprimand the offender, to take steps to prevent recurrence, and to admonish the jury to disregard the matter).

In the present case, the trial court not only allowed cross-examination on the subject of coaching, the trial court also allowed additional witnesses to testify to the coaching. In this respect, we find no error in the trial court's actions.

Rodriguez next asserts that the judge's statements constituted prejudicial error. We agree.

As a preliminary matter, we acknowledge that Rodriguez did not object to the judge's statement and did not, at trial, cite the judge's statement as a possible ground for mistrial. However, we find that these deficiencies are not fatal to Rodriguez' claim of prejudicial error.

Generally, " '[a] claim of improper conduct on the part of the trial judge in the presence of the jury will not be reviewed on appeal in the absence of a timely objection.' " *State v. Navrkal*, 242 Neb. 861, 868, 496 N.W.2d 532, 537 (1993), quoting *Pitt v. Checker Cab Co.*, 217 Neb. 600, 350 N.W.2d 507 (1984). One cannot gamble that improper judicial conduct will inure to his benefit and then complain that he guessed wrong. *State v. Jenson*, 232 Neb. 403, 440 N.W.2d 686 (1989); *Pitt, supra*.

The timely objection requirement is inapplicable to the

present case because the trial judge in the present case assumed the role of a witness. Neb. Evid. R. 605, Neb. Rev. Stat. § 27-605 (Reissue 1989), specifically provides: "The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point." In discussing Fed. R. of Evid. 605, which is identical to the Nebraska rule, one commentator has explained that the rule does not apply only to formal testimony:

> [*A*] *judge, although he is neither called to testify nor voluntarily takes the stand, may nevertheless assume the role of a witness.* Such behavior . . . should be treated analogously to direct violation of [rule 605]. That is, the appellate court must examine the particular circumstances of the case to determine whether the judge's behavior was so prejudicial to the substantial rights of the parties as to merit a reversal.

(Emphasis supplied.) 3 Jack B. Weinstein & Margaret A. Berger, Weinstein's Evidence ¶ 605[04] at 605-15 to 605-16 (1993).

In the present case, the trial judge's conduct amounts to testimony from the bench. The credibility of witnesses was, as always, an issue for the jury to decide. In addition, once Rodriguez had raised the specter of coaching, the existence of coaching was an issue for the jury to decide. Speaking directly to these issues, the trial judge stated that he had been watching Overman and that Overman had not coached Valdez. In relaying this information, the trial judge assumed the role of a witness.

Having found error, we are now obligated to determine whether this error was prejudicial. We find that the trial judge's comment prejudiced Rodriguez' case because the comment bolstered the credibility of the key prosecution witness, Valdez.

To establish reversible error, a defendant must demonstrate that the trial court's action prejudiced or otherwise adversely affected a substantial right of the defendant. *State v. Drinkwalter*, 242 Neb. 40, 493 N.W.2d 319 (1992); *State v. Chapman*, 234 Neb. 369, 451 N.W.2d 263 (1990). We have repeatedly stated that a trial judge should carefully refrain from expressing any opinion of or commenting on the evidence.

Drinkwalter, supra; *State v. Bideaux*, 219 Neb. 718, 365 N.W.2d 830 (1985); *Pitt, supra*; *State v. Goff*, 174 Neb. 548, 118 N.W.2d 625 (1962), *overruled on other grounds, State v. Fletcher*, 221 Neb. 562, 378 N.W.2d 859 (1985); *Moore v. State*, 147 Neb. 390, 23 N.W.2d 552 (1946); *Stoffel v. Metcalfe Construction Co.*, 145 Neb. 450, 17 N.W.2d 3 (1945); *Hansen v. State*, 141 Neb. 278, 3 N.W.2d 441 (1942). Improper comments by the trial judge may be prejudicially erroneous when they tend to discredit a witness and his testimony. *Stoffel, supra*. Likewise, such comments may be prejudicially erroneous when they tend to enhance a witness' credibility. See *State v. Smith*, 200 Conn. 544, 512 A.2d 884 (1986). When the trial judge affects the credibility of a witness, either negatively or positively, the judge invades the province of the jury. See *Stoffel, supra*.

At trial, a crucial issue was Valdez' credibility. Valdez was the only witness who could connect Rodriguez to the crime. No other witness saw who sold the cocaine to Valdez. Thus, the prosecution could succeed only if the jury believed the testimony of Valdez. Cross-examination of Valdez was essential to the defense's efforts to discredit Valdez. During the cross-examination of Valdez, the defense claimed that Overman, seated at the prosecution table, was coaching Valdez. The trial judge flatly stated that no coaching occurred.

By commenting on Valdez' credibility in this manner, the trial judge blunted the defense's weapon of cross-examination. Although the court allowed the defense to make a factual issue out of the coaching and allowed numerous witnesses to testify to the coaching, the court had already communicated its evaluation of the situation to the jury. We have previously reflected upon the strong bond between the judge and the jury: " 'It is well known to those who are familiar with jury trials that jurors are usually alert to discover the attitude of the court respecting the merits of the case, and particularly in criminal actions. . . .' " *Moore*, 147 Neb. at 399, 23 N.W.2d at 557. Accord *Hansen, supra*. Other courts have reasoned similarly:

> Ordinarily, the umpire is to call the balls and strikes and not play first base. [Citations omitted.]
>
> . . . .

> A judge, sitting on the Bench, in a black robe, traditionally enjoys a warm and uncritical trust of the jurors. Intervention, coupled with the jurors' trust, can upset the equilibrium of normal advocacy relationships in the courtroom. .

State v. Sonen, 492 N.W.2d 303, 309-10 (S.D. 1992) (Henderson, J., specially concurring). By stating that no coaching occurred, the trial judge necessarily bolstered Valdez' credibility in the eyes of the jury and prejudiced Rodriguez' case.

The State contends that the judge's comments were not prejudicial. Relying on *Bideaux, supra*, the State argues that the comments were tantamount to saying "overruled." In *Bideaux*, defense counsel objected to a statement in the prosecution's closing argument as not being reflected by the evidence. The trial judge responded, " 'I think the evidence does reflect it, counsel.' " *Bideaux*, 219 Neb. at 723, 365 N.W.2d at 834. On appeal, we stated that the trial judge's comment was tantamount to saying "overruled" and held that the comment did not constitute prejudicial error.

The present case exceeds the benchmark set by *Bideaux*. A well-established legal principle holds that it is improper for counsel to comment, at closing argument, on matters unsupported by the evidence. 23A C.J.S. *Criminal Law* § 1262 (1989). See *State v. Pierce*, 231 Neb. 966, 439 N.W.2d 435 (1989) (prosecutor's argument should be based on evidence introduced at trial). The trial judge in *Bideaux* merely stated, in a shorthand manner, that the prosecution had not run afoul of this legal principle. In contrast, the trial judge in the present case was not making a shorthand reference to an accepted legal principle. The trial judge in the present case not only *commented* on the evidence, but also *provided* the evidence by stating that no coaching occurred.

Based on the centrality of Valdez' testimony and the nature of the trial judge's comments, we conclude that Rodriguez' right to a fair trial was prejudiced. We reverse the conviction and remand the cause for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

ROSEMARY SCHIEFFER, APPELLANT, V. CATHOLIC ARCHDIOCESE OF OMAHA, A CORPORATION, AND TIMOTHY LANGE, APPELLEES.

508 N.W.2d 907

Filed December 17, 1993. No. S-91-388.

1. **Demurrer: Pleadings.** In considering a demurrer, a court must assume that the pleaded facts, as distinguished from legal conclusions, are true as alleged and must give the pleading the benefit of any reasonable inference from the facts alleged, but cannot assume the existence of a fact not alleged, make factual findings to aid the pleading, or consider evidence which might be adduced at trial.
2. **Pleadings.** A petition is sufficient if, under the facts alleged, the law entitles a plaintiff to recover. That is to say, facts are sufficient to constitute a cause of action when they are a narrative of the events, acts, and things done or omitted which show a legal liability of the defendant to the plaintiff.
3. **Actions: Mental Distress.** To state a cause of action for intentional infliction of emotional distress, a plaintiff must allege facts showing (1) that there has been intentional or reckless conduct, (2) that the conduct was so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and is to be regarded as atrocious and utterly intolerable in a civilized community, and (3) that the conduct caused emotional distress so severe that no reasonable person should be expected to endure it.
4. **Torts: Intent.** Consent ordinarily bars recovery for intentional interferences with person or property.
5. _____: _____. When a defendant by his conduct intentionally interferes with a legally protected interest of person or property, either consent to the invasion resulting from such conduct or consent to the conduct that brought about the invasion avoids liability.
6. **Actions: Alienation of Affections: Criminal Conversation.** Causes of action based on criminal conversation or alienation of affections are barred by Neb. Rev. Stat. § 25-21,188 (Reissue 1989).
7. **Res Judicata.** The doctrine of res judicata is based on the principle that a final judgment on the merits by a court of competent jurisdiction is conclusive upon the parties in any later litigation involving the same cause of action.
8. **Torts: Negligence: Liability: Employer and Employee.** For the doctrine of respondeat superior to apply, an employee must be liable for a tort committed in the scope of his employment. Likewise, an underlying requirement in actions for negligent supervision and negligent training is that the employee is individually liable for a tort or guilty of a claimed wrong against a third person, who then seeks recovery against the employer.
9. **Demurrer: Pleadings.** Neb. Rev. Stat. § 25-854 (Reissue 1989) does not provide an absolute right to amend a petition after a demurrer has been sustained, nor is the statute without limitation.

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

Herbert J. Friedman, of Friedman Law Offices, for appellant.

Patrick G. Vipond and William R. Settles, of Kennedy, Holland, DeLacy & Svoboda, and Edward D. Hotz, of Zweiback, Hotz & Lamberty, for appellee Catholic Archdiocese of Omaha.

John M. Gerrard, of Gerrard, Stratton & Mapes, P.C., for appellee Lange.

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

BOSLAUGH, J.

This is a suit for damages brought by the plaintiff, Rosemary Schieffer, against the defendants, Catholic Archdiocese of Omaha (Archdiocese), a corporation, and Timothy Lange. The original petition, filed March 27, 1990, was filed in the name of Jane Doe. Separate actions against the defendants were also filed by the plaintiff's husband and daughter. All of these actions were consolidated. General demurrers to the petitions of the plaintiff and her husband were sustained and the petitions dismissed on September 28, 1990. Apparently, there were no appeals from the order of dismissal.

Motions to strike and to make the plaintiff's original petition more definite and certain were filed by the defendants, and the demurrers to that petition were withdrawn. The motions were sustained in part, and on December 10, 1990, the plaintiff filed an amended petition. The amended petition alleged intentional infliction of emotional distress, negligence, and breach of fiduciary duty in separate causes of action. The amended petition also contained a fourth cause of action involving the plaintiff's husband's alleged loss-of-consortium claim that had been assigned to her. Demurrers to the amended petition were sustained on February 8, 1991, and the amended petition dismissed. This appeal followed.

The plaintiff's 11 assignments of error combine to assert that the trial court erred (1) by sustaining the defendants' demurrers and dismissing the amended petition, (2) by failing to allow the plaintiff an opportunity to amend her amended petition, and

(3) by failing to specify the grounds for sustaining the defendants' demurrers.

In considering 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. *Hamilton v. City of Omaha*, 243 Neb. 253, 498 N.W.2d 555 (1993).

A petition is sufficient if, under the facts alleged, the law entitles a plaintiff to recover. That is to say, facts are sufficient to constitute a cause of action when they are a narrative of the events, acts, and things done or omitted which show a legal liability of the defendant to the plaintiff. *Gerken v. Hawkins Constr. Co.*, 243 Neb. 157, 498 N.W.2d 97 (1993).

Viewed most favorably to the plaintiff, the amended petition alleges the following:

In 1979, the plaintiff began counseling with the defendant Lange concerning family matters. Lange was the plaintiff's parish priest and "spiritual leader." During this time period, the plaintiff was vulnerable because of prior emotional problems. While she was in this vulnerable state and during the course of pastoral counseling, Lange made sexual advances toward the plaintiff that continued for a period of 3 years. In 1982, Lange and the plaintiff began a sexual relationship that continued until approximately June 1989.

The amended petition further alleges that at all times applicable to this action, Lange was an employee of the defendant Archdiocese and at all times was acting within the scope and course of his employment. Further, Lange and the Archdiocese were charged with the obligation to administer pastoral and spiritual advice and care to the plaintiff and her family, and as such, held a position of trust and responsibility to the plaintiff and her family.

The first assignment of error is that the trial court erred by sustaining the demurrers of the defendants and dismissing the plaintiff's amended petition. The plaintiff argues that she stated facts sufficient to constitute a cause of action as to all of her

claims. We discuss the various causes of action in turn, beginning first with the allegations against the defendant Lange. The plaintiff's claims against Lange, as alleged in the amended petition, are based on intentional infliction of emotional distress, negligence, and breach of fiduciary duty.

The plaintiff's first cause of action alleges that the conduct of Lange was outrageous and extreme and caused her severe emotional distress. As a proximate result of that conduct, the plaintiff suffered severe and permanent emotional injury and incurred current and future medical expenses. The plaintiff also claims that she has lost faith in the Catholic Church and in God.

With regard to intentional infliction of emotional distress, this court has delineated three elements that must be met for this cause of action:

> "(1) [t]hat there has been intentional or reckless conduct; (2) [t]hat the conduct was so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and is to be regarded as atrocious and utterly intolerable in a civilized community; and (3) [t]hat the conduct caused emotional distress so severe that no reasonable person should be expected to endure it."

Nichols v. Busse, 243 Neb. 811, 817, 503 N.W.2d 173, 179 (1993), quoting *Gall v. Great Western Sugar Co.*, 219 Neb. 354, 363 N.W.2d 373 (1985).

There are several reasons why the plaintiff's alleged claim for intentional infliction of emotional distress was subject to demurrer. What is involved in this case is conduct between consenting adults. There is no allegation that the defendant used force or fraud to accomplish his sexual relations with the plaintiff during the period from 1982 to 1989. The amended petition does allege that the plaintiff was "vulnerable" because of "prior emotional problems." This allegation falls far short of alleging that the plaintiff was incapable of consenting to what took place.

In tort law, consent ordinarily bars recovery for intentional interferences with person or property. According to W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 18 at 112 (5th ed. 1984), it is a fundamental principle of common law that "to one who is willing, no wrong is done." That text further

states:

> [W]hen the defendant by his conduct intentionally interferes with a legally protected interest of person or property, either consent to the invasion resulting from such conduct, or consent to the conduct that brought about the invasion, avoids liability. One, of course, consents to an invasion such as a sex contact if he or she wants or desires the invasion. Consent avoids recovery simply because it destroys the wrongfulness of the conduct as between the consenting parties, however harmful it might be to the interest of others, and even though it is perhaps both immoral and criminal.

Id. at 113.

A sexual relationship between two consenting adults is not outrageous conduct such as to give rise to a claim for intentional infliction of emotional distress. This seems especially true given the fact that the plaintiff and Lange engaged in an approximate 7-year sexual relationship. See, also, Restatement (Second) of Torts § 892 A (1982).

The plaintiff cites two cases which held that a parishioner stated a claim for intentional infliction of emotional distress against a member of the clergy for sexual misconduct with a parishioner: *Destefano v. Grabrian*, 763 P.2d 275 (Colo. 1988), and *Erickson v. Christenson*, 99 Or. App. 104, 781 P.2d 383 (1989).

We believe the *Destefano* and *Erickson* cases may be distinguished factually, at least in part. In the *Destefano* case, the court emphasized that the defendant had held himself out to be trained and capable of conducting marital counseling. The court further stated that on remand, it was for the trial court to determine in the first instance as to whether the conduct of the defendant priest at issue was "outrageous."

The *Erickson* case involved conduct against a 13-year-old girl. The case at bar involves an adult plaintiff, and there is no allegation that the defendant Lange held himself out as a professionally trained counselor.

In the second cause of action, the plaintiff alleged that Lange was negligent by failing to properly counsel her concerning her marital and family relationships when he knew or should have

known she was having domestic difficulties and that, further, Lange was negligent by failing to remove himself as parish priest when he knew or should have known that a continuing relationship with her would cause her emotional harm. Finally, the plaintiff alleges that Lange was negligent by violating his oath of celibacy. In substance, the plaintiff alleged a claim for clergy malpractice, a purported breach of professional standards by a priest.

So far as we have been able to determine, no jurisdiction to date has recognized a claim for clergy malpractice. See, *Nally v. Grace Com. Church of the Valley*, 47 Cal. 3d 278, 763 P.2d 948, 253 Cal. Rptr. 97 (1988), *cert. denied* 490 U.S. 1007, 109 S. Ct. 1644, 104 L. Ed. 2d 159 (1989); *Destefano v. Grabrian, supra*; *Byrd v. Faber*, 57 Ohio St. 3d 56, 565 N.E.2d 584 (1991); *Schmidt v. Bishop*, 779 F. Supp. 321 (S.D.N.Y. 1991).

The allegations of negligence against Lange with regard to failing to remove himself as parish priest and violating his vows of celibacy were not discussed in the plaintiff's brief and will not be further considered.

The third cause of action alleges that Lange had a fiduciary obligation to the plaintiff to refrain from doing anything that might harm her relationship with her husband and children, in light of Lange's continuing duty to exercise reasonable care. The plaintiff alleges that Lange breached this duty and that this breach caused her damage.

Several cases have allowed recovery on the theory of breach of fiduciary duty with regard to sexual misconduct of a member of the clergy with a parishioner. See, *Destefano v. Grabrian, supra*; *Erickson v. Christenson, supra*.

However, this cause of action was rejected by the court in *Schmidt v. Bishop, supra*. The *Schmidt* court recognized that with regard to a breach-of-fiduciary cause of action against a member of the clergy, there are many constitutional difficulties with regard to defining a standard of care. The *Schmidt* court reasoned:

> [I]n analyzing and defining the scope of a fiduciary duty owed persons by their clergy, the Court would be confronted by the same constitutional difficulties encountered in articulating the generalized standard of

> care for a clergyman required by the law of negligence. . . . [A]s with her negligence claim, [the plaintiff's] fiduciary duty claim is merely another way of alleging that the defendant grossly abused his pastoral role, that is, that he engaged in malpractice.

(Emphasis omitted.) *Schmidt v. Bishop*, 779 F. Supp. at 326. We agree with the reasoning of the court in the *Schmidt* case.

The fourth cause of action alleges a loss-of-consortium claim assigned to the plaintiff by her husband, Sylvester Schieffer. The amended petition alleges that as a result of the defendants' intentional infliction of emotional distress, negligence, and breach of fiduciary duty, the husband has lost the care and comfort of his wife and has been deprived of her comfort and companionship and incurred pain, suffering, and mental anguish, past and future. With regard to this cause of action, the demurrers filed by the defendants alleged that the plaintiff failed to state facts sufficient to state a cause of action. The demurrers also alleged an additional ground for dismissal, because this cause of action alleged the same facts and issues as the separate previous action that had been filed by the husband. Since the husband's petition in the previous action was dismissed by the trial court, the present loss-of-consortium cause of action should be dismissed as res judicata.

It appears that the trial court properly dismissed this cause of action based on both reasons alleged in the defendants' demurrers. It is clear that the husband's loss-of-consortium claim, assigned to the plaintiff, was essentially a claim for criminal conversation and alienation of affection. Causes of action based on criminal conversation or alienation of affection are barred by Neb. Rev. Stat. § 25-21,188 (Reissue 1989). See *Speer v. Dealy*, 242 Neb. 542, 495 N.W.2d 911 (1993). The statute provides: "No cause of action for (1) alienation of affections or (2) criminal conversation shall be allowed to commence after January 9, 1986." Accordingly, since there could be no recovery on a claim for the "loss of consortium" in this case under § 25-21,188, the trial court properly dismissed the fourth cause of action.

The trial court also properly dismissed the loss-of-consortium cause of action on the basis of res judicata.

The loss-of-consortium claim was originally alleged in a separate action filed by the plaintiff's husband. After the defendants demurred to the husband's petition, the district court dismissed the petition on October 2, 1990. It does not appear from the record that the husband amended his petition or appealed that order of dismissal. However, the husband subsequently assigned the loss-of-consortium claim to the plaintiff, who included it as the fourth cause of action in the amended petition. The defendants' demurrers alleged that this cause of action was barred as res judicata, since the same claim had been previously litigated and dismissed by the trial court in a separate action.

> "The doctrine of res judicata is based on the principle that a final judgment on the merits by a court of competent jurisdiction is conclusive upon the parties in any later litigation involving the same cause of action. . . .
>
> "Res judicata is founded on a policy favoring termination of an action by preclusion or prevention of subsequent litigation on the same cause."

In re Estate of Watkins, 243 Neb. 583, 586, 501 N.W.2d 292, 294-95 (1993), quoting *NC + Hybrids v. Growers Seed Assn.*, 228 Neb. 306, 422 N.W.2d 542 (1988). The loss-of-consortium claim was adjudicated in the prior action. Since the husband elected not to amend or appeal the trial court's dismissal of his suit, the plaintiff is now precluded from litigating the same issue again.

In the amended petition, the plaintiff alleges that the defendant Archdiocese was directly negligent by hiring Lange and placing him in the position of parish priest. The amended petition also alleges that the Archdiocese was negligent in failing to investigate Lange's background by inquiring into his relations with other women while acting as parish priest in other parishes, when the Archdiocese knew or should have known that Lange had been actively involved in relationships with women in the past, in violation of his celibacy vows. Finally, the plaintiff argues that the Archdiocese was negligent in failing to supervise Lange in connection with his pastoral duties when they knew or should have known of his past sexual affairs and by failing to remove Lange as a parish priest when they had this

knowledge.

If there is no tort liability to the plaintiff against Lange individually, it follows that the Archdiocese cannot be held liable for his conduct. *Strock v. Pressnell*, 38 Ohio St. 3d 207, 527 N.E.2d 1235 (1988), supports this proposition.

In *Strock*, a husband and wife began marriage counseling with a Lutheran minister. The minister and the wife began a consensual sexual relationship, which eventually led to the divorce of the husband and the wife. The husband brought an action against both the minister and the church which employed him. The suit against the minister alleged clergy malpractice, breach of fiduciary duty, fraud, misrepresentation, nondisclosure, and intentional infliction of emotional distress. The suit against the church alleged liability based on agency principles and claims of negligent supervision and negligent training of the minister.

At trial, the husband's claims against both the minister and the church were dismissed. The Ohio Supreme Court affirmed the dismissals of the husband's claims. With regard to the cause of action against the church, the court held that the church could not be liable to the husband either on agency principles or for negligent supervision or training of the minister. The court stated:

> It is axiomatic that for the doctrine of respondeat superior to apply, an employee must be liable for a tort committed in the scope of his employment. Likewise, an underlying requirement in actions for negligent supervision and negligent training is that the employee is individually liable for a tort or guilty of a claimed wrong against a third person, who then seeks recovery against the employer. Because no action can be maintained against [the minister] in the instant case, it is obvious that any imputed actions against the church are also untenable.

(Emphasis omitted.) *Strock v. Presnell*, 38 Ohio St. 3d at 217, 527 N.E.2d at 1244.

The plaintiff also assigns as error the failure of the district court to allow amendment of her amended petition upon the court's sustaining of the defendants' demurrers.

Since we have determined that the plaintiff failed to state

facts sufficient to constitute a cause of action against the defendant Lange, it is unnecessary to consider the plaintiff's contention with regard to the Archdiocese. If the plaintiff has not established a cause of action against Lange, then the plaintiff can have no cause of action against the Archdiocese for anything that the plaintiff claimed Lange did.

The plaintiff does not tell us what additional facts could be alleged in a further attempt to state a cause of action.

Neb. Rev. Stat. § 25-854 (Reissue 1989) provides that if a demurrer is sustained, "the adverse party may amend, if the defect can be remedied by way of amendment . . . ." This statute, however, does not provide an absolute right of amendment, nor is it without limitation. See, *LaPan v. Myers*, 241 Neb. 790, 491 N.W.2d 46 (1992); *Knoell v. Huff*, 224 Neb. 90, 395 N.W.2d 749 (1986). This court has also previously held that "it is an abuse of discretion by the trial court ' " 'to sustain a demurrer without leave to amend where there is a reasonable possibility that the defect can be cured by amendment, particularly in the case of an original complaint.' . . ." ' " *LaPan v. Myers*, 241 Neb. at 793, 491 N.W.2d at 49-50, quoting *Newman Grove Creamery Co. v. Deaver*, 208 Neb. 178, 302 N.W.2d 697 (1981).

The record does not support a reasonable possibility that the plaintiff could allege additional facts so that the petition would state a cause of action. The plaintiff had already amended the petition once. Accordingly, the trial court did not err in dismissing the amended petition in this case without allowing the plaintiff an opportunity to further amend her pleading.

The final assignment of error is the failure of the district court to specify the grounds upon which it sustained the defendants' demurrers. The plaintiff argues that although the defendants stated more than one ground for the demurrers, the trial court's order was silent regarding which of the multiple theories were sustained. This court has previously held that *when a demurrer is interposed stating several grounds*, the court should, when sustaining the demurrer, specify the grounds upon which the demurrer is sustained; otherwise, this court is not informed regarding wherein the complaint was deficient. See, *Fulk v. McLellan*, 243 Neb. 143, 498 N.W.2d 90

(1993); *St. Paul Fire & Marine Ins. Co. v. Touche Ross & Co.*, 234 Neb. 789, 452 N.W.2d 746 (1990).

The defendants' demurrers in this case alleged that the amended petition "does not state facts sufficient to constitute a cause of action." The demurrers also alleged an additional ground for dismissal with regard to the husband's loss-of-consortium claim. The demurrers asserted that this cause of action pled the same facts and issues that existed in the previous action dismissed by the district court and therefore should be dismissed based on res judicata grounds. Thus, with the exception of the loss-of-consortium claim, the only grounds asserted for the demurrer was failure to allege facts sufficient to constitute a cause of action. Therefore, the grounds on which the trial court based its demurrer as to the first three counts of the amended petition were readily apparent.

> Failure to specify the grounds for sustaining a demurrer does not affect the legal position of the parties in the case. "[T]his court will not presume, when a trial court fails to state a reason for the dismissal of an action, that the dismissal was based on an invalid ground."

LaPan v. Myers, 241 Neb. at 793, 491 N.W.2d at 49, quoting *Bert Cattle Co. v. Warren*, 238 Neb. 638, 471 N.W.2d 764 (1991).

For reasons stated previously, it was clear that the husband's loss-of-consortium claim was properly dismissed on both grounds asserted in the demurrers. Accordingly, the district court's failure to specify the ground upon which the demurrers were sustained with regard to this cause of action did not prejudice the plaintiff. The final assignment of error is without merit.

The judgment of the district court sustaining the demurrers to the amended petition and dismissing the amended petition is affirmed.

AFFIRMED.

WHITE, J., dissents.

LANPHIER, J., dissenting.

I respectfully dissent. The majority decision concludes that a person cannot claim he is wronged by actions of another to

which he consented. This is correct logic and law by itself. However, the proposition overlooks the question of how such consent was achieved.

Should consent bar a claim where such consent may have been achieved by the actions of a fiduciary which constitute overreaching by such fiduciary? That is a question which cannot be answered as a matter of law. The answer is best left to a jury after consideration of all of the facts. The only ground listed in the demurrers which is applicable to our consideration of this matter is failure to state a cause of action. The petition states a cause of action in three respects.

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

Plaintiff's amended petition states that plaintiff began counseling with Lange and that during the course of counseling, "Lange made numerous sexual advances on Plaintiff which lasted for approximately a three-year period." During this time, plaintiff alleged, she was "vulnerable because of prior emotional problems." Plaintiff also alleged that in 1982, Lange succeeded in "seducing" the plaintiff. The majority determined that these allegations are insufficient to state a cause of action for intentional infliction of emotional distress. This decision is based on a determination that "[w]hat is involved in this case is conduct between consenting adults."

The petition alleges, however, that plaintiff was not a fully "consenting adult." Plaintiff alleges she was vulnerable and that she was seduced by a pastoral counselor whom she trusted. In considering 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. *Gallion v. Woytassek, ante* p. 15, 504 N.W.2d 76 (1993); *Hamilton v. City of Omaha*, 243 Neb. 253, 498 N.W.2d 555 (1993). Assuming, as we must, that plaintiff's allegations are true, that she was vulnerable and that she was so seduced, it cannot fairly be said as a matter of law that she was a

"consenting adult" so as to bar a claim against one who would ordinarily be classified as a fiduciary.

Plaintiff cited two cases, *Destefano v. Grabrian*, 763 P.2d 275 (Colo. 1988), and *Erickson v. Christenson*, 99 Or. App. 104, 781 P.2d 383 (1989), in which claims against members of the clergy for intentional infliction of emotional distress were upheld. The majority, however, concludes that these cases are factually distinct.

The defendant in *Destefano* was alleged to have held himself out as being trained and capable of conducting marital counseling, which is not alleged in this case. Alleging that the defendant held himself out as a trained professional marital counselor may be necessary to establish one type of a fiduciary relationship to establish a breach of a fiduciary's duties. There is no need to establish such a relationship to establish a cause of action for intentional infliction of emotional distress. The outrageousness of Lange's conduct should not depend upon whether or not he held himself out as one type of professional. It may be one of many factors which should be considered when determining the degree of culpability.

Likewise, the fact that the plaintiff in *Erickson* was only 13 years old when the conduct at issue began is just one factor to consider when determining whether the conduct in question is outrageous. Certainly, the fact that the plaintiff here is an adult does not mean that Lange's conduct could not be outrageous.

To state a cause of action for intentional infliction of emotional distress, the plaintiff must allege facts that would show (1) there has been intentional or reckless conduct, (2) the conduct was so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and is to be regarded as atrocious and utterly intolerable in a civilized community, and (3) the conduct caused emotional distress so severe that no reasonable person should be expected to endure it. *Nichols v. Busse*, 243 Neb. 811, 503 N.W.2d 173 (1993); *Gall v. Great Western Sugar Co.*, 219 Neb. 354, 363 N.W.2d 373 (1985).

The petition alleges facts which, if viewed as true, establish that Lange's conduct was intentional. The petition further alleges that "the conduct of the Defendants, and each of them, was outrageous and extreme in nature and intended to cause

and did cause severe emotional distress upon Plaintiff." In her petition, plaintiff alleges that "by virtue of the conduct hereinbefore set forth, that the conduct of the Defendants . . . was outrageous and extreme in nature . . . ." The petition set forth the following conduct:

> Starting in 1979, Plaintiff began counseling with Lange, concerning family matters having full confidence that he was her parish priest and spiritual leader. During this time, Plaintiff was vulnerable because of prior emotional problems. Commencing in about 1979, while the plaintiff was vulnerable, and during the course of pastoral counseling, Lange made numerous sexual advances on Plaintiff which lasted for approximately a three-year period. In 1982, Lange succeeded in seducing the Plaintiff, and a sexual relationship developed between Lange and Plaintiff that lasted until approximately June of 1989.
>
> . . . At all times herein, Defendants, and each of them, were charged with the obligation to administer pastoral and spiritual advice and care to the Plaintiff and her family, and as such, held a position of trust and responsibility to Plaintiff and her family.

Plaintiff alleges she "incurred severe and permanent emotional injury and was damaged as follows: A. Plaintiff incurred medical expenses of $2,500.00 and will incur medical expenses in the future. B. Plaintiff has lost her faith in the Catholic Church and God and incurred emotional pain, suffering and mental anguish, past and future."

The petition alleges sufficient facts to state a cause of action against defendant Lange for intentional infliction of emotional distress. The issue of consent would be an affirmative defense.

NEGLIGENCE

Plaintiff's petition also states a cause of action against the Archdiocese for negligence.

Nebraska has recognized that an employer is subject to liability for harm to third persons resulting from the employer's negligent selection of an improper employee. *Greening v. School Dist. of Millard*, 223 Neb. 729, 393 N.W.2d 51 (1986). To state a cause of action for negligence, one must plead facts

from which it can be inferred that the defendant owed a duty to protect the plaintiff from injury, that the defendant failed to discharge that duty, and that damage proximately resulted from such failure. *Christianson v. Educational Serv. Unit No. 16*, 243 Neb. 553, 501 N.W.2d 281 (1993).

In *Destefano v. Grabrian*, 763 P.2d 275, 288 (Colo. 1988), the following allegations were held to state a viable claim for negligent supervision:

> "Defendant Diocese of Colorado Springs knew or should have known that Defendant Grabrian was engaging in conduct which was outrageous, negligent, and a breach of his fiduciary duty, and Defendant Diocese owed a duty of supervision of said Defendant Grabrian to the public and breached said duty, causing the injuries and damages set forth above."

With respect to this cause of action, plaintiff alleged the following:

> A. Defendant Archdiocese was negligent as follows:
>
> (1) Hiring Defendant Lange in the position of parish priest in Plaintiff's parish.
>
> (2) Failing to properly investigate Defendant Lange's background by inquiring into his relations with other women while he was acting as a parish priest in other parishes when they [sic] knew, or should have known, that he had been actively involved with relationships with women in violation of his vows of celibacy on more than one occasion.
>
> (3) Failing to train Lange to avoid sexual contact with parishioners.
>
> (4) Failing to supervise Lange in connection with his pastoral duties with respect to his relations with female parishioners when they [sic] knew, or should have known, that he had sexual affairs in the past.
>
> (5) Failing to remove Lange from a position of pastoral responsibility when the Defendant knew, or should have known, of Lange's sexual involvement with the Plaintiff.

From these allegations it can reasonably be inferred that the Archdiocese owed a duty to plaintiff, that it failed to discharge that duty, and that plaintiff's severe emotional distress

proximately resulted from that failure. Plaintiff's petition therefore states a cause of action for negligence against the Archdiocese. The demurrer, therefore, should have been overruled in this respect also.

BREACH OF FIDUCIARY DUTY

The majority also rejected the third cause of action claimed by plaintiff, breach of fiduciary duty. In *Destefano v. Grabrian, supra*, the Supreme Court of Colorado held a cause of action for breach of fiduciary duty was stated where a woman alleged a member of the clergy had sexual intercourse with her while he was providing her with marriage counseling. The fiduciary duty, the court said, was created by his undertaking to counsel the woman. It was not created by the fact that he was a clergy member. The court stated:

> If the alleged conduct of Grabrian [the clergy member] was dictated by his sincerely held religious beliefs or was consistent with the practice of his religion, we would have to resolve a difficult first amendment issue. This, however, is not the case. It has not been asserted that Grabrian's conduct falls within the practices or beliefs of the Catholic church.

763 P.2d at 284. Likewise, here there has been no assertion that Lange's conduct falls within the practices or beliefs of the Catholic Church. Thus, there is no difficult First Amendment issue to confront.

Lange's duty to plaintiff, given the nature of the counseling relationship, was to help her with family matters. See *Destefano v. Grabrian, supra*. Seduction of plaintiff, if proved, would be an obvious breach of that duty. A person standing in a fiduciary relationship with another is subject to liability for harm resulting from a breach of the duty imposed by the relationship. Restatement (Second) of Torts § 874 (1979). Lange could, if the allegations contained in the petition are proven, be subject to liability for any harm he caused.

For the reasons cited, I would reverse the judgment of the district court.

SHANAHAN, J., joins in this dissent.

KATHLEEN M. BREWER, APPELLANT, V. THOMAS E. BREWER, BY SUBSTITUTED PARTIES, THOMAS M. MAUL, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF THOMAS E. BREWER, AND WAYNE E. GRACHEK, AS TRUSTEE OF THE THOMAS E. BREWER TESTAMENTARY TRUST, APPELLEES.

509 N.W.2d 10

Filed December 17, 1993. No. S-91-674.

1. **Modification of Decree: Child Support: Appeal and Error.** Modification of child support is an issue entrusted to the discretion of the trial court, and although reviewed de novo on the record, the decision of the trial court will be affirmed absent an abuse of discretion.
2. **Judges: Words and Phrases: Appeal and Error.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system.
3. **Appeal and Error.** A claimed prejudicial error must not only be assigned, but must be discussed in the brief of the asserting party.
4. **Child Support: Death: Social Security.** Social Security payments made to an obligor's child on account of the obligor's death are to be considered as credits toward the obligor's court-ordered support obligation, absent circumstances making allowance of such credit inequitable.

Appeal from the District Court for Platte County: JOHN C. WHITEHEAD, Judge. Affirmed.

John K. Green for appellant.

Clark J. Grant, of Grant, Rogers, Maul & Grant, for appellees.

HASTINGS, C.J., BOSLAUGH, CAPORALE, FAHRNBRUCH, and LANPHIER, JJ., and GRANT, J., Retired.

CAPORALE, J.

I. STATEMENT OF CASE

A decree dissolving the marriage of the appellant mother, Kathleen M. Brewer, ordered the father, Thomas E. Brewer, to make a monthly support payment for their minor daughter, Ashley JoAnne. As a result of the father's subsequent death, the appellees, the father's estate and testamentary trust, as the parties substituted in place of the father, seek to credit against their respective child support liabilities the benefits being paid

on behalf of the daughter under the provisions of the federal Social Security Act, 42 U.S.C. § 301 et seq. (1988 & Supp. III 1991). Following an evidential hearing, the district court so ordered. The mother assigns that ruling as her sole operative error. We affirm.

II. FACTS

The dissolution decree ordered the father to pay $500 per month in child support. This requirement was in accordance with the stipulated agreement of the mother and father, which was incorporated into the decree. The agreement recited it to be the intention of the dissolution parties that the agreement be a full, final, and complete settlement of all matters in dispute between them, and required the father to maintain a term policy of insurance on his life, payable to the daughter equal to the amount of child support which would have accrued through her 19th birthday. The agreement also required the father to maintain an otherwise undefined "health and accident insurance" policy on the daughter.

The father thereafter executed a will, which placed his assets in trust should he die before the daughter attained the age of majority. The trust requires that the trustee pay the court-ordered child support. The will provides for distribution of one-half of the total of the trust fund to the daughter when she reaches the age of 21 and disbursement of the balance upon her attaining age 25. Should the daughter die before distribution of all the assets, the assets are to be paid to a designated charity.

Although the father purchased two term life insurance policies, they were payable to the trust, not to the daughter. The record does not tell us whether the father did or did not provide a health and accident policy of any description for the daughter.

III. SCOPE OF REVIEW

Modification of child support is an issue entrusted to the discretion of the trial court, and although reviewed de novo on the record, the decision of the trial court will be affirmed absent an abuse of discretion. *Lodden v. Lodden*, 243 Neb. 14, 497 N.W.2d 59 (1993).

A judicial abuse of discretion exists when a judge, within the

effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system. *Wulff v. Wulff*, 243 Neb. 616, 500 N.W.2d 845 (1993).

IV. ANALYSIS

We note at the outset of our analysis that the mother assigned two errors not mentioned in part I above. One relates to the order in which the district court ruled on the revivor of this action; the other deals with the date on which the district court ordered the credit to take effect. However, in her brief she failed to argue either of these claimed errors.

To be considered by an appellate court, a claimed prejudicial error must not only be assigned, but must be discussed in the brief of the asserting party. Neb. Ct. R. of Prac. 9D(1)d (rev. 1992). See, also, *Lange Indus. v. Hallam Grain Co., ante* p. 465, 507 N.W.2d 465 (1993); *Delicious Foods Co. v. Millard Warehouse, ante* p. 449, 507 N.W.2d 631 (1993); *Maack v. School Dist. of Lincoln*, 241 Neb. 847, 491 N.W.2d 341 (1992).

Consequently, we do not concern ourselves with the mother's unargued claims of error, but limit ourselves to a review of her claim that the estate and trust are not entitled to credit for the Social Security benefits paid on behalf of the daughter at the rate of $832 per month.

1. Other Jurisdictions

The majority of jurisdictions hold that a child support obligor is entitled to credit for Social Security benefits paid for a child's benefit on account of the obligor's disability. See, *Windham v. State ex rel. Windham*, 574 So. 2d 853 (Ala. Civ. App. 1990); *Binns v. Maddox*, 57 Ala. App. 230, 327 So. 2d 726 (1976); *Horton v. Horton*, 219 Ga. 177, 132 S.E.2d 200 (1963); *Faul v. Faul*, 548 So. 2d 957 (La. App. 1989); *Folds v. Lebert*, 420 So. 2d 715 (La. App. 1982).

(a) General Rationale

Some courts allow the obligor to make a unilateral reduction in the payment without any action by the court. See, *Binns v.*

Maddox, supra; *Andler v. Andler*, 217 Kan. 538, 538 P.2d 649 (1975); *Cohen v. Murphy*, 368 Mass. 144, 330 N.E.2d 473 (1975); *Mooneyham v. Mooneyham*, 420 So. 2d 1072 (Miss. 1982). Most courts, however, require a noncustodial parent to seek a modification of the decree to reduce or eliminate the child support obligation because of Social Security benefits paid to the custodial parent.

Hence, in *Chase v. Chase*, 74 Wash. 2d 253, 444 P.2d 145 (1968), the Supreme Court of Washington held that the onset of disability and the resulting entitlement to Social Security are changes in the condition of the parties to be considered in a modification proceeding, and the receipt of Social Security benefits does not give rise to a deduction absent affirmative action by the court. Therefore, other changes in the economic conditions of the parties would affect the amount of deduction permitted. Other courts have followed this rule. See, *In re Marriage of Robinson*, 651 P.2d 454 (Colo. App. 1982) (disability and resulting entitlement to Social Security are changes in condition of parties to be considered in support modification proceedings, and credit to be allowed by trial court is discretionary, not automatic); *Newman v. Newman*, 451 N.W.2d 843 (Iowa 1990) (burden of seeking modification of support order rightfully lies with parent who seeks to offset support obligation against Social Security benefits); *Hendricks v. Hendricks*, 594 So. 2d 1129 (La. App. 1992) (justice or equity will not nullify or reduce alimony or child support award until judgment is altered or amended by operation of law); *Gerlich v. Gerlich*, 379 N.W.2d 689 (Minn. App. 1986) (child's receipt of Social Security benefits from account of parent charged with support does not constitute payment from that parent but may constitute change of circumstances and grounds for modification of support order); *Moritz v. Moritz*, 368 N.W.2d 337 (Minn. App. 1985) (receipt of Social Security dependent benefits is change of circumstances and factor to be considered in modification hearings); *Burnham v. Burnham*, 743 S.W.2d 568 (Mo. App. 1987) (burden of seeking modification of support obligation rests on retired or disabled parent seeking to substitute Social Security benefits for amount owed under divorce decree); *Cope and Cope*, 49 Or. App. 301, 619 P.2d 883

(1980), *decision aff'd* 291 Or. 412, 631 P.2d 781 (1981) (father's sua sponte deduction of child's Social Security benefits from decreed support obligation barred by statute; rather, changes in father's obligation to pay support should be made only with approval of court upon showing of changed circumstances); *In re Marriage of Hughes*, 69 Wash. App. 778, 850 P.2d 555 (1993) (under appropriate circumstances obligor parent may be entitled to equitable offset provided there is no unfairness to custodial parent); *Hepton v. Hepton*, 25 Wash. App. 229, 605 P.2d 1288 (1980) (receipt of Social Security by child does not give rise to an automatic reduction of parent's support payment; it is one circumstance for court to consider in deciding whether to modify support award).

Although by far, most of the cases in which courts have allowed an offset against child support have been for Social Security disability benefits, other state courts allow an obligor to offset court-ordered child support by Social Security retirement benefits. See, *Cash v. Cash*, 234 Ark. 603, 353 S.W.2d 348 (1962); *Bradley v. Holmes*, 561 So. 2d 1034 (Miss. 1990); *McClaskey v. McClaskey*, 543 S.W.2d 832 (Mo. App. 1976); *Mask v. Mask*, 95 N.M. 229, 620 P.2d 883 (1980).

The rationale for both types of payment is the recognition of the presumed decline in income. As the court pointed out in *Potts v. Potts*, 240 N.W.2d 680 (Iowa 1976), the purpose of Social Security disability payments is to replace income lost because of the employee's disability. Under these circumstances, it is equitable to treat dependency benefits as a substitute for child support for the period during which such benefits are paid. See, also, *In re Marriage of Hughes, supra*.

In contrast, cases which have held that a noncustodial parent is not entitled to credit against his child support obligation for Social Security payments have reasoned that receipt of such benefits does not constitute payment from that parent. See, *Hennagin v. County of Yolo*, 481 F. Supp. 923 (E.D. Cal. 1979) (where parent is responsible for making court-ordered support payments, such legal obligation cannot be discharged by denominating children's disability insurance benefits as child support from parent); *Marriage of Haynes*, 343 N.W.2d 679 (Minn. App. 1984) (retiree has no property interest in Social

Security benefits paid to child); *Fuller v. Fuller*, 49 Ohio App. 2d 223, 360 N.E.2d 357 (1976) (Social Security benefits payable to dependent child of Social Security recipient inure directly to child, notwithstanding prerequisite status of parent; no indices of parent's ownership ever attach to such funds).

(b) Effect of Agreement

The mother asserts that the incorporation of the property settlement agreement into the decree prohibits the crediting of the Social Security benefits against that obligation, as it was intended as a full, final, and complete settlement of the father's child support obligation. However, other jurisdictions have ruled that the existence of a separation agreement is not determinative. See *Hamilton v. Hamilton*, 598 S.W.2d 767 (Ky. App. 1980) (evidence that child became entitled to Social Security benefits and that mother frequently had excess from such child support payments supported trial court's finding that it was appropriate that child support payments be terminated at father's death despite existence of separation agreement between father and mother, incorporated into divorce decree, providing for child support payments to minor child).

In two cases similar to the one now before us, *Bowden v. Bowden*, 426 So. 2d 448 (Ala. App. 1983), and *Board v. Board*, 690 S.W.2d 380 (Ky. 1985), the existence of separation agreements did not abrogate the noncustodial parent's right to credit Social Security payments.

In *Bowden*, the parents of the minor child entered into an agreement which required the husband to pay the wife $300 for the support and maintenance of the minor child, and to purchase and maintain life insurance policies sufficient to insure that the monthly payments for the support of the child provided in the agreement would be paid in the event of the death of the husband. The husband died testate, and the child began receiving Social Security benefits exceeding the $300 per month child support specified in the agreement. At the time of his death, the husband did not have in effect the insurance policy as required in the agreement. Pointing out that the purpose of Social Security is the same as that of an insurance

policy with a private carrier, wherein a parent insures against death or loss of physical ability to fulfill moral and legal obligations to dependent children, the court held that the death benefits paid to the minor child from the Social Security account of his deceased parent could be credited against the husband's monthly obligations.

In *Board*, the husband agreed to pay the wife $200 a week for the support of their two minor children pursuant to a property settlement agreement. The husband died 3 months after the divorce, at which time the wife began receiving $370 per month per child from his Social Security benefits. In affirming the judgment of the trial court, the Court of Appeals had stressed that the wife would receive an unreasonable windfall if she were permitted to receive both child support and Social Security benefits. Affirming both the trial court and the Court of Appeals, the Supreme Court of Kentucky held that Social Security benefits could be credited directly without a motion for modification of the decree.

The mother cites *Cohen v. Cohen*, 246 So. 2d 581 (Fla. App. 1971), *writ discharged* 255 So. 2d 524 (Fla.), as support for her proposition that in the absence of a provision in the property settlement between her and the father, the estate is not entitled to a partial credit or discharge for death benefit payments made to the minor children by the Social Security Administration. In *Cohen*, a father executed a voluntary property settlement with his ex-wife which provided for payments for child support and education. Affirming a final summary judgment for the ex-wife as to her claim for child support payments without setoff for the Social Security payments, the *Cohen* court noted that Social Security death benefits were known to the father at the time he executed the property settlement agreement and at the time the agreement was incorporated into his final decree of divorce. It reasoned that had the father desired to receive credit against his support payments for any death benefits paid by Social Security, he should have made a provision for such credit in the agreement.

Cohen is, however, different from the matter at hand; the purposes for which the voluntary support payments were made in *Cohen* are different. In this case, the father's will provided

only for the court-ordered child support payments. In *Cohen*, the property settlement agreement was a voluntary agreement to provide $40 a week for each of two minor children and the tuition for normal Hebrew School training for each of the boys and, in addition, to pay the normal and usual expenses entailed in the Bar Mitzvah. Hence, the agreement provided payment for a specified item, tuition. In accord is *Thompson v. Thompson*, 254 Ark. 881, 496 S.W.2d 425 (1973), in which the court refused to offset child support payments with money given by the Veterans' Administration to a child of a disabled veteran while the child was enrolled in college. Noting that it had previously held that sums paid from Social Security payments and military allotments should be credited to child support awards, the court distinguished the Veterans' Administration education benefits as a specialty item available for use only under specified circumstances, unlike allotments and Social Security payments, which, the court said, are generally available for ordinary use.

In agreement with *Cohen* is *Williams v. Williams*, 789 S.W.2d 781 (Ky. 1990). In *Williams*, the court refused to reduce a husband's court-ordered maintenance to his former wife because of her receipt of Social Security benefits. The court relied in part on the existence of a property settlement agreement which clearly designated that the instrument was the final settlement of all the parties' property rights and made no provisions for the adjustment of maintenance due to subsequent Social Security benefits to which the wife became entitled. The *Williams* court contrasted the agreement before it with the one in *Board v. Board*, 690 S.W.2d 380 (Ky. 1985), in which the existence of a separation agreement did not prevent the court from crediting Social Security benefits. The *Williams* court found that the property settlement agreement before it provided only for spousal maintenance, whereas, in *Board*, the agreement provided for payment of child support. Thus, the *Williams* court held that the Social Security payments made to the wife involved Social Security benefits the wife has earned a right to receive by virtue of her marital relationship and as a result of her participation in and contribution to the marriage.

2. NEBRASKA PRECEDENT

Those decisions holding that Social Security payments are not automatically offset but are a factor to be considered are consistent with decisions in other Nebraska cases governing crediting of Social Security toward court-ordered child support.

In a creditor's bill to enforce a judgment for back child support, Social Security payments to a divorced wife paid for the benefit of her children, following an incapacitating auto accident suffered by the father subsequent to the divorce, were held to have been properly credited against the final judgment. *Schulze v. Jensen*, 191 Neb. 253, 214 N.W.2d 591 (1974). Affirming a judgment which found the father liable, the *Schulze* court rejected the contention that it had been error to credit the Social Security benefits received against the child support obligation because such payments were from a collateral governmental source and did not relieve the father from his obligation under the divorce decree. The court concluded that the payments resulted directly from the father's accidental disability and were a substitute for his loss of earning power and his obligation to pay for the support of his dependents.

Under different facts, the trial court in *Lainson v. Lainson*, 219 Neb. 170, 362 N.W.2d 53 (1985), refused to credit the Social Security benefits received by the minor child against the father's child support obligation. On appeal, we held that the action was within the trial court's discretion and that *Schulze* did not mandate that the disability payments be offset. At the time the trial court entered its decree, it was aware of the father's disability and of the Social Security payments being made in the child's behalf. We reasoned that the trial court considered the overall situation of both parents and the child, as well as the earning capacity of the father, in making its decision to refuse to consider Social Security payments the mother received.

After reviewing both the *Schulze* and *Lainson* cases, we, in *Hanthorn v. Hanthorn*, 236 Neb. 225, 460 N.W.2d 650 (1990), held that Social Security payments made to the obligor's child on account of the obligor's disability are to be considered as credits toward the obligor's court-ordered support obligation,

absent circumstances making allowance of such credit inequitable. In so doing, we noted that the relief granted the obligor is an equitable credit for the disability benefits received by the children, which is by nature different from a retroactive modification of a vested and accrued obligation.

3. APPLICATION OF PRECEDENT

The fact situation in this case is different from those in *Schulze*, *Lainson*, or *Hanthorn*. Here, the father has died and the estate is seeking to offset child support payments by the amount of Social Security benefits received on behalf of the daughter.

In reported cases involving Social Security death benefits paid to a child, courts have allowed the noncustodial parent to credit Social Security payments toward child support, even though the payments are received on account of the death of the noncustodial parent. As the court pointed out in *In re Marriage of Meek*, 669 P.2d 628 (Colo. App. 1983), Social Security death benefits represent money earned and contributed through the efforts of a working parent or spouse, which payments, like proceeds on an insurance policy, substitute as income to the worker's family should he or she die or become disabled. The court in *In re Marriage of Meek* therefore treated the benefits to which the minor child was entitled as a result of her father's death as payments in the nature of support. See, also, *Bowden v. Bowden*, 426 So. 2d 448 (Ala. Civ. App. 1983) (under North Carolina law, death benefits paid minor from Social Security account of deceased father could be credited against monthly obligations under separation agreement of parents); *Board v. Board, supra* (estate of deceased father entitled to have its obligation for child support credited for Social Security benefits paid for child support); *Gibson v Gibson*, 110 Mich. App. 666, 313 N.W.2d 179 (1981) (all relevant factors, including child's income from Social Security payments, must be considered by trial court in deciding request made by personal representative of estate of deceased former husband to discharge child support payments to extent of Social Security benefits received by child). Contra, *Matter of Estate of Patterson*, 167 Ariz. 168, 805 P.2d 401 (Ariz. App. 1991)

(noncustodial parent not entitled to credit against child support obligation for federal benefits children would have been entitled to receive regardless of divorce and that do not decrease noncustodial parent's own income); *Estate of Brummett by Brummett v. Brummett*, 472 N.E.2d 616 (Ind. App. 1984) (trial court did not abuse discretion in failing to revoke child support order when, as result of death of parent obligated to pay support, beneficiary of order was receiving Social Security survivor's benefits); *In re Marriage of Foley*, 501 N.W.2d 497 (Iowa 1993) (income child receives from Social Security, as beneficiary of deceased parent, not available for offset against adoptive parent's child support obligations).

Whether the Social Security benefits are received because of disability, retirement, or death of the obligor, courts allowing credit for Social Security payments against the parent's child support obligation reason that dependency benefits are not a mere gratuity from the federal government. The benefits have been earned in part through the employee's payment of Social Security taxes. See, *Flemming v. Nestor*, 363 U.S. 603, 80 S. Ct. 1367, 4 L. Ed. 2d 1435 (1960), *reh'g denied* 364 U.S. 854, 81 S. Ct. 29, 5 L. Ed. 2d 77; *Potts v. Potts*, 240 N.W.2d 680 (Iowa 1976); *Andler v. Andler*, 217 Kan. 538, 538 P.2d 649 (1975); *Chase v. Chase*, 74 Wash. 2d 253, 444 P.2d 145 (1968). It should not matter to the custodial party that the obligor is given credit; the purpose of the order has been accomplished. See, also, *Binns v. Maddox*, 57 Ala. App. 230, 327 So. 2d 726 (1976); *McCloud v. McCloud*, 544 So. 2d 764 (La. App. 1989); *Newton v. Newton*, 622 S.W.2d 23 (Mo. App. 1981). As the Arkansas court indicated in *Cash v. Cash*, 234 Ark. 603, 353 S.W.2d 348 (1962), the Social Security payments made by the federal government to the dependent son were earned in part by the appellant himself and were not altogether a gift from the federal government.

In like fashion, we have ruled that amounts paid to a mother under a military allotment are to be credited against child support payments owed by the father. *Hopwood v. Hopwood*, 169 Neb. 760, 100 N.W.2d 833 (1960). In affirming the judgment of the trial court that the father was not indebted to the mother, the court found that the payment of allotments,

including the amount deducted from the soldier's pay and that allowed by the government under the Servicemen's Dependents Allowance Act of 1942, would be applied against the father's child support obligation. In so holding, the court found that the right to this additional allowance from the government was wholly dependent on the fact that the father was serving in the armed services.

In *Hanthorn v. Hanthorn*, 236 Neb. 225, 227, 460 N.W.2d 650, 652 (1990), the noncustodial parent who sought credit for Social Security benefits filed an " 'Application for Credit for Social Security Payments on Child Support.' " The court did not require a modification hearing, although a hearing was held to adduce evidence. Likewise, in *Schulze v. Jensen*, 191 Neb. 253, 214 N.W.2d 591 (1974), the crediting of Social Security benefits toward court-ordered child support was done from a creditor's bill.

On the other hand, a modification hearing implies a change in the amount of the court's order on behalf of the minor child and, consequently, requires a material change in circumstances. See, *Wulff v. Wulff*, 243 Neb. 616, 500 N.W.2d 845 (1993); *Czaplewski v. Czaplewski*, 240 Neb. 629, 483 N.W.2d 751 (1992). Here, no change in the amount of payment is requested; the only change is the source of that payment. Therefore, a request to credit Social Security benefits does not require a modification hearing as such, but, rather, only an opportunity for the custodial parent to adduce evidence of any inequity that might occur as the result of crediting Social Security benefits toward court-ordered child support. See *Board v. Board*, 690 S.W.2d 380 (Ky. 1985) (crediting of Social Security child support benefits against supporting parent's child support obligation is not a "modification" of divorce decree requiring motion and procedure).

In view of that distinction, the evidential hearing granted by the district court provided the mother with the opportunity to adduce any evidence of inequitableness arising by virtue of crediting the Social Security benefit of $832 per month against the father's court-ordered child support obligation. No such evidence was adduced.

V. JUDGMENT

The district court's ruling to credit Social Security benefits toward the father's court-ordered child support did not constitute an abuse of discretion. Accordingly, the judgment of the district court is affirmed.

AFFIRMED.

WHITE, J., not participating.

PAMELA RITCHIE SHERARD, APPELLANT, V. STATE OF NEBRASKA, SECOND INJURY FUND, APPELLEE.

509 N.W.2d 194

Filed December 17, 1993. No. S-91-802.

1. **Appeal and Error.** An appellate court has an obligation to reach an independent, correct conclusion regarding matters of law, irrespective of the determination made by the lower court.
2. **Judgments: Interest.** When a decree falls within the purview of the applicable postjudgment interest statute, interest is chargeable without an express direction to that effect appearing in the decree.
3. **Judgments: Workers' Compensation: Attorney Fees: Interest.** When a court awards attorney fees against an employer pursuant to Neb. Rev. Stat. § 48-125(1) (Reissue 1988), the employer shall be liable for interest pursuant to § 48-125(2). The employer's liability for interest exists, and execution for interest may issue, even when the judgment is silent as to interest.
4. **Judgments: Workers' Compensation: Final Orders.** A judgment for compensation pursuant to the Nebraska Workers' Compensation Act cannot be enforced until it becomes conclusive upon the parties.
5. **Judgments: Final Orders.** An award by the Nebraska Supreme Court becomes conclusive upon the parties when that court issues a mandate.
6. **Judgments.** The issuance of a mandate is a ministerial act.
7. **Courts: Presumptions.** In the absence of evidence to the contrary, a court will presume that official acts, including ministerial acts, have been properly performed.
8. **Courts: Presumptions: Time.** When the record is silent on the issue, a court will presume that a mandate was duly issued at the appropriate time.
9. **Courts: Workers' Compensation: Judicial Notice: Appeal and Error.** When a district court is called upon to enforce a decision of the Workers' Compensation Court, the district court has a duty to take judicial notice of any appellate decisions which may have been rendered in the same case.

10. **Property.** Absent a statute to the contrary, State property is not subject to execution.
11. **Political Subdivisions: Property: Words and Phrases.** Public funds are funds belonging to the State, or to any county or political subdivision of the State.
12. **Second Injury Fund: Property.** The monies in the Second Injury Fund are not State property. The Second Injury Fund can therefore be subject to a writ of execution.

Appeal from the District Court for Lancaster County: DONALD E. ENDACOTT, Judge. Reversed and remanded with directions.

T.J. Hallinan, of Cobb, Hallinan & Ehrlich, P.C., for appellant.

Don Stenberg, Attorney General, and Lynn A. Melson for appellee.

HASTINGS, C.J., BOSLAUGH, CAPORALE, FAHRNBRUCH, and LANPHIER, JJ.

PER CURIAM.

Plaintiff-appellant, Pamela Ritchie Sherard, appeals an order of the district court quashing her writ of execution. We reverse the judgment and remand the cause with directions to issue the writ.

This is the second appearance of this case in this court. The underlying facts are outlined in our prior opinion, *Sherard v. Bethphage Mission, Inc.*, 236 Neb. 900, 464 N.W.2d 343 (1991) (*Sherard I*). Only those facts necessary to explain our present decision will be reviewed.

Sherard originally brought an action in the Nebraska Workers' Compensation Court to recover disability benefits against her employer, Bethphage Mission, Inc. Bethphage impleaded the State of Nebraska, Second Injury Fund (the Fund). The compensation court entered an award, and Bethphage and the Fund requested a rehearing. On February 14, 1990, the compensation court entered a rehearing award in favor of Sherard. The compensation court ordered both Bethphage and the Fund to make specified weekly payments to Sherard.

The Fund appealed the rehearing award to this court. On January 11, 1991, we decided *Sherard I*, in which we affirmed

the rehearing award and additionally ordered the Fund to pay Sherard $1,500 in attorney fees. After *Sherard I*, the Fund paid Sherard the disability benefits then due and the attorney fees. The Fund did not pay Sherard any interest. This unpaid interest is the subject of the present dispute.

To collect the unpaid interest, Sherard sought a writ of execution from the Lancaster County District Court. The Fund moved to quash the writ. After an evidentiary hearing and submission of briefs, the district court granted the Fund's motion to quash. Sherard appeals from this order, claiming that the district court erred in granting the motion to quash.

Sherard's claim presents us with three legal issues. First, did *Sherard I* provide a basis for awarding interest? Second, was *Sherard I* properly filed with the district court for enforcement? Third, may a district court issue a writ of execution against the Second Injury Fund? Each of these issues is a matter of law, in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the lower court. *VanDeWalle v. Albion Nat. Bank*, 243 Neb. 496, 500 N.W.2d 566 (1993).

We first address the issue of interest. In *Sherard I*, we awarded Sherard attorney fees pursuant to Neb. Rev. Stat. § 48-125(1) (Reissue 1988). The version of § 48-125(1) applicable at the time of *Sherard I* provided, in relevant part:

> If the employer files an application for a rehearing before the compensation court from an award of a judge of 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, and the Supreme Court shall in like manner allow the employee a reasonable sum as attorney's fees for the proceedings in the Supreme Court.

The Fund is an employer within the meaning of this section. *Pollard v. Wright's Tree Service, Inc.*, 212 Neb. 187, 322 N.W.2d 397 (1982). Because the Fund's appeal in *Sherard I* failed to produce a reduction in the amount of the award, we held the Fund liable for a portion of Sherard's attorney fees.

Our judgment in *Sherard I* does not mention interest.

However, interest is allowed by statute; an award of attorney fees under § 48-125(1) implicates subsection (2) of the same statute. The version of § 48-125(2) applicable at the time of *Sherard I* provided, in relevant part:

> When an attorney's fee is allowed pursuant to this section, there shall further be assessed against the employer an amount of interest on the final award obtained, computed from the date compensation was payable, as provided in section 48-119, at a rate equal to the rate of interest allowed per annum under section 45-104.01, as such rate may from time to time be adjusted by the Legislature.

Neb. Rev. Stat. § 48-119 (Reissue 1988) provides that if the disability continues for 6 weeks or longer, then compensation is payable from the date of the injury. Neb. Rev. Stat. § 45-104.01 (Reissue 1988) provides for an interest rate of 14 percent per annum.

The precise issue before us is whether, when an appellate court judgment is silent as to interest and interest on the judgment is provided by statute, a district court may order execution to collect interest. We find that a district court may so order.

We have previously encountered this issue in conjunction with a postjudgment interest statute. In *Stuart v. Burcham*, 62 Neb. 84, 86 N.W. 898 (1901), we held that when a decree falls within the purview of the applicable postjudgment interest statute, interest is chargeable without an express direction to that effect appearing in the decree.

The postjudgment interest statute discussed in *Stuart* is analogous to § 48-125(2), the statute at issue here. The statute discussed in *Stuart* provided that " '[i]nterest . . . *shall be* . . . at the rate of [7 percent].' " (Emphasis supplied.) *Stuart*, 62 Neb. at 86, 86 N.W. at 899. Section 48-125(2) provided that interest "*shall further be assessed* against the employer." (Emphasis supplied.) As a general rule of statutory construction, the word "shall" is considered mandatory. *Moyer v. Douglas & Lomason Co.*, 212 Neb. 680, 325 N.W.2d 648 (1982); *Pelzer v. City of Bellevue*, 198 Neb. 19, 251 N.W.2d 662 (1977). Both the *Stuart* statute and § 48-125(2) required an award of interest. We previously interpreted the *Stuart* statute to allow interest even

when the decree was silent as to interest, and we now interpret § 48-125(2) in a similar fashion.

Such an interpretation is supported by courts of other jurisdictions. Those courts generally hold that although interest may be specified in a judgment, statutory interest is also recoverable when the judgment makes no mention of its recovery. See, *Rogers v. Springfield Fire etc. Ins. Co.*, 92 Cal. App. 537, 268 P. 679 (1928); *Arnold v. Arnold*, 258 Iowa 850, 140 N.W.2d 874 (1966); *Commonwealth, Department of Highways v. Young*, 380 S.W.2d 239 (Ky. 1964); *Thomas v. St. Charles Parish*, 613 So. 2d 698 (La. App. 1993); *Bolt v. Nelson*, 263 Mich. 158, 248 N.W. 581 (1933); *Baldwin v. Collins*, 479 P.2d 567 (Okla. 1970); *Wolfgang v. Thiele Co.*, 141 Or. 280, 17 P.2d 313 (1932); *Golden v. Murphy*, 611 S.W.2d 914 (Tex. Civ. App. 1981); *Dairy Distributors, Inc. v. Local 976, etc.*, 16 Utah 2d 85, 396 P.2d 47 (1964). Other sources specifically explain that "where interest on judgments is allowed by statute, execution for interest may issue whether or not it is allowed in the judgment." 33 C.J.S. *Executions* § 75 b. at 216-17 (1942). Accord *Amis v. Smith*, 41 U.S. (16 Pet.) 303, 10 L. Ed. 973 (1842) (applying Mississippi law).

Based on our decision in *Stuart*, principles of statutory construction, and the weight of the above authorities, we hold that when a court awards attorney fees against an employer pursuant to § 48-125(1), the employer shall be liable for interest pursuant to § 48-125(2). The employer's liability for interest exists, and execution for interest may issue, even when the judgment is silent as to interest. Thus, *Sherard I*, in which we awarded attorney fees pursuant to § 48-125(1), provides grounds upon which the district court, pursuant to § 48-125(2), could have issued a writ of execution for interest.

We next address the issue of Sherard's filing documents with the district court. A judgment for compensation pursuant to the Nebraska Workers' Compensation Act cannot be enforced until it becomes "conclusive upon the parties." Neb. Rev. Stat. § 48-188 (Reissue 1988). See *Leitz v. Roberts Dairy*, 239 Neb. 907, 479 N.W.2d 464 (1992). An award by this court becomes conclusive upon the parties when this court issues a mandate. *Id.* Cf. *Smith v. Garbe*, 86 Neb. 91, 124 N.W. 921 (1910)

(appellate court's judgment is final and binding regardless of whether its mandate was ever entered of record in the district court). Once an award becomes conclusive, it may be filed with the district court, "whereupon such order, award, or judgment shall have the same force and effect as a judgment of such district court." § 48-188.

As a preliminary matter, we note that *Sherard I* was conclusive upon the parties despite the fact that no mandate appears in the record before us. The issuance of a mandate is a ministerial act. *Save The Trains Assn. v. Chicago & N. W. Ry. Co.*, 168 Neb. 180, 95 N.W.2d 334 (1959). In the absence of evidence to the contrary, we presume that official acts, including ministerial acts, have been properly performed. *County of Hamilton v. Thomsen*, 158 Neb. 254, 63 N.W.2d 168 (1954). When the record is silent on the issue, we will presume that a mandate was duly issued at the appropriate time. See Neb. Ct. R. of Prac. 14A(1) (rev. 1992) (stating the times during which a mandate cannot issue).

Although *Sherard I* was conclusive upon the parties, Sherard did not file a copy of *Sherard I* with the district court. Instead, she filed a copy of the Workers' Compensation Court rehearing award. At the evidentiary hearing on the Fund's motion to quash, Sherard then entered into evidence a copy of *Sherard I*.

Sherard's filing under § 48-188 provided a sufficient basis upon which the district court could enforce the judgment. First, the district court was presented with an actual copy of the judgment to be enforced. Second, even if Sherard had only filed a copy of the rehearing award, the district court would have been charged with knowledge of our judgment. When a district court is called upon to enforce a decision of the Workers' Compensation Court, the district court has a duty to take judicial notice of any appellate decisions which may have been rendered in the same case. Cf. *Bank of Mead v. St. Paul Fire & Marine Ins. Co.*, 202 Neb. 403, 275 N.W.2d 822 (1979). We therefore find that, either through the submission of evidence or through judicial notice, the district court in the present case could have recognized the award of attorney fees in *Sherard I*. The district court could then have issued a writ of execution for the interest due pursuant to § 48-125(2).

Finally, we address the issue of whether a writ of execution may issue against the Fund. The Fund contends that the monies in the Second Injury Fund are State property and therefore are not subject to execution. We agree that, absent a statute to the contrary, State property is not subject to execution. *County of Madison v. School District No. 2*, 148 Neb. 218, 27 N.W.2d 172 (1947). We also acknowledge that the Fund's contention is supported by some authority. See, *McAvoy v H B Sherman Co*, 401 Mich. 419, 258 N.W.2d 414 (1977); *State, ex rel., v. Indus. Comm.*, 116 Ohio St. 45, 156 N.E. 101 (1927); *Industrial Accident Board v. Miears*, 227 S.W.2d 571 (Tex. Civ. App. 1950), *rev'd in part on other grounds and aff'd in part*, 149 Tex. 270, 232 S.W.2d 671; *Mason-Walsh-Atkinson-Kier Co. v. Dept. L. & I.*, 5 Wash. 2d 508, 105 P.2d 832 (1940). However, we find that the monies in the Second Injury Fund are not State property.

The Second Injury Fund is established by and described in Neb. Rev. Stat. § 48-128 (Reissue 1988). That statute provides, in relevant part:

> The Second Injury Fund shall be for the purpose of making payments in accordance with this section and for paying administrative expenses relating to such fund. The State Treasurer shall be the custodian of the Second Injury Fund, and *all money and securities in the fund* shall be held in trust by the State Treasurer and *shall not be money or property of the state.*

(Emphasis supplied.) According to the Fund, this language means only that the Second Injury Fund is not a part of the State's general fund. The meaning which the Fund assigns to this language is unwarranted by the plain language of the statute.

Beyond the plain language of the statute, persuasive authorities convince us that the monies in the Second Injury Fund are not State property. We find such precedents both in Nebraska and in other jurisdictions.

Looking first to Nebraska case law, we notice a strong parallel between State property and "public funds." Public funds are funds belonging to the State, or to any county or political subdivision of the State. *Allen v. City of Omaha*, 136

Neb. 620, 286 N.W. 916 (1939). In *Allen*, we held that the monies in a police pension fund were not public funds. This holding rested on several characteristics of the police fund: the police fund was not raised by taxation or by operation of a general law applicable to the public at large, the police fund was statutorily segregated for a specific use, and the monies in the police fund were held in trust by the city treasurer. Based on these characteristics, we found that the monies in the police fund did not belong to the city of Omaha and were not city funds.

The Second Injury Fund shares all of the relevant characteristics with the police fund at issue in *Allen*. The Second Injury Fund is not raised by taxation; rather, the Director of Insurance collects annual assessments from each insurance company transacting business in Nebraska. The Second Injury Fund is statutorily segregated in a special trust fund and can only be drawn upon for particular purposes. The Second Injury Fund is held in trust by its custodian, the State Treasurer. Under the reasoning of *Allen*, the Second Injury Fund does not belong to the State and is not State property. See 7B John A. Appleman, Insurance Law and Practice § 4595 (Walter F. Berdal ed. 1979) (second injury funds are private funds, not public funds).

Courts in other jurisdictions have held that state insurance funds are not state property. See, *Industrial Com. v. School Dist. No. 48, etc.*, 56 Ariz. 476, 108 P.2d 1004 (1941); *Senske v. Fairmont & Waseca Canning Co.*, 232 Minn. 350, 45 N.W.2d 640 (1951); *State ex rel. Stearns v. Olson*, 43 N.D. 619, 175 N.W. 714 (1919); *Moran v. State ex rel. Derryberry*, 534 P.2d 1282 (Okla. 1975); *Chez, Atty. Gen., v. Industrial Comm. of Utah et al.*, 90 Utah 447, 62 P.2d 549 (1936). One court has even stated that although state insurance funds have some of the qualities of a public fund, the state has no interest in such insurance funds other than in the funds' proper administration. *Senske, supra*. In holding that state insurance funds are not state property, courts consider a number of the same characteristics we considered in *Allen*. See, *School Dist. No. 48, etc., supra* (funds not made up of taxes collected from citizenry at large); *Senske, supra* (funds not derived from taxation);

Olson, supra (funds not collected by taxation can only be disbursed for particular purposes); *Moran, supra* (funds held in trust, can only be disbursed for particular purposes); *Chez, Atty. Gen., supra* (funds not derived from the state, can only be used for particular purposes).

Based on the plain language of the statute, our decision in *Allen*, and cases from other jurisdictions, we hold that the monies in the Second Injury Fund are not State property. The Second Injury Fund can therefore be subject to a writ of execution.

In summary, we conclude that our decision in *Sherard I* implicitly held the Fund liable for interest, that *Sherard I* was properly before the district court, and that the Second Injury Fund is subject to execution. We reverse the decision of the district court and remand the cause with directions to issue a writ of execution for the allowable interest.

REVERSED AND REMANDED WITH DIRECTIONS.

WHITE, J., participating on briefs.

SHANAHAN, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. ARVELL COOK, APPELLANT.
509 N.W.2d 200

Filed December 17, 1993. No. S-92-1096.

1. **Convictions: Appeal and Error.** In reviewing a criminal conviction, it is not the province of an appellate court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the trier of fact, and the verdict of the jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
2. **Homicide: Intent: Words and Phrases.** A person commits murder in the first degree if he or she kills another person purposely and with deliberate and premeditated malice.
3. _____: _____: _____. "Purposely," as an element of first degree murder, means intentionally. The intent involved in an actor's conduct is a mental process and may be inferred from the conduct itself; the actor's language, if any, in reference to the conduct; and the circumstances surrounding the conduct.

4. **Homicide: Intent: Circumstantial Evidence: Words and Phrases.** Malice, like intent, concerns the state of mind of the slayer and may be inferred from the words and acts of the defendant, the circumstances surrounding his or her conduct, and the evidence relating to the circumstances of the criminal act. Malice is that condition of the mind which is manifested by the intentional doing of a wrongful act without just cause or excuse.
5. **Homicide: Intent: Words and Phrases.** "Deliberate" means not suddenly, not rashly; but deliberation requires that the defendant considered the probable consequences of his or her act before doing the act. A person kills with deliberate malice when he or she, without just cause or excuse, kills another not suddenly or rashly, but after considering the probable consequences of doing the act.
6. _____: _____: _____. "Premeditated" means to have formed a design to commit an act before it is done. A person kills with premeditated malice if before the act causing the death occurs, he or she has formed the intent or determined to kill the victim without legal justification.
7. **Verdicts: Appeal and Error.** 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. Moreover, on such a claim, 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.
8. **Homicide: Intent: Time.** No particular length of time for premeditation is required, provided that the intent to kill is formed before the act is committed and not simultaneously with the act that caused the death.
9. **Intent: Evidence: Weapons.** Malice may be inferred from the shooting of another person with a deadly weapon.

Appeal from the District Court for Douglas County: JOHN E. CLARK, Judge. Affirmed.

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

Don Stenberg, Attorney General, and Mark D. Starr for appellee.

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

HASTINGS, C.J.

Arvell Cook appeals his convictions, following trial by jury, of first degree murder and use of a firearm to commit a felony. He assigns as error the giving of instruction No. 12, which defined reasonable doubt, and the sufficiency of the evidence to sustain the murder conviction. We affirm.

On the evening of February 29, 1992, Nebraska Morrow was working at M & G Enterprises, a package liquor and general store in Omaha. Morrow, 65 years old, was a co-owner of the business. Employee Bolden Hooper was also working at the store that night.

At approximately 8 or 8:30 p.m., the appellant, Cook, came into the store. Hooper testified that he was waiting on a customer when he saw Cook talking to Morrow and raising the countertop to go behind it into an employees-only area. Hooper then saw Morrow hit Cook once with a large stick which was kept behind the counter. Cook fell to the ground and was bleeding from a wound to his head. Morrow's nephew, Terrence Sledge, took Cook's hand, helped him to his feet, and told him to leave the store.

After Cook got up he repeatedly asked Morrow to come out from behind the counter to fight him. Sledge stated that Cook walked out the door, but came back in and said, "Nebraska, you're dead," three times before he finally left the store. Sledge estimated that this incident took place at 9:30 p.m.

Morrow called the police to report the disturbance. Omaha police officer James Arndt stated that he responded to the dispatch at approximately 9:45 p.m. Morrow told him that there had been a disturbance outside which had carried into the store, but that the individuals involved had already left and that there was no more problem. Morrow also told Arndt that he had struck one of the individuals with a "wooden bat" when the man tried to climb over the counter and that he was concerned that the man might need medical attention.

Although Morrow told the police officer that he did not know the names of the men involved in the disturbance, he called his brother, Napoleon Morrow, after the incident and told his brother that he had hit a man named "Cooks" when the man had tried to force his way behind the counter. Napoleon Morrow identified Cook as the man known as Cooks.

Around midnight, Kiesha Jackman, Tiffany Pogue, Tyrone Watson, and three other friends arrived at M & G Enterprises to buy some beer. Jackman testified that she was driving her mother's car and that she backed into the parking lot because she was afraid of the neighborhood. Pogue stated that three

members of the group went into the store while the others waited in the car. While she was waiting in the car, she saw a man walking "catty-corner across the parking lot." Jackman told her that the man had a gun, and Pogue then saw that the man had a gun by the side of his leg. Pogue identified the man with the gun as Cook. She testified that he was walking by himself and that he was not running, staggering, or tripping. She saw Cook walk up to the front door and stop for 20 or 30 seconds to look around inside; he then "swung the door open and walked inside." She said that about 1½ or 2 minutes later she heard a shot, and then she saw two women run out of the store. After that, she observed Cook, still carrying the gun, walk out of the store and back across the parking lot. She did not see any blood on him at that time, but did notice what looked like a sore on his head. She said that his eyes were "glazed over a little bit."

Four other witnesses testified variously to seeing Cook go into the store and shoot Nebraska Morrow. All identified Cook at trial as the man who had fired the shotgun.

The shotgun blast to the upper left portion of Morrow's chest severed his aorta, the major blood vessel carrying blood away from the heart. A pathologist testified that death occurred within minutes.

Although the weapon was not recovered during the subsequent investigation, a search of Cook's residence on the morning after the shooting produced a spent .410 shotgun shell.

Following his convictions, Cook was sentenced to consecutive terms of life imprisonment for first degree murder and 10 years imprisonment for use of a firearm in the commission of a felony, with credit given for 263 days served. Apparently contending that his head injury caused him to act with "clouded reason," Cook asserts that the evidence in this case is so lacking in probative force that it is insufficient as a matter of law to support the conviction for first degree murder. He further argues that a rational trier of fact would have found him guilty of manslaughter.

In reviewing a criminal conviction, it is not the province of an appellate court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the

trier of fact, and the verdict of the jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. *State v. Thompson, ante* p. 375, 507 N.W.2d 253 (1993); *State v. Russell*, 243 Neb. 106, 497 N.W.2d 393 (1993).

We recently stated in *Thompson*:

> A person commits murder in the first degree if he or she kills another person purposely and with deliberate and premeditated malice. Neb. Rev. Stat. § 28-303(1) (Reissue 1989). "Purposely," as an element of first degree murder, means intentionally. . . . The intent involved in an actor's conduct is a mental process and may be inferred from the conduct itself; the actor's language, if any, in reference to the conduct; and the circumstances surrounding the conduct. . . .
>
> "Malice," like intent, concerns the state of mind of the slayer and may be inferred from the words and acts of the defendant, the circumstances surrounding his or her conduct, and the evidence relating to the circumstances of the criminal act. . . . Malice is that condition of the mind which is manifested by the intentional doing of a wrongful act without just cause or excuse. . . .
>
> " 'Deliberate malice' and 'premeditated malice' are separate and distinct elements of the crime of murder in the first degree. . . .
>
> " 'Deliberate' means not suddenly, not rashly; but deliberation requires that the defendant considered the probable consequences of his or her act before doing the act. . . . A person kills with 'deliberate malice' when he or she, without just cause or excuse, kills another not suddenly or rashly, but after considering the probable consequences of doing the act.
>
> " 'Premeditated' means to have formed a design to commit an act before it is done. . . . A person kills with "premeditated malice" if before the act causing the death occurs, he or she has formed the intent or determined to kill the victim without legal justification."

(Citations omitted.) *Ante* at 399-400, 507 N.W.2d at 270-71.

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. Moreover, on such a claim, 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. Thompson, supra*; *State v. Connely*, 243 Neb. 319, 499 N.W.2d 65 (1993).

Here it is clear that the jury verdict finding Cook guilty of first degree murder is supported by relevant evidence. The question of premeditation is for the jury to determine. No particular length of time for premeditation is required, provided that the intent to kill is formed before the act is committed and not simultaneously with the act that caused the death. *State v. Batiste*, 231 Neb. 481, 437 N.W.2d 125 (1989).

Malice may be inferred from the shooting of another person with a deadly weapon. *State v. Thompson, supra*; *State v. Nielsen*, 243 Neb. 202, 498 N.W.2d 527 (1993).

The jury here was properly instructed on the elements of first degree murder and also of manslaughter, which, under the facts of this case, would have required a showing that the killing was done "upon a sudden quarrel" and "without malice." Neb. Rev. Stat. § 28-305(1) (Reissue 1989).

The evidence of Cook's words and actions and the circumstances surrounding his conduct clearly justified the jury in finding beyond a reasonable doubt that he had committed the crime of first degree murder, rather than the lesser offense of manslaughter. This assignment of error is without merit.

Cook next asserts that the trial court erred in overruling his objection to the jury instruction taken from NJI 14.08 defining reasonable doubt. The challenged instruction was previously examined by this court in *State v. Morley*, 239 Neb. 141, 474 N.W.2d 660 (1991), *habeas corpus granted, Morley v. Stenberg*, 828 F. Supp. 1413 (D. Neb. 1993). In *State v. Morley*, the appellants asserted that the instruction, by inaccurately defining "reasonable doubt," allowed the jury to find them guilty on the basis of a lesser quantum of proof than is required under the Due Process Clause of U.S. Const. amend. XIV. We distinguished the questioned instruction from the reasonable

doubt instruction found objectionable in *Cage v. Louisiana*, 498 U.S. 39, 111 S. Ct. 328, 112 L. Ed. 2d 330 (1990), and found that the questioned instruction did not lessen the State's burden of proof below the requisite standard, nor did it violate the due process requirements of the 14th Amendment. See, *State v. Van Ackeren*, 242 Neb. 479, 495 N.W.2d 630 (1993), *cert. denied* ____ U.S. ____, 114 S. Ct. 113, 126 L. Ed. 2d 78; *State v. Victor*, 242 Neb. 306, 494 N.W.2d 565 (1993), *cert. granted in part* ____ U.S. ____, 114 S. Ct. 39, 125 L. Ed. 2d 788; *State v. Drinkwalter*, 242 Neb. 40, 493 N.W.2d 319 (1992); *State v. Lewis*, 241 Neb. 334, 488 N.W.2d 518 (1992). Thus, under the authority of *State v. Morley*, Cook's second assignment of error is also without merit.

It is true that in *Morley v. Stenberg, supra*, the U.S. District Court for the District of Nebraska found that the challenged instruction so misstated the degree of certainty necessary to convict that it violated the Constitution by lowering the State's burden of proof. However, the U.S. Supreme Court has granted certiorari in *State v. Victor, supra*, involving the same issue. Unless there is a definitive holding by that Court upholding the claimed unconstitutionality of our instruction on burden of proof, we will continue to adhere to our ruling in *State v. Morley, supra*.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JESSE L. LIVINGSTON, APPELLANT.

509 N.W.2d 205

Filed December 17, 1993. Nos. S-92-1102, S-92-1103.

1. **Trial: Judges: Witnesses: Testimony.** The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point. This rule applies not only to formal testimony but also to whenever the judge assumes the role of a witness.
2. **Postconviction: Appeal and Error.** On appeal from a proceeding for

postconviction relief, the trial court's findings will be upheld unless such findings are clearly erroneous.

3. **Postconviction.** An evidentiary hearing on a postconviction motion is required on an appropriate motion containing factual allegations which, if proved, constitute an infringement of the movant's rights under the Nebraska or federal Constitution. 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 not entitled to relief.
4. **Postconviction: Right to Counsel.** The district court may appoint not to exceed two attorneys to represent prisoners in all postconviction relief proceedings.
5. _____: _____. Whether counsel is to be appointed in postconviction relief proceedings is discretionary with the trial court.
6. **Postconviction: Right to Counsel: Appeal and Error.** Failure to appoint counsel in postconviction proceedings is not error in the absence of an abuse of discretion.

Petition for further review from the Nebraska Court of Appeals, on appeal thereto from the District Court for Douglas County, THEODORE L. CARLSON, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Jesse L. Livingston, pro se.

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

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

FAHRNBRUCH, J.

Jesse L. Livingston claims the Nebraska Court of Appeals erred when it summarily affirmed the district court's denial of his motions for postconviction relief in these two unrelated cases which have been consolidated for disposition in this court.

Livingston argues that the trial court erred when it denied him an evidentiary hearing and denied his request for appointed counsel in regard to the proceedings on his postconviction relief motions.

Following the Court of Appeals' summary affirmances, we granted Livingston's petitions for further review. After reviewing the two records involved, we reverse the Court of Appeals' summary affirmances and remand these two causes to that court with directions to remand the causes to the district court with instructions to grant Livingston an evidentiary

hearing on his postconviction relief motions.

HISTORY

In the district court for Douglas County, Livingston entered a no contest plea in each of the two cases under consideration. Livingston was charged with assault in the first degree in one case and with robbery in the second case. The records reflect that in accepting Livingston's two no contest pleas, the trial judge basically asked a series of questions calling primarily for yes or no answers. The judge did not ask Livingston whether he was under the influence of medication or drugs at the time of the pleas or whether he had taken medication or drugs prior to his pleas. Before accepting the pleas, the trial judge found that each plea was made voluntarily and intelligently. At the time of Livingston's pleas, the trial court made no observations on the record as to whether Livingston was under the influence of any medication or drugs.

Livingston later filed motions to withdraw each of his no contest pleas. He claimed that he had not given either of his pleas voluntarily and intelligently because he was under the influence of medication at the time. In his motions for postconviction relief, Livingston alleges that for several months before entering his pleas he had been taking 60 milligrams of Empirin with Codeine every 4 hours for injuries he sustained from gunshot wounds. Livingston further alleges that taking the prescribed medication over a long period of time causes varying degrees of drowsiness, loss of memory, and periods of hallucination. Livingston claims he was in jail during the time he was taking the medication. He was still in jail when he entered his pleas.

During the hearing on his motions to withdraw his no contest pleas, Livingston testified that because of the medication's effects, he did not understand what was happening when he entered his pleas. At the plea withdrawal hearings, the judge stated from the bench that at the plea hearings, which were held 3 months earlier, he had observed Livingston's demeanor when he entered his pleas and that in the court's opinion, Livingston's pleas had been entered voluntarily and intelligently. It is apparent that in rejecting Livingston's motions to withdraw his

no contest pleas, the court relied, in large measure, upon the court's memory of what the court recalled from the 3-month-old hearings when Livingston entered his pleas of no contest. The bill of exceptions containing the plea hearings, which were held one immediately after the other, does not reflect any observations by the trial judge of Livingston's demeanor at the time Livingston entered his pleas, nor does it reflect any specific findings as to whether Livingston was under the influence of medication or drugs when he entered his no contest pleas. By making the observations that he did at the plea withdrawal hearings, the trial judge assumed the role of a witness, contrary to the prohibition of Neb. Rev. Stat. § 27-605 (Reissue 1989), which provides: "The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point." This rule applies not only to formal testimony but also to whenever the judge assumes the role of a witness. See *State v. Rodriguez, ante* p. 707, 509 N.W.2d 1 (1993).

The district court overruled Livingston's motions to withdraw his no contest pleas and sentenced him to consecutive terms of 10 to 15 years' imprisonment for robbery and 5 to 10 years' imprisonment for assault. On direct appeal to this court, we summarily affirmed judgment of the trial court. *State v. Livingston*, 235 Neb. xxii (case No. 89-1235, Mar. 29, 1990).

The same attorneys represented Livingston at the plea hearings and at the withdrawal of plea hearings in the trial court. A trial counsel who participated in one of the cases in the trial court represented the defendant in both cases on direct appeal to this court. In the direct appeals, there was no assignment of error that the trial judge had assumed the role of a witness.

It was after this court's summary affirmances on direct appeal that Livingston filed his pro se motions for postconviction relief. In his motions, Livingston claims, inter alia, that his attorneys were ineffective because they failed to investigate Livingston's use of medication and because they failed to present evidence as to the medication's effects at the time of his pleas. As previously stated, Livingston sought an evidentiary hearing and appointed counsel for his

postconviction proceedings.

In denying Livingston postconviction relief, the district court found that the record supported a finding that Livingston had entered his two no contest pleas voluntarily and intelligently. The district court also stated that Livingston arguably had been afforded an "evidentiary hearing on the drug assertion" when the district court heard Livingston's motions to withdraw his pleas. The district court concluded that Livingston's constitutional rights had not been violated and that no evidentiary hearing was warranted. As also previously stated, the Court of Appeals summarily affirmed the district court's judgment on Livingston's postconviction relief motions.

STANDARD OF REVIEW

On appeal from a proceeding for postconviction relief, the trial court's findings will be upheld unless such findings are clearly erroneous. *State v. Johnson*, 243 Neb. 758, 502 N.W.2d 477 (1993).

EVIDENTIARY HEARING

After review of the record in each case by this court, we reverse the Court of Appeals' summary affirmances. At the plea withdrawal hearings, Livingston's attorneys presented no evidence to corroborate Livingston's testimony that medication impaired his ability to enter his pleas voluntarily and intelligently. Other than Livingston's testimony, the only "evidence" at that hearing was the trial judge's recollection of his earlier observations as to how Livingston appeared to the judge when he entered his no contest pleas.

An evidentiary hearing on a postconviction motion is required on an appropriate motion containing factual allegations which, if proved, constitute an infringement of the movant's rights under the Nebraska or federal Constitution. *State v. Victor*, 242 Neb. 306, 494 N.W.2d 565 (1993). Conversely, 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 not entitled to relief. *Id.*; *State v. Maeder*, 240 Neb. 955, 486 N.W.2d 193 (1992).

Livingston's postconviction relief motions contain factual

allegations concerning the entry of his no contest pleas, their acceptance by the trial court, and his motions to withdraw those pleas, which allegations, if proved, could be found to constitute an infringement of Livingston's constitutional due process rights because of ineffective assistance of counsel. Before deciding that Livingston's postconviction motions did not entitle Livingston to relief, the trial court should have afforded him an opportunity, through an evidentiary hearing, to prove the truth of the factual allegations in his motions. The trial court's failure to give Livingston that opportunity was clearly wrong. Moreover, the records, files, and bill of exceptions in Livingston's cases fail to affirmatively establish that Livingston is not entitled to postconviction relief.

Livingston has raised a constitutional issue as to whether his trial attorneys rendered ineffective assistance of counsel by failing to investigate Livingston's use of medication and by failing to present evidence of the medication's effects. Livingston also raised issues as to whether he was on medication when he entered his pleas and whether such medication impaired his ability to enter his pleas voluntarily and intelligently.

To determine whether Livingston is entitled to relief because of his trial attorneys' alleged failure to investigate Livingston's use of medication and the effect the medication had upon him at the time of his pleas, it will be necessary to ascertain facts beyond the records that were before the postconviction trial court. On remand, the district court should conduct a postconviction evidentiary hearing to determine whether at his no contest plea hearings Livingston was deprived of effective assistance of counsel, whether Livingston was on medication when he entered his pleas, and, if he was taking medication, what effect it had, if any, upon his ability to voluntarily and intelligently enter his no contest pleas.

APPOINTED COUNSEL

Livingston has also assigned as error the postconviction court's failure to appoint counsel to represent him for his postconviction relief proceedings. There is no federal or state constitutional right to an attorney in state postconviction

proceedings. See, *Coleman v. Thompson*, 501 U.S. 722, 111 S. Ct. 2546, 111 L. Ed. 2d 640 (1991); *State v. Stewart*, 242 Neb. 712, 496 N.W.2d 524 (1993).

Statutorily, the district court *may* appoint not to exceed two attorneys to represent prisoners in all postconviction relief proceedings. See Neb. Rev. Stat. §§ 29-3001 through 29-3004 (Reissue 1989 & Cum. Supp. 1992). Thus, whether counsel is to be appointed in postconviction relief proceedings is discretionary with the trial court, and the failure to appoint counsel in such proceedings is not error in the absence of an abuse of discretion.

It was not an abuse of discretion for the trial court to deny appointed counsel for Livingston when the court found that on the face of his postconviction relief motions Livingston was not entitled to any relief.

It is apparent that, upon remand of these two causes to the district court, Livingston, to support his claims, will need to present facts not contained in his postconviction records. Upon remand of these causes to the district court, nothing in this opinion should be construed as preventing Livingston from again applying to the district court for appointed counsel.

In summary, we reverse the Court of Appeals' summary affirmances in these two appeals. We remand the causes to the Court of Appeals with directions to remand them to the district court with instructions to grant Livingston an evidentiary hearing in the two causes.

REVERSED AND REMANDED WITH DIRECTIONS.

SHANAHAN, J., not participating.

BOSLAUGH, J., dissents.

STATE OF NEBRASKA, APPELLEE, V. MICHAEL E. DEGROAT, APPELLANT.

508 N.W.2d 861

Filed December 17, 1993. No. S-93-239.

1. **Police Officers and Sheriffs: Search and Seizure: Probable Cause: Motor Vehicles: Weapons.** Inasmuch as roadside encounters between police and suspects present especially dangerous situations, the police may search those parts of the passenger compartment of a vehicle they have properly stopped where a weapon may be hidden on the reasonable belief that a suspect is dangerous and may gain access to a weapon.
2. **Constitutional Law: Search and Seizure: Due Process.** The protection U.S. Const. amend. IV affords against unreasonable seizures is made applicable to the states through the Due Process Clause of U.S. Const. amend. XIV and is further guaranteed to the citizens of Nebraska through Neb. Const. art. I, § 7.
3. **Police Officers and Sheriffs: Arrests: Probable Cause.** Reasonable cause to arrest without a warrant exists when a law enforcement officer has knowledge, based on information which is reasonably trustworthy under the circumstances, which justifies the officer's prudent belief that a suspect is committing, or has committed, a crime.
4. **Arrests: Probable Cause.** If the facts available at the time of an arrest would justify a person of reasonable caution to believe that an offense has been or is being committed, probable cause exists.
5. _____: _____. The determination of whether there exists probable cause to arrest without a warrant rests on a practical, rather than a technical, concept.
6. **Arrests: Probable Cause: Convictions: Evidence.** Probable cause sufficient to justify an arrest does not require the same type of specific evidence of each element of the offense as would be needed to support a conviction.
7. **Motions to Suppress: Appeal and Error.** An appellate court will uphold a trial court's ruling on a motion to suppress unless its findings of fact are clearly erroneous.
8. _____: _____. In determining whether a trial court's findings on a motion to suppress are clearly erroneous, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that it observed the witnesses.
9. _____: _____. In determining the correctness of a trial court's ruling on a suppression motion, an appellate court will accept the factual determinations and credibility choices made by the trial court unless, in light of all the circumstances, such findings are clearly erroneous.
10. **Controlled Substances: Intent.** One possesses a controlled substance when one knows of the nature or character of the substance and of its presence and has dominion or control over it.
11. **Controlled Substances: Evidence: Proof.** A defendant's control or dominion over the premises at which contraband is located may establish the defendant's constructive possession of it.
12. **Arrests: Probable Cause: Controlled Substances: Motor Vehicles.** The

unexplained presence of an unlawful substance in plain view and in close proximity to the driver of an automobile gives rise to probable cause for arresting the driver for possession of the substance.

Appeal from the District Court for Douglas County: MICHAEL MCGILL, Judge. Affirmed.

Thomas M. Kenney, Douglas County Public Defender, and Janine F. Ucchino for appellant.

Don Stenberg, Attorney General, and Joseph P. Loudon for appellee.

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

CAPORALE, J.

Following a bench trial, the defendant-appellant, Michael E. DeGroat, was adjudged guilty of the unlawful possession of a controlled substance, lysergic acid diethylamide (LSD), a felony, in violation of Neb. Rev. Stat. §§ 28-416(3) and 28-405(c)(9) [Schedule I] (Cum. Supp. 1992). Asserting that his warrantless arrest was unlawful, DeGroat appealed to the Nebraska Court of Appeals and assigned as error the district court's failure to suppress the physical evidence seized at the time of his arrest and the statement he later made to the police. Under the power granted us by Neb. Rev. Stat. § 24-1106(3) (Cum. Supp. 1992) to regulate the caseload of this court and that of the Court of Appeals, we removed the appeal to this court. We now affirm the judgment of the district court.

While on bicycle patrol, Officers Jeff S. Saalfeld and Daniel L. Clark of the Omaha Police Division saw a pickup truck being operated on an Omaha street. Three people were seated in the cab of the truck, which was equipped with bucket seats, and at least two persons were riding in the bed of the truck.

The truck halted in a traffic lane, where people began to get out of the bed of the truck; as a result, other vehicles had to drive around the truck. Because the people in the bed had been seen to have been drinking and the truck was obstructing traffic, the officers approached it to make a "traffic stop." In the meantime, the truck had begun to move, so when Saalfeld reached it, he announced, "Omaha police officer." The driver,

later determined to be DeGroat, the owner of the vehicle, then stopped.

Clark went to the driver's side, and Saalfeld to the passenger's side. Although the timing is not entirely clear, it appears from the testimony at the suppression hearing that as Clark began to ask DeGroat for his driver's license and proof of ownership, Saalfeld saw the middle passenger reach behind the driver's bucket seat with her left hand, completely turning her torso to the back of the cab in the process. However, at the trial, Saalfeld testified he saw this passenger reach behind DeGroat with her left hand and place something on a tray or ledge running along the back of the cab. In any event, Saalfeld recognized the passenger as being Tina Gomez, a woman whom he had encountered in his official capacity on prior occasions. At the suppression hearing, Saalfeld testified that Gomez' actions attracted his attention because people often attempt to hide guns or contraband, that he had previously seen such furtive gestures made by occupants of an automobile, and that based on those observations, he had, on hundreds of occasions, found weapons or contraband. He further testified that he was most concerned that Gomez might have hidden a weapon.

Immediately upon seeing Gomez reach behind the driver's seat, the officers had DeGroat and his two passengers get out of the truck. Saalfeld looked into the truck to see where Gomez had reached and saw on the ledge in the back of the cab a small, clear receptacle with a material inside which, as a result of his training and experience, he suspected to be LSD. After checking his suspicions by picking up the container, Saalfeld placed DeGroat and Gomez under arrest.

A police cruiser was called to transport DeGroat to central police headquarters, where he was interviewed by Clark. After waiving his *Miranda* rights, DeGroat admitted that the LSD was his. Later chemical testing established that the container indeed held LSD.

With respect to the search, it must be borne in mind that the validity of DeGroat's vehicle being approached and stopped by the police is not at issue. Inasmuch as roadside encounters between police and suspects present especially dangerous situations, the police may search those parts of the passenger

compartment of a vehicle they have properly stopped where a weapon may be hidden on the reasonable belief that a suspect is dangerous and may gain access to a weapon. *State v. Pierce and Wells*, 215 Neb. 512, 340 N.W.2d 122 (1983). Gomez' reaching back to the ledge provided the police with a reasonable belief that she might gain access to a weapon and thus be dangerous. Consequently, the district court did not err in refusing to suppress the physical evidence seized as a result of the search of the truck.

In regard to his postarrest statement to the police, DeGroat argues, in essence, that his arrest was unlawful and that as a result, the statement developed as a consequence of the arrest was inadmissible under the "fruit of the poisonous tree" doctrine announced in *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). See, also, *Brown v. Illinois*, 422 U.S. 590, 95 S. Ct. 2254, 45 L. Ed. 2d 416 (1975); *State v. Tingle*, 239 Neb. 558, 477 N.W.2d 544 (1991).

The protection U.S. Const. amend. IV affords against unreasonable seizures is made applicable to the states through the Due Process Clause of U.S. Const. amend. XIV, see *Mapp v. Ohio*, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961), and is further guaranteed to the citizens of Nebraska through Neb. Const. art. I, § 7. Accordingly, Neb. Rev. Stat. § 29-404.02 (Reissue 1989) empowers a peace officer, so far as is relevant here, to "arrest a person without a warrant" only if "the officer has reasonable cause to believe that such person has committed . . . [a] felony."

We have declared that reasonable cause to arrest without a warrant exists when a law enforcement officer has knowledge, based on information which is reasonably trustworthy under the circumstances, which justifies the officer's prudent belief that a suspect is committing, or has committed, a crime. *State v. Van Ackeren*, 242 Neb. 479, 495 N.W.2d 630 (1993). The same concept has been expressed in the declaration that if the facts available at the time of the arrest would justify a person of reasonable caution to believe that an offense has been or is being committed, probable cause exists. *State v. Roggenkamp*, 224 Neb. 914, 402 N.W.2d 682 (1987). The determination of whether there exists probable cause to arrest without a warrant

rests on a practical, rather than a technical, concept. See *State v. McDonald*, 195 Neb. 625, 240 N.W.2d 8 (1976). Thus, probable cause sufficient to justify an arrest does not require the same type of specific evidence of each element of the offense as would be needed to support a conviction. *State v. Brewer*, 190 Neb. 667, 212 N.W.2d 90 (1973).

Before proceeding further, it is appropriate to recall that an appellate court will uphold a trial court's ruling on a motion to suppress unless its findings of fact are clearly erroneous. *State v. Harris, ante* p. 289, 505 N.W.2d 724 (1993). Moreover, in determining whether a trial court's findings on such a motion are clearly erroneous, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that it observed the witnesses. *State v. Johnson*, 242 Neb. 924, 497 N.W.2d 28 (1993). Expressed another way, the rule is that in determining the correctness of a trial court's ruling on a suppression motion, an appellate court will accept the factual determinations and credibility choices made by the trial court unless, in light of all the circumstances, such findings are clearly erroneous. *State v. Strickland*, 209 Neb. 133, 306 N.W.2d 600 (1981).

Whether the district court found that Saalfeld saw Gomez place something on the ledge behind DeGroat's seat or merely saw her reach there is unimportant, for although there are other inferences, either finding supports a conclusion that the container had been resting on the ledge and its presence was being confirmed, or that the container was being returned to its usual location.

One possesses a controlled substance when one knows of the nature or character of the substance and of its presence and has dominion or control over it. *State v. Farrell*, 242 Neb. 877, 497 N.W.2d 17 (1993). A defendant's control or dominion over the premises at which contraband is located may establish the defendant's constructive possession of it. *State v. Lonnecker*, 237 Neb. 207, 465 N.W.2d 737 (1991). In *State v. Woodruff*, 205 Neb. 638, 288 N.W.2d 754 (1980), we wrote more specifically that constructive possession of a controlled substance may be proved by direct or circumstantial evidence and may be shown

by an accused's proximity to the substance at the time of the arrest or by a showing of ownership, dominion, and right of control over the automobile in which the contraband was found. The defendant therein, in an effort to avoid arrest on an unrelated warrant, lay down in the backseat of an automobile he owned, and a woman drove it away. An inventory search of the automobile after the defendant and woman were apprehended revealed the presence of a controlled substance in a box located partially under the driver's seat and partially on the floor behind the seat, and the defendant's jacket lying across the rear of the backseat held a syringe needle and a note listing dates and amounts. We held the evidence sufficient to support the defendant's conviction for possession of the controlled substance.

In the course of holding in *State v. Rys*, 186 Neb. 341, 183 N.W.2d 253 (1971), that the evidence was sufficient to sustain the conviction of the minor owner-driver of a vehicle for unlawfully possessing alcohol, we wrote that "[o]rdinarily, when liquor, narcotics, or contraband materials are found on a defendant's premises or in an automobile possessed and operated by him, the evidence of unlawful possession is deemed sufficient to sustain a conviction in the absence of any other reasonable explanation for its presence." *Id.* at 346, 183 N.W.2d at 256. The evidence in *Rys* was that when the defendant's vehicle was stopped, the defendant immediately approached the marshal and offered for inspection a title to the automobile and, on request, displayed his driver's license. Desiring further verification of ownership, the marshal ordered the passengers out of the automobile and, upon opening a door, saw a bottle of whiskey on the right-hand side of the floor in the front seat area.

We have since come to recognize that requiring a defendant to explain the presence of contraband is inconsistent with the presumption of innocence and substitutes the lack or absence of an explanation by a defendant as proof in place of the State's requisite proof on the element of possession. *State v. Harney*, 237 Neb. 512, 466 N.W.2d 540 (1991). We have thus disapproved an instruction which told a jury that " 'in the absence of any other reasonable explanation for its presence,' "

possession of a controlled substance could be shown by evidence that it was found in an automobile possessed and operated by the defendant. *Id.* at 513, 466 N.W.2d at 543. But here, we are not dealing with proof at trial; while DeGroat may not have had any obligation to explain the presence of the LSD to the police, the police were free to act upon the only information they had in making the arrest. The unexplained presence of an unlawful substance in plain view and in close proximity to the driver of an automobile gives rise to probable cause for arresting the driver for possession of the substance.

DeGroat's reliance upon *Rogers v. State*, 586 So. 2d 1148 (Fla. App. 1991), for his argument to the contrary is misplaced. Therein, the police stopped a vehicle after an informant had told them that the defendant driver, whom the police found had twice before been arrested for narcotics violations, would go to a particular place to have cocaine placed in compartments behind the front seats of his vehicle. A search of the vehicle resulted in the finding of cocaine in a pocket attached to the back of the front passenger's seat. After the driver was arrested, the police searched a passenger's purse and found it also contained cocaine. The *Rogers* court ruled the arrest of the driver to have been valid but the arrest of the passenger to have been invalid. First of all, DeGroat seems to overlook that the arrest of the *Rogers* driver was upheld. As to the *Rogers* passenger, the obvious distinction is that neither the cocaine in the automobile nor the cocaine in her purse was in plain view. As she was not the driver of the automobile, she could not be said to have had dominion and control over the vehicle and, therefore, could not be said to have had constructive possession of its contents.

The police having had probable cause to effect a warrantless arrest of DeGroat, the district court did not err in failing to suppress DeGroat's postarrest admission that the LSD was his.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ERNEST L. SIMS, APPELLANT.

509 N.W.2d 6

Filed December 17, 1993. No. S-93-312.

1. **Postconviction: Proof.** One moving for postconviction relief must allege facts which, if proved, constitute a denial or violation of his or her rights under the Nebraska or federal Constitution.
2. **Constitutional Law: Postconviction.** The Nebraska Postconviction Act applies only where a prisoner has sustained such a denial or infringement of constitutional rights that the judgment is void or voidable.
3. **Constitutional Law: Postconviction: Proof.** An evidentiary hearing on a postconviction motion is required on an appropriate motion containing factual allegations which, if proved, constitute an infringement of the movant's rights under the Nebraska or federal Constitution. Such a hearing is properly denied if the record and the files in the case affirmatively establish that the defendant is not entitled to relief.
4. **Postconviction: Effectiveness of Counsel: Proof.** In order to maintain a successful ineffective assistance of counsel argument, an appellant must show how he was prejudiced in the defense of his case as a result of his attorney's actions or inactions and that, but for the ineffective assistance of counsel, there is a reasonable probability that the result would have been different. A reasonable probability is a probability sufficient to undermine the confidence in the outcome.
5. **Effectiveness of Counsel.** An unfavorable result does not, by itself, support a claim of ineffective assistance of counsel.
6. **Trial: Stipulations: Effectiveness of Counsel.** A strategic decision to enter into a stipulation regarding the cause of the victim's death is, by itself, insufficient to sustain a claim of ineffective assistance of counsel.

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

Ernest L. Sims, pro se.

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

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

BOSLAUGH, J.

The appellant, Ernest L. Sims, was convicted of first degree murder in 1975 in connection with the shooting death of Raymond Martzett. The judgment was affirmed in *State v. Sims*, 197 Neb. 1, 246 N.W.2d 645 (1976). The underlying facts

of the case are described in that opinion. Sims now appeals from the district court's denial of his pro se motion for postconviction relief brought pursuant to the provisions of Neb. Rev. Stat. § 29-3001 et seq. (Reissue 1989 & Cum. Supp. 1992). Sims asserts that the district court erred in denying his motion for postconviction relief and in denying him an evidentiary hearing on that motion.

One moving for postconviction relief must allege facts which, if proved, constitute a denial or violation of his or her rights under the Nebraska or federal Constitution. *State v. Russell*, 239 Neb. 979, 479 N.W.2d 798 (1992). The Nebraska Postconviction Act applies only where a prisoner has sustained such a denial or infringement of constitutional rights that the judgment is void or voidable. *State v. Keever*, 234 Neb. 289, 450 N.W.2d 682 (1990).

Furthermore, while an evidentiary hearing on a postconviction motion is required on an appropriate motion containing factual allegations which, if proved, constitute an infringement of the movant's rights under the Nebraska or federal Constitution, such a hearing is properly denied if the record and the files in the case affirmatively establish that the defendant is not entitled to relief. *State v. Bowen, ante* p. 204, 505 N.W.2d 682 (1993).

In his motion for postconviction relief, Sims claims that he was, in several respects, denied effective assistance of counsel. In order to maintain a successful ineffective assistance of counsel argument, an appellant must show how he was prejudiced in the defense of his case as a result of his attorney's actions or inactions and that, but for the ineffective assistance of counsel, there is a reasonable probability that the result would have been different. A reasonable probability is a probability sufficient to undermine the confidence in the outcome. In the absence of such a showing, the requested relief must be denied. *State v. Sanders*, 241 Neb. 687, 490 N.W.2d 211 (1992).

Sims first claims that he was denied effective assistance of counsel in that his trial counsel failed to interview Richard Keith and call Keith as a witness during the trial. Sims' postconviction motion asserts that Keith "was threatened by the County

Attorney and the Police Department to testify against [Sims] by fabricating a testimony" and that in exchange, charges against Keith were dropped. Despite this assertion, the record shows that Keith's only connection with the case is that he happened to be a passenger in a vehicle with Sims immediately before Sims was arrested. Keith was not a witness to the shooting and did not testify at the trial. However, numerous other witnesses to the shooting did testify at the trial, and these witnesses identified Sims as the person who shot the victim. In fact, Sims himself testified that he shot the victim, but stated that in doing so, he acted in self-defense. In light of such evidence, the record affirmatively establishes that Sims was not prejudiced by his trial counsel's failure to interview Keith or call Keith as a witness.

Sims next claims that his trial counsel failed to point out witnesses' conflicting testimony regarding Sims' and the victim's possession and handling of firearms. However, the testimony cited by Sims in his motion for postconviction relief is not, in fact, conflicting. Such testimony merely describes differing circumstances when, in two different instances, Sims and the victim confronted each other. Because the testimony was not conflicting, Sims' counsel was not remiss in failing to raise that issue during the trial.

Apparently, with his self-defense claim in mind, Sims also asserts in his postconviction motion that his trial counsel failed "to show intent by the victim against [Sims], when the victim had a gun, and [Sims] was not armed." In support of this assertion, Sims' motion cites testimony that when Sims first confronted the victim concerning the victim's operation of a motor vehicle, the victim pointed a handgun at Sims. However, Sims left the area after this incident, but later returned to the area and shot the victim. While the record does show that the victim did point a firearm at Sims during the initial confrontation, the record also shows that the victim did not point a weapon at Sims after he returned following the initial confrontation.

Sims does not lucidly explain the precise basis of his complaint regarding his trial counsel's failure to "show intent by the victim against [Sims]." As stated, however, Sims'

postconviction motion does no more than assert that he received ineffective assistance of counsel because his trial counsel was unsuccessful in arguing that Sims acted in self-defense. However, an unfavorable result does not, by itself, support a claim of ineffective assistance of counsel. See *State v. Colgrove*, 207 Neb. 496, 299 N.W.2d 753 (1980).

Sims also asserts in his motion that his trial counsel was ineffective because his trial counsel, with Sims' consent, stipulated that the victim died as a result of wounds from a shotgun blast. It is apparent from the record, however, that trial counsel was attempting to prevent the introduction of graphic evidence of the victim's wounds. The strategic decision to enter into a stipulation regarding the cause of the victim's death is, by itself, insufficient to sustain a claim of ineffective assistance of counsel. See *State v. Nielsen*, 243 Neb. 202, 498 N.W.2d 527 (1993) (a strategic decision to call, or not to call, particular witnesses will not, without more, sustain a finding of ineffectiveness of counsel).

While Sims also asserts that his trial counsel did not explain Sims' right to face the pathologist as a witness against him, Sims' motion contains no factual allegation which, if proven, would show that he was prejudiced by the stipulation regarding the victim's cause of death or that the result of the trial might have been different if the pathologist had been required to testify. Sims does allege that "[t]he [p]athologist would have testified that the victim did not die immediately, which contradicts the [S]tate's theory of premeditation, and deliberation." This, however, is simply a non sequitur assertion. The record does show that the victim died a short time after he was wounded rather than immediately upon being shot. However, such evidence has no bearing upon the question whether Sims acted with deliberation and premeditation when he shot the victim.

Sims finally claims that his trial counsel failed to show that Doris Butler was not an eyewitness to the shooting. In making this claim, Sims cites the testimony of a police officer who testified that he interviewed Butler and also some of the eyewitnesses to the shooting. Sims implicitly suggests that this officer testified that Butler was an eyewitness to the shooting

and asserts that his attorney should have impeached such testimony. However, a review of the testimony shows that the officer did not testify that Butler was a witness; he only testified that he interviewed Butler, as well as eyewitnesses to the shooting. In fact, it is eminently clear from the evidence presented at trial that Butler was not an eyewitness to the shooting, and Sims' trial counsel was not deficient in any way with respect to that issue.

In addition to his claim of ineffective assistance of counsel, Sims also objects to statements made outside of the presence of the jury by the trial judge. This issue is one which could have been raised by Sims in his direct appeal. It is well established that a motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal. *State v. Bowen, ante*, p. 204, 505 N.W.2d 682 (1993). Nevertheless, we note that the statements made by the trial judge were directed only to counsel during the discussion of Sims' motion to strike the testimony of a witness who had rendered aid to the victim. That witness described the victim's wounds, and Sims sought to strike the description of the wounds. In overruling the motion to strike that testimony, the trial court stated:

> The question of the type of wounds, the nature of the wounds, that's very important in a first degree murder, whether he shot him high or low. That's a question of fact for this jury to determine, if the man is just going to hurt him to stop him he would shoot him in the foot. He wouldn't shoot him in the heart. I will overrule your motion.

Again, these statements were made outside of the presence of the jury. Furthermore, the record does not show, nor is there an allegation, that such statements were included in the jury instructions with respect to Sims' self-defense claim. Despite this, Sims claims that "[t]he trial court decided prejudicially how [Sims] should have shot the victim in a [sic] self defense [and] was prejudiced in determining how [Sims] should have defended himself." We must conclude, however, the trial court's statement, outside the presence of the jury and in the context in which it was made, did not result in prejudice to Sims or violate

his constitutional rights.

Lastly, Sims objects to the testimony of Jack O'Donnell, a police officer who testified at trial, and claims that a portion of that testimony is inadmissible hearsay. Again, this is an issue which could have been raised in the direct appeal. We note, however, that O'Donnell testified regarding statements which were made by Sims following the shooting. A statement is not hearsay if it is offered against a party and is the party's own statement. See Neb. Evid. R. 801(4)(b)(i). Consequently, contrary to Sims' assertion, O'Donnell's testimony was properly allowed.

Because the record affirmatively establishes that Sims is not entitled to relief, the district court properly denied Sims an evidentiary hearing on his motion for postconviction relief and properly overruled that motion. Consequently, the judgment of the district court is affirmed.

AFFIRMED.

SHANAHAN, J., not participating.

FLORIST SUPPLY OF OMAHA, INC., APPELLEE, V. ADDIE PROCHASKA AND JANE POOLE, INDIVIDUALLY AND DOING BUSINESS AS PETAL PUSHER FLORAL SHOP, APPELLANTS.

509 N.W.2d 209

Filed December 23, 1993. No. S-90-1188.

1. **Open Accounts: Pleadings.** Neb. Rev. Stat. § 25-837 (Reissue 1989) is merely permissive and provides a form that may be used in pleading an action upon an account or instrument for the unconditional payment of money only.
2. **Pleadings: Appeal and Error.** Any error or defect in the pleadings which does not affect the substantial rights of the adverse party must be disregarded.
3. **Appeal and Error.** An appellate court will not consider errors which are assigned but not discussed in the proponent's brief.
4. **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.

Petition for further review from the Nebraska Court of Appeals, HANNON, IRWIN, and WRIGHT, Judges, on appeal thereto from the District Court for Buffalo County, RONALD D. OLBERDING, Judge, on appeal thereto from the County Court for Buffalo County, JOHN P. ICENOGLE, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

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

Thomas W. Tye II and Gary E. Brollier, of Tye, Hopkins & Tye, for appellee.

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

PER CURIAM.

Florist Supply of Omaha, Inc. (Florist Supply), the plaintiff, brought this action to collect $6,401.68 due on an open account from appellants Addie Prochaska and Jane Poole, individually and doing business as Petal Pusher Floral Shop. The amount claimed by Florist Supply included $1,241.34 in interest charges which Florist Supply had added to the appellants' account. Following a trial, the county court deducted those interest charges from the $6,401.68 claimed by Florist Supply and entered a $5,160.34 judgment in its favor. After the district court had affirmed that judgment, the Nebraska Court of Appeals reversed the judgment, holding that it was error to overrule the appellants' demurrer to Florist Supply's petition. See *Florist Supply of Omaha v. Prochaska*, 2 NCA 78 (1993). This court then granted Florist Supply's petition for further review.

Neb. Rev. Stat. § 25-837 (Reissue 1989) states in part:

> In an action, counterclaim or setoff, founded upon an account, promissory note, bill of exchange, or other instrument for the unconditional payment of money only, it shall be sufficient for the party to give a copy of the account or instrument, with all credits and endorsements

> thereon, and to state that there is due to him on such account or instrument, from the adverse party, a specified sum, which he claims with interest.

The Court of Appeals reasoned that under the statute, there are two methods of suing on an account. The first method is to attach a copy of the account to the petition. The second method is to set out in the petition a copy of the account or a statement of the account. The Court of Appeals then concluded that as no account had been attached to the petition and the petition itself did not set out a statement of the account with specificity, the petition failed to state a cause of action, and, thus, the appellants' demurrer should have been sustained.

However, § 25-837 is permissive and says what may be done to plead a suit on an account. The statute does not say that in an action on an account, a petition which does not include an attached copy of the account, or does not set out a copy of the account therein, fails to state a cause of action.

The petition alleges that at the appellants' behest, Florist Supply opened an account for the appellants on April 23, 1985; that from and after that time Florist Supply provided to the appellants products and services through June 10, 1988; that only one payment, in the amount of $53.13, had been made on the account since March 10, 1987; that due demand for payment had been made 90 days prior to the filing of the petition; and that there is due and owing on the account $6,401.68.

While the petition was subject to being made more definite and certain by setting forth the details of the claimed indebtedness, and the appellants' motion seeking such should have been sustained, the petition nonetheless stated a cause of action, and the appellants' demurrer was thus properly overruled. As the appellants have not shown they suffered any prejudice by the erroneous ruling on their motion to make more definite and certain, we do not concern ourselves with that issue. Neb. Rev. Stat. § 25-853 (Reissue 1989) states: "The court in every stage of an action must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect."

Because the Court of Appeals held that it was error to overrule the appellants' demurrer, it did not reach other issues raised in the appeal to that court. In the interest of judicial economy, we now address those issues, rather than remanding the action for further consideration by the Court of Appeals.

The appellants also assigned as error the trial court's overruling of their foundational objection to the testimony of Florist Supply's president, O.V. Nielson. However, the appellants fail to discuss the basis for this assignment of error. An appellate court will not consider errors which are assigned but not discussed in the proponent's brief. See *Grote v. Meyers Land & Cattle Co.*, 240 Neb. 959, 485 N.W.2d 748 (1992). In this regard, we also note that Florist Supply has not cross-appealed and has assigned no error with respect to the trial court's ruling on Florist Supply's claim for interest.

Finally, the appellants argue that the judgment awarded to Florist Supply is not supported by the evidence. The evidence presented shows that the appellants opened their account with Florist Supply in 1985 and continued to purchase materials on open account until June 10, 1988. The evidence presented also establishes the amount due on that account. 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. *Properties Inv. Group v. Applied Communications*, 242 Neb. 464, 495 N.W.2d 483 (1993); *Dowd v. First Omaha Sec. Corp*, 242 Neb. 347, 495 N.W.2d 36 (1993). Suffice to say that the evidence amply supports Florist Supply's judgment.

The judgment of the Court of Appeals is reversed, and the cause is remanded to the Court of Appeals with directions to reinstate the judgment entered by the trial court.

REVERSED AND REMANDED WITH DIRECTIONS.

TOMMY E. PLAMBECK, APPELLANT, V. UNION PACIFIC RAILROAD COMPANY, A CORPORATION, APPELLEE.

509 N.W.2d 17

Filed December 23, 1993. No. S-91-747.

1. **Summary Judgment.** Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Contracts: Appeal and Error.** Whether a contract is ambiguous is a question of law. When an appellate court is deciding questions of law, the court has an obligation to resolve the questions independent of the conclusions reached by the trial court.
3. **Contracts: Words and Phrases.** A document is ambiguous if a word, phrase, or provision in the document has, or is susceptible of, at least two reasonable but conflicting interpretations.
4. **Contracts: Evidence.** If the contract is ambiguous, the meaning of the contract is a question of fact, and a court may consider extrinsic evidence to determine the meaning of the contract.
5. **Contracts.** Although the language of a document may be clear and unambiguous, a latent ambiguity exists when collateral facts make the meaning of the contract uncertain.

Petition for further review from the Nebraska Court of Appeals, IRWIN and MILLER-LERMAN, Judges, and NORTON, District Judge, Retired, on appeal thereto from the District Court for Douglas County, JAMES M. MURPHY, Judge. Judgment of Court of Appeals reversed, and cause remanded for further proceedings.

Thomas A. Gleason for appellant.

Richard J. Hautzinger and Kathleen J. Ford for appellee.

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

WHITE, J.

Tommy E. Plambeck appeals from a decision of the Nebraska Court of Appeals that affirmed the summary judgment granted by the district court in favor of appellee, Union Pacific Railroad Company (Union Pacific). The district court held that a general release and covenant not to sue (the

release) barred Plambeck's cause of action. We reverse the decision of the Court of Appeals that affirmed the decision of the district court, and we remand the cause for further proceedings.

Plambeck began working for Union Pacific in June 1978 as a photographer in its public relations department. Plambeck was a nonunion employee, and his employment was not the subject of a written contract or labor agreement.

In July 1979, Plambeck fell and injured his back while on assignment for Union Pacific. From the time of his injuries until 1986, Plambeck worked intermittently because of his injuries. Plambeck underwent back surgery in February 1986 and then remained off work. In September, Plambeck met with his supervisors and discussed his rehabilitation and return to work, with a target date of October. Plambeck contends that his supervisors continually reassured him that he would not lose his job.

Toward the end of 1986, Union Pacific laid off employees pursuant to an involuntary force-reduction program. Plambeck was one of the employees who was terminated under the program. Plambeck received $16,000 as severance pay and was asked to sign a release form. Plambeck and his counsel added a paragraph to the release form, and then, on December 30, Plambeck signed the release. The release, including the paragraph added by Plambeck, states:

> In consideration of the benefits provided me under the terms and conditions of the Union Pacific Railroad Company Involuntary Force Reduction Program, I hereby release and forever discharge Union Pacific Railroad Company, Missouri Pacific Railroad Company, The Western Pacific Railroad Company, their parents, subsidiaries ("the Company"), officers, agents and employees *from any and all claims, causes of action and liabilities of any kind or nature arising out of my employment at, or termination of my non-agreement employment* from Union Pacific Railroad Company, Missouri Pacific Railroad Company, The Western Pacific Railroad Company, or any of their subsidiary companies. I further agree not to institute any proceedings against the

> Company, its officers, agents and employees, *based on any matter relating to my employment at, or termination of my non-agreement employment* from the Company.
>
> This General Release and Covenant Not to Sue is subject to the following exceptions. Tom Plambeck reserves to himself, and does not waive, impair, or prejudice his claims against the Union Pacific Railroad Company, or its subsidiaries, employees, agents, or assigns *his claims arising from a fall from a ladder at the Omaha Shops occurring July 13, 1979,* and presently in suit at Doc. 817, No. 210, District Court of Douglas County, Nebraska, *or any other claims available related to his health* for which Union Pacific Railroad Company, its subsidiaries, employees, agents, or assigns may be liable.
>
> I acknowledge that this Program and this document have been fully explained to me and I understand its terms.

(Emphasis supplied.)

The pending action referred to in the second paragraph of the release was Plambeck's personal injury claim under the Federal Employers' Liability Act. In that action, a jury awarded Plambeck $9,100.37.

In November 1989, Plambeck filed a wrongful termination action against Union Pacific. Plambeck alleges that under Union Pacific's written rehabilitation program, Union Pacific was required to continue to employ Plambeck. Union Pacific filed a motion for summary judgment, contending that Plambeck's action was barred by the release that he signed when he was terminated. After a hearing, the district court agreed with Union Pacific and granted summary judgment.

Plambeck appealed the summary judgment to the Court of Appeals. In that appeal, Plambeck argued that the release is ambiguous regarding which claims against Union Pacific he had relinquished and which claims against Union Pacific he had preserved. The Court of Appeals held, as a matter of law, that the language of the release is not ambiguous.

In the present appeal, Plambeck argues that the district court erred in granting the summary judgment because there is a genuine issue of material fact regarding the interpretation of the

release signed by Plambeck. Specifically, Plambeck contends that the language "or any other claims available related to his health for which Union Pacific . . . may be liable" in the paragraph added by Plambeck modifies or negates the general release from liability related to his termination. Plambeck further contends that extrinsic evidence will establish that his intent in adding the second paragraph was to permit him to assert any claims related to his injuries, including the fact that he was wrongfully terminated because of his injuries. Plambeck argues that because the language is ambiguous, there is a question of fact whether his claim for wrongful termination is barred by the release, and, thus, the summary judgment was improper.

Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *VonSeggern v. Willman, ante* p. 565, 508 N.W.2d 261 (1993); *Gould v. Orr, ante* p. 163, 506 N.W.2d 349 (1993); *Economy Preferred Ins. Co. v. Mass*, 242 Neb. 842, 497 N.W.2d 6 (1993). Whether the summary judgment was proper depends on whether the language of the release is ambiguous. If the release is not ambiguous, then summary judgment was proper; if the release is ambiguous, then summary judgment was not proper because the court faced a question of fact—how to interpret the release.

Whether a contract is ambiguous is a question of law. When an appellate court is deciding questions of law, the court has an obligation to resolve the questions independent of the conclusions reached by the trial court. *VonSeggern, supra*; *Bell Abstract & Title v. Caro, Inc.*, 243 Neb. 576, 500 N.W.2d 834 (1993); *Crowley v. McCoy*, 234 Neb. 88, 449 N.W.2d 221 (1989); *Knox v. Cook*, 233 Neb. 387, 446 N.W.2d 1 (1989). A document is ambiguous if a word, phrase, or provision in the document has, or is susceptible of, at least two reasonable but conflicting interpretations. *Crowley, supra*; *Knox, supra*. If a contract is ambiguous, the meaning of the contract is a question of fact, and a court may consider extrinsic evidence to

determine the meaning of the contract. *State v. Commercial Casualty Ins. Co.*, 125 Neb. 43, 248 N.W. 807 (1933). See, *IRT Property Co. v. Papagayo, Inc.*, 112 N.C. App. 318, 435 S.E.2d 565 (1993); 30 Am. Jur. 2d *Evidence* § 1069 (1967).

Although the language of a document may be clear and unambiguous, a latent ambiguity exists when collateral facts make the meaning of the contract uncertain. 4 Samuel Williston, A Treatise on the Law of Contracts § 627 (Walter H. Jaeger 3d ed. 1961). See, also, *Younker Brothers, Inc. v. Westroads, Inc.*, 196 Neb. 168, 241 N.W.2d 679 (1976) (recognizing a latent ambiguity in a lease agreement); *Countryside Casualty Co. v. Grant*, 269 Ark. 526, 601 S.W.2d 875 (1980); *IRT Property Co., supra*. For example, this court, in contested-will cases, has stated that if two or more persons satisfy a description of one devisee, there is a latent ambiguity, and extrinsic evidence is admissible to disclose and remove that ambiguity. *In re Estate of Bernstrauch*, 210 Neb. 135, 313 N.W.2d 264 (1981).

In the present case, the collateral fact is Plambeck's claim for wrongful termination based on his health problems. In light of this particular claim, the release is subject to at least two reasonable but conflicting interpretations. Plambeck's claim could fall within either the *release* from liability for termination or the *exception* to the release for health-related claims. As a matter of law, we find that Plambeck's claim illustrates an ambiguity which cannot be resolved from the face of the document.

When a contract is ambiguous, the meaning of the contract is a question of fact, and extrinsic evidence is admissible to remove the ambiguity. There exists a genuine issue of material fact regarding the meaning of the release, and, thus, summary judgment was improper. We reverse, and remand the cause for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

CAPORALE, J., dissenting.

I must dissent. In the first instance, it seems to me that the majority overlooks a most basic tenet of contract law, namely, that any ambiguity in a contract will be construed against the

drafter and be given the construction the other party would be fairly justified in giving it. See *Brockley v. Lozier Corp.*, 241 Neb. 449, 488 N.W.2d 556 (1992). No one claims there is any ambiguity (latent, patent, or of any other description) in the portion of the document drafted by the defendant-appellee employer, Union Pacific Railroad Company. Rather, the purported ambiguity resides in the portion of the document drafted by the plaintiff-appellant employee, Tommy E. Plambeck. Thus, if the claimed ambiguity actually existed, it would have to be construed against the employee.

But a review of the relevant rules demonstrates that there is no ambiguity. It must be borne in mind that the fact that the parties to a document have or suggest opposing interpretations does not necessarily, or by itself, compel a conclusion that the document is ambiguous. *Baker's Supermarkets v. Feldman*, 243 Neb. 684, 502 N.W.2d 428 (1993). Quite the contrary, a contract must receive a reasonable construction so as to give effect to the intention of the parties and carry out, rather than defeat, the inherent purpose for which it was executed. See *General Motors Acceptance Corp. v. Blanco*, 181 Neb. 562, 149 N.W.2d 516 (1967). Moreover, a contract must be construed as a whole, and, if possible, effect must be given to every part thereof. *Baker's Supermarkets, supra.*

The termination is the reason the employee received $16,000 and signed the contract. That being so, it cannot reasonably be contended that the employee reserved the right to challenge the termination of his employment even if the termination arose out of the condition of his health. Thus, the reservation of "any other claims available related to his health" cannot reasonably be said to refer to health conditions resulting in the termination of employment, but to other health claims, such as might arise because the employee was exposed to some delayed-action disease-producing agent or as might arise from a health condition unknown at the time the contract was executed. Known health claims which the employee intended exempted from the general terms of the agreement should have been specifically itemized by him, as he did the then-pending lawsuit.

It seems to me the Court of Appeals correctly applied the law

of contracts as we had heretofore declared it to be. Since the majority opinion does not directly overrule any of our prior cases, what the law may be at the moment is, regrettably, anyone's guess.

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

ROBERT E. WHEELER, APPELLANT, V. NEBRASKA STATE BAR ASSOCIATION, APPELLEE.

508 N.W.2d 917

Filed December 23, 1993. No. S-92-268.

1. **Demurrer: Pleadings.** In considering 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 facts not alleged, make factual findings to aid the pleading, or consider evidence which might be adduced at trial.
2. **Pleadings: Words and Phrases.** A statement of facts sufficient to constitute a cause of action means a narrative of the events, acts, and things done or omitted which shows a legal liability of the defendant to the plaintiff.
3. **Demurrer: Pleadings.** In ruling on a demurrer, the petition is to be construed liberally; if as so construed the petition states a cause of action, the demurrer is to be overruled.
4. _____: _____. If from the facts stated in the petition it appears that the plaintiff is entitled to any relief, a general demurrer will not lie.
5. **Libel and Slander.** The question of whether a particular publication is defamatory is, in the first instance, a question of law for the court.
6. _____. In determining whether a statement implies a provably false factual assertion, both the language of the statement and the context in which the statement was made must be examined.
7. _____. Ratings, being by their very nature subjective, cannot imply a provably false factual assertion.

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

Robert E. Wheeler, pro se.

Paula J. Metcalf, Douglas J. Peterson, and James A. Snowden, of Knudsen, Berkheimer, Richardson & Endacott, for appellee.

HASTINGS, C.J., BOSLAUGH, CAPORALE, FAHRNBRUCH, and LANPHIER, JJ., and GRANT, J., Retired.

CAPORALE, J.

I. STATEMENT OF CASE

After the district court sustained the defendant-appellee Nebraska State Bar Association's demurrer to the plaintiff-appellant Robert E. Wheeler's amended petition, Wheeler elected to stand on that pleading. The district court thereafter dismissed the suit. Although Wheeler assigns additional errors, they are subsumed in his claim that the district court erroneously determined that the amended petition failed to state a cause of action. The record failing to sustain that claim, we affirm the judgment of the district court without reaching the other assignments of error.

II. FACTS

Wheeler, a former county court judge, alleges in his amended petition that the bar association, in releasing its "NSBA Judicial Performance Evaluation - 1990" of judges to the media, caused him to lose the 1990 election for retention in his judicial office and, in addition, has caused him to suffer general damage to his reputation which prevents him from gaining further employment. Wheeler further pleads that the bar association had reason to know that many of the lawyer survey responses were invalid, but nonetheless published the allegedly defamatory survey without investigating the truth or validity of the individual responses.

Averring that the bar association published the defamatory survey without regard to the truth or validity of the individual lawyer statements, Wheeler maintains that, in concert with its members, the bar association acted to defame him by including obviously invalid and vindictive responses in its survey.

More specifically, Wheeler asserts that prior to the release of the survey, the bar association published a news release in which, under the heading "Lawyers to rate judges' performance," the bar association stated its intention to publish an evaluation to give " ' "voters solid information about the judiciary to help them make informed decisions on judges standing for retention this November" ' " and to give

" ' "each judge a report card of his or her strengths and weaknesses." ' " The release went on to claim that " '[t]o assure valid results, lawyers must base their evaluations on recent, first-hand experience with the judge . . . .' " Wheeler professes that in making those statements, the bar association told the public that the survey's results were "fair, valid, and solidly based upon the facts of the judge's judicial performance."

The amended petition continues by reciting that on that same day, the bar association issued to its nonjudicial members a form on which they were to evaluate state and federal judges in 21 performance characteristics from a 1, very poor performance, to a 5, excellent performance.

The results, Wheeler asserts, were then received by the bar association and tabulated for distribution to the public without any statistical analysis to test the validity of the results obtained; nor did the bar association interpret the data collected or establish a mean or standard of deviation, despite the existence of a recognized science for evaluating the responses and drawing conclusions from the results. Wheeler also states that the bar association mailed the survey to all of its active members in disregard for the truth and validity of its results despite ethical restraints of the bar association that prohibit members from answering the survey if the member has not had sufficient experience with the judge's performance. Further, he alleges that more lawyers responded to his evaluation than there were lawyers with sufficient information to answer the survey and that, in fact, the number of lawyers who responded to his evaluation were more than the number who answered the survey of other judges with comparable judicial workloads and exposure.

Wheeler declares that the bar association made no investigation of the validity of the individual responses, nor did it establish any standards to assure the fairness and validity in its survey form and method. He concludes that the bar association released and published the judicial evaluation with actual malice and avers that the survey was used as the basis of further libel and defamation in a campaign against his retention, which use and abuse the bar association could reasonably have foreseen. Such actions, according to Wheeler,

constitute libel per se.

Reciting that after the survey was published, he lost the retention election by a margin of 173 votes out of a total of 8,861 votes cast, he seeks, among other things, money damages for the loss of his position as a judge and for the loss of his reputation. In addition to claiming that he was defamed, he asserts he was deprived of his federal and state rights to procedural and substantive due process and trial by jury and that the denial of these rights may entitle him to relief under 42 U.S.C. § 1983 (1988).

III. ANALYSIS

1. Scope of Review

Before proceeding further, we once again recall that in considering 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 facts not alleged, make factual findings to aid the pleading, or consider evidence which might be adduced at trial. *St. Paul Fire & Marine Ins. Co. v. Touche Ross & Co.*, *ante* p. 408, 507 N.W.2d 275 (1993); *Gallion v. Woytassek*, *ante* p. 15, 504 N.W.2d 76 (1993); *Hamilton v. City of Omaha*, 243 Neb. 253, 498 N.W.2d 555 (1993); *LaPan v. Myers*, 241 Neb. 790, 491 N.W.2d 46 (1992).

A statement of facts sufficient to constitute a cause of action means a narrative of the events, acts, and things done or omitted which shows a legal liability of the defendant to the plaintiff. *St. Paul Fire & Marine Ins. Co.*, *supra*; *Gallion*, *supra*; *Hamilton*, *supra*; *Gerken v. Hawkins Constr. Co.*, 243 Neb. 157, 498 N.W.2d 97 (1993).

In ruling on a demurrer, the petition is to be construed liberally; if as so construed the petition states a cause of action, the demurrer is to be overruled. *St. Paul Fire & Marine Ins. Co.*, *supra*; *Matheson v. Stork*, 239 Neb. 547, 477 N.W.2d 156 (1991); *Widga v. Sandell*, 236 Neb. 798, 464 N.W.2d 155 (1991).

If from the facts stated in the petition it appears that the plaintiff is entitled to any relief, a general demurrer will not lie. *St. Paul Fire & Marine Ins. Co.*, *supra*; *Central Nebraska*

Public Power and Irrigation District v. Walston, 140 Neb. 190, 299 N.W. 609 (1941).

2. NATURE OF DEFAMATION

The question of whether a particular publication is defamatory is, in the first instance, a question of law for the court. *Silence v. Journal Star Printing Co.*, 201 Neb. 159, 266 N.W.2d 533 (1978). Obviously, the nature of the allegedly defamatory statement is critical; beginning with dictum in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974), *appeal after remand* 680 F.2d 527 (7th Cir. 1982), *cert. denied* 459 U.S. 1226, 103 S. Ct. 1233, 75 L. Ed. 2d 467 (1983), courts began to distinguish between statements of fact and opinion, holding that statements of opinion were protected by the First Amendment and thus not actionable. See *Moyer v. Amador Val. Jnt. Union Sc. Dist.*, 225 Cal. App. 3d 720, 275 Cal. Rptr. 494 (1990).

> Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact.

Gertz, 418 U.S. at 339-40.

Sixteen years later, the U.S. Supreme Court rejected what it called "the creation of an artificial dichotomy between 'opinion' and 'fact.' " *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19, 110 S. Ct. 2695, 111 L. Ed. 2d 1 (1990), *on remand sub. nom Milkovich v. News-Herald*, 70 Ohio App. 3d 480, 591 N.E.2d 394, *cause dismissed* 59 Ohio St. 3d 702, 571 N.E.2d 137 (1991). The high court explained that the language in *Gertz* had been interpreted too broadly and was not intended to create a wholesale defamation exemption for anything that might be labeled opinion. Instead, the *Milkovich* Court made clear that a false assertion of fact could be libelous even though couched in terms of opinion, while still recognizing that statements that cannot be interpreted as stating actual facts are entitled to protection. Thus, the threshold question in defamation suits is whether a reasonable fact finder could conclude that the published statements imply a provably false factual assertion.

The *Milkovich* Court determined that the statement before it—that a high school wrestling coach lied at a judicial hearing—implied an assertion of fact. In reversing the dismissal of *Milkovich*, the Court cited three reasons a jury could conclude that the statement accused Milkovich of perjury: first, the statement was not loose, figurative, or hyperbolic language which would negate the impression that the writer was seriously maintaining Milkovich committed the crime of perjury; second, the general tenor of the article did not negate the impression created by the defamatory language; and third, the connotation that Milkovich committed perjury is sufficiently factual to be susceptible of being proved true or false.

Although *Milkovich* rested in part on the previous holding in *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 106 S. Ct. 1558, 89 L. Ed. 2d 783 (1986), *appeal dismissed, cert. denied* 475 U.S. 1134, 106 S. Ct. 1784, 90 L. Ed. 2d 330, which was explicitly limited to cases involving media defendants, courts have extended *Hepps* and *Milkovich* to nonmedia defendants. *Don King Productions, Inc. v. Douglas*, 742 F. Supp. 778 (S.D.N.Y. 1990); *Dodson v. Dicker*, 306 Ark. 108, 812 S.W.2d 97 (1991); *Kahn v. Bower*, 232 Cal. App. 3d 1599, 284 Cal. Rptr. 244 (1991).

The *Milkovich* test places emphasis on the objectivity and verifiability of a statement. In so doing, the approach is similar to pre-*Milkovich* cases using the fact-opinion analysis.

California courts use a " 'totality of the circumstances' " test to establish the objectivity and verifiability of a statement, examining first the language of the statement and then the context in which the statement was made. *Baker v. Los Angeles Herald Examiner*, 42 Cal. 3d 254, 260, 721 P.2d 87, 90, 228 Cal. Rptr. 206, 209 (1986), *cert. denied* 479 U.S. 1032, 107 S. Ct. 880, 93 L. Ed. 2d 834 (1987), *reh'g denied* 480 U.S. 912, 107 S. Ct. 1360, 94 L. Ed. 2d 531. See, also, *Milkovich, supra* (Brennan, J., dissenting).

In such an analysis, a court looks at the nature and full content of the communication and to the knowledge and understanding of the audience to whom the publication was directed. *Baker, supra*. A multifactor test assessing the allegedly defamatory statement in the totality of the circumstances in which it appears has been adopted in other states as well.

Information Control v. Genesis One Computer Corp., 611 F.2d 781 (9th Cir. 1980); *Burns v. McGraw-Hill Broadcasting Co., Inc.*, 659 P.2d 1351 (Colo. 1983); *Cole v. Westinghouse Broadcasting Co., Inc.*, 386 Mass. 303, 435 N.E.2d 1021 (1982), *cert. denied* 459 U.S. 1037, 103 S. Ct. 449, 74 L. Ed. 2d 603. See, also, *Ollman v. Evans*, 750 F.2d 970 (D.C. Cir. 1984), *cert. denied* 471 U.S. 1127, 105 S. Ct. 2662, 86 L. Ed. 2d 278 (1985) (four factors used to assess whether statement viewed as fact: specificity of the statement, its verifiability, the literary context, and the broader setting in which the statement appears, e.g., part of a public debate); *Lester v. Powers*, 596 A.2d 65 (Me. 1991).

Indeed, *Letter Carriers v. Austin*, 418 U.S. 264, 94 S. Ct. 2770, 41 L. Ed. 2d 745 (1974), and *Greenbelt Pub. Assn. v. Bresler*, 398 U.S. 6, 90 S. Ct. 1537, 26 L. Ed. 2d 6 (1970), appear to have applied the analysis later delineated in *Milkovich*. In *Letter Carriers*, three nonunion employees of the postal service were included on a list of names titled "List of Scabs" circulated by the Letter Carriers Union. A piece of trade union literature defining a "scab" as a " 'traitor to his God, his country, his family and his class' " was attached to the list. (Emphasis omitted.) 418 U.S. at 268. In determining that the description of "scab" was opinion, the *Letter Carriers* Court considered both its specific linguistic context and its broader social setting. The Court found that "traitor," in the context of the union literature, was used in a loose, figurative sense and could not be taken for an assertion that the employees had committed the criminal offense of treason. The Court further noted that because the statements appeared in union literature, readers would be alerted by virtue of the broad context in which the statement was made that the statement was opinion.

Letter Carriers relied upon *Greenbelt Pub. Assn.* for the proposition that the allegedly libelous language must be evaluated in its broader context to assess whether a reader would have understood the allegation to be a statement of fact. In *Greenbelt Pub. Assn.*, a developer was attempting to secure a zoning variance to construct high-density housing. The developer's negotiating tactics were characterized as "blackmail" in the local paper, and he sued, alleging that the articles imputed a crime to him. The *Greenbelt Pub. Assn.*

Court reversed the developer's judgment against the newspaper which had printed this statement, concluding that as a matter of constitutional law, the word "blackmail" in these circumstances was not libel when reported. The *Greenbelt Pub. Assn.* Court then held that in light of the full context of the articles, a reader would have understood the blackmail statement as a criticism of the developer's negotiating tactics rather than as an actual criminal charge.

We hereby adopt the use of the totality of the circumstances analysis in determining whether a statement implies a provably false factual assertion. In applying that analysis to the case at hand, we must determine whether the allegedly defamatory statements of the bar survey had a precise meaning, likely to give rise to factual implications capable of proof or disproof. The complexity inherent in determining whether a statement is verifiable can be seen in the case of *Ollman, supra*. Therein, a professor stated that Ollman had no status within the political science profession. The *Ollman* court ruled that the quotation of the professor was protected as opinion and held that the no status charge would plainly appear to the average reader to be rhetorical hyperbole in light of Ollman's position as a professor at one university and his nomination as chairman of an academic department at another. One dissenter, however, reasoned that the statement was verifiable, such as by conducting a poll of American Political Science Association members as to their opinion, on a scale of 1 to 10, of the scholarly value of Ollman's work (Wald, J., dissenting in part). Contra, *Cepeda v. Cowles Magazines and Broadcasting, Inc.*, 328 F.2d 869, 870 (9th Cir. 1964), *cert. denied* 379 U.S. 844, 85 S. Ct. 51, 13 L. Ed. 2d 50 (remarks that a baseball player had " 'doghouse status' " not protected).

In the instant case, lawyers were asked to rate a judge with respect to knowledge and application of substantive law and rules of evidence and procedure; ability to perceive factual and legal issues; awareness of recent legal developments; an absence of bias or prejudice in civil and criminal cases; whether the judge was influenced by the nature of the case, identities of lawyers or litigants involved, or improper ex parte approaches; patience and courtesy to lawyers, litigants, witnesses, and

jurors; overall judicial temperament and demeanor; efficiency in docket management; punctuality in attending court proceedings and promptness in making rulings and giving decisions; attentiveness to arguments and testimony; management and control of trial; efficiency and conscientiousness as a worker; quality and clarity of written opinions; and an absence of undue personal observations or criticisms of litigants, judges, and lawyers from the bench or in written opinions. In addition, lawyers were asked to indicate whether the judge's health was such that the judge could effectively discharge the duties of the judicial office and whether the judge should be retained in office.

In a case very similar to the one at hand, *Aisenson v. American Broadcasting Co.*, 220 Cal. App. 3d 146, 269 Cal. Rptr. 379 (1990), a superior court judge brought a defamation suit against a television station as a result of the station's reporting that the judge had received the lowest score of all local superior court judges in an opinion poll of attorneys conducted by the station. The poll posed six questions similar to those in the poll now before us: Did the judge have the appropriate demeanor, temperament, courtesy? Was the judge usually decisive? Did the judge make efficient use of court time? Did the judge tend to impose appropriate sentences? Did the judge know the law? How did the judge rate overall? The attorneys ranked the judges on a 1-to-10 scale, with 10 as excellent, and, as in this case, were instructed to evaluate only those judges with whom they had enough experience to form a fair evaluation. The *Aisenson* court found that the poll reflected the opinions of the attorneys who participated in it, and those opinions are protected regardless of whether they are well founded or utterly wrong. However, the court reasoned that when the station broadcast the opinions of the attorneys, the opinions became facts and not editorial comment or criticism. Hence, the station would be liable only if it aired false statements of fact by not reporting the results of the poll truthfully and accurately. Finding that there was no evidence that the completed ballots had been tampered with, that the computer printout did not reflect the opinions expressed by the attorneys being polled, or that the data processing cards

inaccurately encoded the information contained in the ballots, the court ruled that the responses were not defamatory, noting that virtually every assessment of judicial performance short of a purely numerical comparison of verdicts or sentences must rely on the subjective opinions of observers. Therefore, to form the basis for a cause of action for defamation, the survey results must be verifiable.

Wheeler argues that some of the characteristics on which he was rated are subject to verification. He points out that the matter of docket control, punctuality, promptness in rendering opinions, and the quality of his opinions can be verified through local court records. In much the same manner, he asserts that his knowledge of the law can be discerned from his law school transcripts and his teaching abilities in new-judge orientations and seminars. Further, he argues that courtesy and judicial temperament are "not entirely subjective" and are determinable from tape recordings of each of the proceedings. Wheeler further urges that the matter of improper influences is verifiable, based on the number of appeals filed from his decisions.

Thus, contrary to the position taken by the *Aisenson* plaintiff, Wheeler complains that the bar association " 'did not interpret the data collected nor was it modified or altered in any manner,' " that " '[i]t was reported as received,' " and that "all survey returns [were included] in the published results." Assuming, without deciding, that the sources Wheeler points to could have some relevance in determining the characteristics on which he was judged, it is still clear that the survey was a compilation of attorneys' subjective ratings on each characteristic. As such, the ratings given him represented a collective subjective evaluation, which by its very nature ranged from well founded to utterly wrong. See *Botos v. Los Angeles County Bar Ass'n*, 151 Cal. App. 3d 1083, 199 Cal. Rptr. 236 (1984). Whether Wheeler receives a 1, 2, 3, 4, or 5 on a particular characteristic comes down to a subjective interpretation by an individual attorney. A representation that a candidate is able and has proper character and temperament is simply a subjective expression of opinion. *Association of Bar of City of New York v. C.I.R.*, 858 F.2d 876 (2d Cir. 1988), *cert.*

denied 490 U.S. 1030, 109 S. Ct. 1768, 104 L. Ed. 2d 204 (1989). Ratings by their very nature will reflect the philosophy of those doing the rating and are nothing more than expressions of subjective evaluations concerning a judicial candidate's qualifications. There is simply no objective method to determine the rating an individual judge should receive in any given performance category; therefore, by their very subjective nature, ratings cannot imply a provably false factual assertion.

Nor was the nature of the subjective evaluations changed by the fact that the bar association elected to characterize them as providing solid information giving each judge a report card of his or her strengths and weaknesses. Although the characterization is hyperbolic, given the context in which made, it is, as the foregoing review of the law demonstrates, a permitted exaggeration. The bar association's representation that to assure valid results lawyers must base their evaluation on recent, first-hand experience merely describes the manner in which the bar association intended the lawyers to perform.

It may be that Wheeler was in reality a good judge; but if so, he was nonetheless perceived by those who rated him to be otherwise. The raters had a right to their subjective views, and the bar association had the right to publish those collective impressions.

That being the situation, the judicial performance evaluation was, as a matter of law, not defamatory; Wheeler thus failed to state a defamation cause of action.

3. Other Causes

Wheeler's claim that he also stated other causes of action, as delineated in the last paragraph of part II of this opinion, is predicated on the existence of a cause of action for defamation. Since he failed to state such an action, it necessarily follows that he stated no other cause of action.

IV. JUDGMENT

Accordingly, the judgment of the district court is affirmed.

AFFIRMED.

HASTINGS, C.J., not participating in the decision.

WHITE, J., not participating.

STATE OF NEBRASKA, APPELLEE, v. JOSE MENDEZ, APPELLANT.
508 N.W.2d 924

Filed December 23, 1993. No. S-93-105.

Appeal from the District Court for Scotts Bluff County: ALFRED J. KORTUM, Judge. Affirmed.

Byron M. Johnson, Scotts Bluff County Public Defender, and Bernard J. Straetker for appellant.

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

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

PER CURIAM.

Defendant was charged with the crime of sexual assault in the first degree, in violation of Neb. Rev. Stat. § 28-319(1)(c) (Reissue 1989). The information alleged that defendant, being older than 19, subjected a female child, less than 16, to sexual penetration. Defendant was convicted after a jury trial and was sentenced to a prison term of 2 to 3 years. He timely appealed.

Defendant assigns two errors, contending that the trial court erred in failing to sustain defendant's motion for a directed verdict when the evidence was insufficient to sustain defendant's conviction and in imposing an excessive sentence. We affirm.

With regard to the evidence question, our examination of the record shows that the State's evidence of defendant's guilt, if believed, was more than sufficient to support defendant's conviction. After proper warnings, defendant admitted to a police officer that he had committed the acts constituting sexual assault in the first degree on a 13-year-old girl. The girl testified to the same acts. Other witnesses testified that defendant had admitted the acts.

The statutory penalty for sexual assault in the first degree is from 1 to 50 years in prison. Defendant's sentence was well within that range. It was not excessive.

AFFIRMED.

IN RE GRAND JURY OF DOUGLAS COUNTY.
ERNIE W. CHAMBERS, APPELLANT, V. DOUGLAS COUNTY DISTRICT COURT, APPELLEE.

509 N.W.2d 212

Filed December 30, 1993. No. S-91-776.

1. **Criminal Law: Juries: Probable Cause: Indictments and Informations.** It is the duty of a grand jury to inquire into offenses against the criminal laws of the State of Nebraska alleged to have been committed within the limits of the county in and for which the grand jury is impaneled and sworn and to determine based on the evidence presented whether or not there is probable cause for finding indictments.
2. **Juries.** The members of a grand jury are sworn to secrecy.
3. **Juries: Indictments and Informations.** A grand jury's report shall not be made public except when it is filed with an indictment, when reporting on the condition of the county jail, or when a person or persons have requested a release and a judge of the district court finds that such release will exonerate that person or persons.
4. **Juries: Public Officers and Employees: Indictments and Informations.** In the absence of a statute authorizing such, a grand jury has no right to file a report reflecting on the character or conduct of public officers or citizens, unless it is accompanied or followed by an indictment charging such individuals with a specific offense against the state.
5. **Juries: Records.** Anyone who has been the subject of an unauthorized report by a grand jury has the right to have the report expunged from official records.

Appeal from the District Court for Douglas County: JAMES M. MURPHY, Judge. Reversed and remanded with directions.

Ernie W. Chambers, pro se.

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

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

BOSLAUGH, J.

Ernie W. Chambers appeals from the trial court's denial of his motion to expunge material from the report issued by the Douglas County Grand Jury, which was convened to investigate crimes connected with the collapse of the Franklin Community Federal Credit Union in Omaha, Nebraska.

On November 4, 1988, federal authorities assumed control of the Franklin Community Federal Credit Union. After much

publicity and many allegations, the Nebraska Legislature passed a resolution forming a committee to investigate allegations surrounding the closing of the credit union. Chambers, who was a member of the Legislature, was appointed vice chairperson of the committee, but later resigned from the committee.

On January 31, 1990, Robert Spire, then Nebraska's Attorney General, filed an application in the district court for Douglas County to convene a grand jury for the purpose of investigating allegations of criminal activity connected with the credit union.

The grand jury was convened and charged on March 19, 1990. On July 23, 1990, the grand jury completed its report and requested that it be filed and made public. After the report was filed with the district court, it was released to the public and publicized by the news media.

The report was a wide-ranging document that discussed numerous matters and individuals and even recommended action be taken in Washington County, Nebraska, against certain individuals named in the report. Chambers and many other persons were criticized in the report, and much of what was apparently testimony before the grand jury was summarized or otherwise discussed in the report.

Chambers filed a motion to expunge the page containing criticism of his involvement in the investigation of the credit union case and such other portions of the report as the court deemed fit. His motion was denied on July 17, 1991. Chambers has appealed to this court and assigned as error the district court's failure to grant his motion to expunge.

It is the duty of the grand jury to inquire into offenses against the criminal laws of the State of Nebraska alleged to have been committed within the limits of the county in and for which the grand jury is impaneled and sworn and to determine based on the evidence presented whether or not there is probable cause for finding indictments. Neb. Rev. Stat. §§ 29-1406(2)(a) and (e) and 29-1407 (Reissue 1989). The grand jury may, during its term, visit the county jail, examine it, and report its condition. Neb. Rev. Stat. § 29-1417 (Reissue 1989).

The members of the grand jury are sworn to secrecy. Neb.

Rev. Stat. §§ 29-1404 and 29-1405 (Reissue 1989). However,

> [a] certified or authorized reporter shall be present at all grand jury sessions. All grand jury proceedings and testimony from commencement to adjournment shall be reported. The reporter's notes and any transcripts which may be prepared shall be preserved, sealed, and filed with the court. No release or destruction of the notes or transcripts shall occur without prior court approval.

Neb. Rev. Stat. § 29-1407.01(1) (Reissue 1989).

The grand jury's report "shall not be made public except" when it is filed with an indictment, when reporting on the condition of the county jail, or when a person or persons have requested a release and the judge of the district court finds that such release will exonerate that person or persons. Neb. Rev. § 29-1420 (Cum. Supp. 1992).

In the absence of a statute authorizing such, a grand jury has no right to file a report reflecting on the character or conduct of public officers or citizens, unless it is accompanied or followed by an indictment charging such individuals with a specific offense against the state. *Kelley v. Tanksley*, 105 Ga. App. 65, 123 S.E.2d 462 (1961). See, also, *In re Grand Jury of Wabasha County*, 309 Minn. 148, 244 N.W.2d 253 (1976); *Simington v. Shimp*, 60 Ohio App. 2d 402, 398 N.E.2d 812 (1978). Furthermore, anyone who has been the subject of an unauthorized report by a grand jury has the right to have the report expunged from official records. *Kelley v. Tanksley, supra.*

In discussing various jurisdictions' opposition to grand jury reports which criticize specifically named individuals, the Ohio Court of Appeals stated:

> The Mississippi Supreme Court has stated that a grand jury report criticizing a named individual is a "conviction by innuendo" and not compatible with basic principles of due process and fairness. Other courts have referred to reports which single out unindicted individuals as a perversion of the grand jury system, the work of a lynch mob, and an odious practice. Several courts have pointed out that injury to an individual named in a report can arise not only from the grand jury proceeding, but also from

> the public's belief that the grand jury speaks with judicial authority. Further, any attempt by a named individual to rebut the contents of the report would not have, in the public's mind, the same "official weight" as the report's original accusation. Finally, at least one court has noted that legal remedies available to parties criticized in grand jury reports are often inadequate.

Simington v. Shimp, 60 Ohio App. 2d at 407-08, 398 N.E.2d at 816.

In the present case, the grand jury's report was not only critical of Chambers, but was also critical of several other individuals and state and local governmental bodies, without indicting any other persons for criminal offenses. The report only recommended indictment of three individuals for criminal offenses.

Section 29-1420 provides for publication of the grand jury's report only upon three exceptions, one being when the report includes indictments. The other exceptions for publication of the grand jury's report are not applicable in this case because the grand jury did not inspect the jail and there is no evidence that any persons requested the district court to publish the report for the purpose of exoneration.

Because the grand jury's report was not authorized for publication pursuant to § 29-1420, it should be expunged in its entirety from the records of the district court.

The judgment of the district court is reversed, and the cause is remanded to the district court, which is ordered to expunge the report of the grand jury in its entirety from the records of the court.

REVERSED AND REMANDED WITH DIRECTIONS.

LANPHIER, J., not participating.

TRANSAMERICA COMMERICAL FINANCE CORPORATION, APPELLEE, V. DENNIS ROCHFORD, APPELLANT.

509 N.W.2d 214

Filed December 30, 1993. No. S-91-806.

1. **Summary Judgment.** A summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences to be drawn therefrom and that the moving party is entitled to judgment as a matter of law.
2. **Statutes: Appeal and Error.** Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below.
3. **Uniform Commercial Code: Guaranty: Notice: Words and Phrases.** One who guarantees the payment of another's debt is a debtor entitled to notice pursuant to Neb. U.C.C. § 9-504(3) (Reissue 1992).
4. **Uniform Commercial Code: Assignments: Security Interests.** An assignment of a debt and of an interest in collateral under a security interest agreement is not a disposition of collateral as contemplated by Neb. U.C.C. § 9-504(1) (Reissue 1980).
5. **Assignments.** An assignment of either a fractional part of a single and entire right against an obligor or of a stated amount from such a right is operative as to that part or amount to the same extent and in the same manner as if the part had been a separate right, subject to the limitation that if the obligor has not contracted to make such a partial performance, no legal proceeding can be maintained by such an assignee against the obligor over his objection, unless all persons having collectively a right to the entire performance are enjoined in the proceeding.
6. **Guaranty: Debtors and Creditors.** Under an absolute guaranty of payment, the guarantor undertakes that if the obligation is not paid when due, the guarantor will pay it according to its terms without regard to whether the guaranteed person has exhausted all remedies against the primary debtor.
7. **Summary Judgment: Proof.** A party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law if the evidence presented for summary judgment remains uncontroverted. After the moving party has shown facts entitling it to a judgment as a matter of law, the opposing party has the burden to present evidence showing an issue of material fact which prevents judgment as a matter of law for the moving party.

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

Eugene L. Hillman, of McCormack, Cooney, Mooney, Hillman & Elder, for appellant.

Robert V. Ginn, Richard A. Drews, and MaryBeth Frankman, of Brashear & Ginn, for appellee.

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

HASTINGS, C.J.

Appellee, Transamerica Commercial Finance Corporation (Transamerica), brought this action against appellant, Dennis Rochford, on a personal guaranty executed by Rochford for the indebtedness of Mission Television and Appliance, Inc., doing business as Paramount Television and Appliance (Paramount), under the provisions of a security agreement. Rochford appeals the order of the district court in which the court overruled his motion for summary judgment, sustained Transamerica's motion for summary judgment, and entered a judgment against him in the amount of $248,714.15.

A summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences to be drawn therefrom and that the moving party is entitled to judgment as a matter of law. *Design Data Corp. v. Maryland Cas. Co.*, 243 Neb. 945, 503 N.W.2d 552 (1993); *In re Estate of Wells*, 243 Neb. 152, 497 N.W.2d 683 (1993).

Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below. *Douglas Cty. Bank & Trust v. Stamper, ante* p. 226, 505 N.W.2d 693 (1993); *In re Application of City of Lincoln*, 243 Neb. 458, 500 N.W.2d 183 (1993).

On February 28, 1989, Transamerica and Paramount entered into an inventory security agreement and power of attorney. Under the terms of that agreement, Transamerica agreed to extend credit to Paramount for the purchase of inventory, and Paramount granted to Transamerica a security interest in all of its collateral. On that same date, Rochford, president of Paramount, executed a personal guaranty, absolute in form, to secure the debt of Paramount to Transamerica. Paramount defaulted on the agreement by failing to make scheduled

liquidation payments to Transamerica in the amounts of $89,815.76 on May 25, 1990, and $78,745.25 on June 10, 1990. Pursuant to the terms of the agreement, Transamerica elected to terminate the agreement and declare the entire amount of indebtedness from Paramount to be immediately due and payable. As of June 25, 1990, the total amount of indebtedness was $442,257.52.

On August 10, 1990, Transamerica assigned to AT&T Commercial Finance Corporation (AT&T) that

> certain "Inventory Security Agreement and Power of Attorney" dated February 28, 1989 between Transamerica and Mission Television and Appliance, Inc. d/b/a Paramount Television and Appliance (hereinafter "Mission"), any and all debt incurred by Mission pursuant to that agreement, any other debt owed by Mission to Transamerica and on any other security agreements and any invoices and billing statements or documents created pursuant thereto, but the debt and instruments assigned pursuant to this paragraph shall only be assigned up to the amount of $350,000.00 in debt owed by Mission to Transamerica.

Transamerica further assigned to AT&T a security interest in and to "[a]ll inventory of whatever kind or nature in the possession, ownership or control of Mission Television and Appliance, Inc." As consideration for the assignment, AT&T paid Transamerica $175,092.88, which was determined to be the full wholesale value of Transamerica's interest in Paramount's inventory, plus an additional $50,000, for a total of $225,092.88. Transamerica did not notify Rochford of its intention to assign the security interest to AT&T.

Subsequent to the assignment, Transamerica initiated this action against Rochford under his personal guaranty. The district court entered judgment against Rochford in the amount of $217,751.66, which would appear to be the approximate difference between the balance owed by Paramount to Transamerica and the $225,092.88 which was the consideration for the assignment from Transamerica to AT&T, plus $30,962.50 accrued interest. On appeal, Rochford asserts that the district court erred in denying his motion for summary

judgment and in granting Transamerica's motion for summary judgment.

It is apparent that Transamerica brought this action for recovery under the terms of the guaranty agreement. However, Rochford alleges and argues that this was an action for a deficiency judgment under the provisions of article 9 of the Nebraska Uniform Commercial Code on secured transactions. Part 5 of article 9 deals with the remedies available under the code to a secured party upon the default of the debtor. If the collateral is not in the possession of the secured party, the secured party has the right to repossess under Neb. U.C.C. § 9-503 (Reissue 1992). The secured party may then propose to retain the collateral in satisfaction of the debt under Neb. U.C.C. § 9-505(2) (Reissue 1992) or sell, lease, or otherwise dispose of the collateral pursuant to Neb. U.C.C. § 9-504 (Reissue 1980). Section 9-504 provides, in pertinent part:

> (1) A secured party after default may sell, lease or *otherwise dispose* of any or all of the collateral in its then condition or following any commercially reasonable preparation or processing. . . .
>
> (2) If the security interest secured an indebtedness, the secured party must account to the debtor for any surplus, and, unless otherwise agreed, *the debtor is liable for any deficiency*. . . .
>
> (3) Disposition of the collateral may be by public or private proceedings and may be made by way of one or more contracts. Sale or other disposition may be as a unit or in parcels and at any time and place and on any terms but every aspect of the disposition including the method, manner, time, place and terms must be commercially reasonable. Unless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, *reasonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor*, if he has not signed after default a statement renouncing or modifying his right to notification of sale.

(Emphasis supplied.) As noted above, the debtor is ordinarily

entitled to notice prior to disposition of the collateral, and unless otherwise agreed, the debtor will be liable for any deficiency following the disposition.

One who guarantees the payment of another's debt is a debtor entitled to notice pursuant to § 9-504(3). *Bank of Burwell v. Kelley*, 233 Neb. 396, 445 N.W.2d 871 (1989); *American Honda Finance Corp. v. Bennett*, 232 Neb. 21, 439 N.W.2d 459 (1989).

Rochford asserts that he was entitled to notice of the "private sale" which was termed an "assignment" by Transamerica. However, as noted above, Transamerica argues that there was no sale or other disposition under § 9-504 because that section addresses the disposition of collateral, not the assignment of a security interest in the collateral.

Rochford does not refer us to any cases which would directly support the assertion that an assignment is a disposition under § 9-504. However, he argues that the transfer of title to the collateral is not essential for finding a disposition and cites cases from other jurisdictions to support that contention. For example, in *First City Bank—Farmer's Branch, Texas v. Guex*, 677 S.W.2d 25 (Tex. 1984), the debtor brought an action against the secured party bank, alleging wrongful disposition of his collateral, a boat and trailer. The bank had released the collateral to a third party, one Kaprielian, who had paid past due installments and signed a promissory note for the unpaid balance of the debt. When the debtor attempted to pay off the loan, he was told that the boat had been sold, although the sale had not been completed. The bank subsequently returned the promissory note to Kaprielian and advised the debtor he could recover the collateral from Kaprielian. When the collateral was recovered 14 months later, it was in a damaged condition. The bank argued that no disposition had taken place because there had been no sale or transfer of title of the collateral to Kaprielian. The court rejected this argument, stating:

> The transactions between the bank and Kaprielian constituted proceedings on any terms. Kaprielian took possession of the boat. The bank took her promissory note and received her check for past-due installments, repossession charges, and late charges. Whether title to

> the boat and trailer were vested in Kaprielian is immaterial. A disposition occurred. Our conclusion is again reinforced by the language of the statute itself. Had the legislature intended the meaning urged by the bank, they would have omitted "or otherwise dispose" after "sell" and "lease."

Id. at 28.

However in *Guex*, the collateral had been repossessed, and it was necessary to invoke the provisions of the code in order to protect the debtor's interests in the collateral. Although Rochford here contends that Transamerica "replevied the inventory and then sold its right, title and interest to the inventory while it remained in place," brief for appellant at 4, Transamerica asserts that while a replevin action was initiated against Paramount, that proceeding was dismissed and no writ of replevin was obtained. There is nothing in the record to indicate that the collateral at issue has been repossessed, and *Guex* can be distinguished on that basis.

Further, § 9-504(4), which deals with the rights of a subsequent purchaser of collateral, is also instructive as to the effect of a disposition: "When collateral is disposed of by a secured party after default, the disposition transfers to a purchaser for value all of the debtor's rights therein, *discharges the security interest* under which it is made and any security interest or lien subordinate thereto." (Emphasis supplied.) Here, there has been no repossession or disposition of the collateral itself, and the security interest has not been discharged, but has only been assigned to a third party. An assignment of a debt and of an interest in collateral under a security interest agreement is not a disposition of collateral as contemplated by § 9-504(1); that section refers to the fact that "[a] secured party after default may sell, lease or otherwise dispose of any or all of the *collateral*." (Emphasis supplied.)

Here the collateral was not disposed of, but, rather, the creditor's security interest in the collateral and debt was assigned to the extent provided in the agreement between Transamerica and AT&T.

> "An assignment of either a fractional part of a single and entire right against an obligor, or of a stated amount from

> such a right, is operative as to that part or amount to the same extent and in the same manner as if the part had been a separate right, subject to the limitation that if the obligor has not contracted to make such a partial performance no legal proceeding can be maintained by such an *assignee* against the *obligor over his objection*, unless all persons having collectively a right to the entire performance are enjoined in the proceeding."

(Emphasis supplied.) *First Nat. Bank of Wayne v. Gross Real Estate Co.*, 162 Neb. 343, 350, 75 N.W.2d 704, 708 (1956), quoting Restatement of Contracts § 156 (1932).

Under an absolute guaranty of payment, which was the case here, the guarantor undertakes that if the obligation is not paid when due, the guarantor will pay it according to its terms without regard to whether the guaranteed person has exhausted all remedies against the primary debtor. See *Nogg Bros. Paper Co. v. Bickels*, 233 Neb. 561, 446 N.W.2d 729 (1989).

Therefore, it is apparent that Transamerica was entitled to bring this action against Rochford, the guarantor, for the balance remaining due to Transamerica. We then turn to whether the granting of summary judgment in favor of Transamerica was justified.

As recently as *Overmier v. Parks*, 242 Neb. 458, 460-61, 495 N.W.2d 620, 622 (1993), we said:

> A party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law if the evidence presented for summary judgment remains uncontroverted. After the moving party has shown facts entitling it to a judgment as a matter of law, the opposing party has the burden to present evidence showing an issue of material fact which prevents judgment as a matter of law for the moving party.

The fact that Transamerica and Paramount entered into a security agreement and power of attorney whereby Transamerica agreed to extend credit to Paramount and that Rochford agreed absolutely to guarantee prompt payment of every indebtedness incurred pursuant to that security

agreement exists without contradiction. According to the affidavit of Kyle A. Larsen, Omaha branch manager for Transamerica, Paramount defaulted on scheduled liquidation payments to Transamerica in the amounts of $89,815.76 on May 25, 1990, and $78,745.25 on June 10, 1990. Rochford agreed that those payments were not made. As stated in its petition, Transamerica elected to terminate the agreement and declare the entire indebtedness due and payable. By affidavit, Larsen stated that the total amount of the indebtedness as of June 25, 1990, was $442,257.52. There is no evidence in the record to the contrary except Rochford's denial that that figure was correct. However, in his deposition, Rochford agreed that the debt to Transamerica was approximately $440,000. Furthermore, in Larsen's affidavit, it was stated that Transamerica assigned a portion of Paramount's debt to AT&T; a copy of the assignment is attached to the affidavit. The assignment recites that the "debt and instruments assigned" shall only be assigned to the amount of $350,000, although there is an additional paragraph which states that "[u]pon request from Transamerica, AT&T shall assign back to Transamerica up to $124,908.00 in [Paramount's] debt." However, nowhere in the record is there any indication that any request for reassignment of any portion of the debt was requested. It is quite apparent that to arrive at the amount due according to the judgment of $217,751.66 plus interest entered by the trial court, that court would have had to assume that the total amount of the reassignment was made. This it could not do.

With the exception just noted, the facts in the record support the conclusions arrived at above. Rochford offered no evidence to contradict such findings. Rochford did allege in his answer that the execution of the assignment "effectively" released the principal debt, thereby releasing Rochford, and that the collateral was disposed of without notice contrary to § 9-504, thereby barring Transamerica from obtaining a "deficiency" judgment. None of this is supported by anything in the record, and the conclusionary allegations which are made are not supported in law.

We therefore find that there is no dispute but that as of June

25, 1990, there remained due on the underlying debt the sum of $442,257.52. Only $350,000 of that debt was assigned, leaving $92,257.52 of debt held by Transamerica for which Rochford was liable under his guaranty as of June 25, 1990. From that day forward to the date of judgment, July 29, 1991, Transamerica is entitled to interest at the rate provided by Neb. Rev. Stat. § 45-102 (Reissue 1988) of 6 percent per annum, there being no specific rate contracted for by the parties appearing in the record. This amounts to $6,133.28. Accordingly, as a matter of law, Transamerica is entitled to summary judgment against Rochford in the total sum of $98,390.80. The judgment of the district court is modified accordingly, and as modified, is affirmed.

AFFIRMED AS MODIFIED.

SHANAHAN, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. ROY T. HUGHES, APPELLANT.

510 N.W.2d 33

Filed December 30, 1993. No. S-92-1087.

1. **Rules of Evidence.** In all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by the Nebraska Evidence Rules, not judicial discretion, except in those instances under the Nebraska Evidence Rules when judicial discretion is a factor involved in admissibility of evidence.
2. **Criminal Law: Trial: Juries: Evidence: Appeal and Error.** In a jury trial of a criminal case, whether an error in admitting or excluding evidence reaches a constitutional dimension or not, an erroneous evidential ruling results in prejudice to a defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt.
3. **Rules of Evidence: Hearsay.** An out-of-court statement will not be excluded by the hearsay rule if (1) the out-of-court declarant is unavailable and (2) the statement is so contrary to the declarant's penal interests that a reasonable person in a similar position would not have made the statement unless he believed it to be true.
4. **Constitutional Law: Rules of Evidence: Hearsay.** The Confrontation Clause of the state and federal Constitutions requires that a third element must be satisfied if a hearsay statement implicates a defendant's penal interests as well as the

declarant's penal interests. This third element requires the court to examine the totality of the circumstances surrounding the making of the statement to determine whether they indicate that the statement is trustworthy.

5. **Rules of Evidence: Hearsay.** Although the hearsay exception for statements against penal interests encompasses statements that may be inherently reliable, the exception also encompasses statements that are inherently unreliable. Particularly, statements made while the declarant is in police custody and in which the declarant implicates another party are highly suspect and presumptively unreliable.
6. **Rules of Evidence: Hearsay: Proof.** Reliability of statements that fall within the hearsay exception for statements against penal interests may not be inferred, and the proponent of such evidence must carry the burden of demonstrating the trustworthiness and reliability of the statement.
7. **Rules of Evidence: Hearsay.** To determine whether a statement against penal interests has particularized guarantees of trustworthiness, a court must examine the totality of the circumstances surrounding the making of the statement. Particularly relevant to the determination of trustworthiness is whether the declarant was in police custody when the statement was made, whether the declarant had a motive to mitigate his own criminal liability, and whether the declarant made the statement in response to leading questions.
8. _____: _____. When a court examines the totality of the circumstances, it must keep in mind that evidence tending to corroborate the content of a hearsay statement cannot support a finding that the statement bears particularized guarantees of trustworthiness. The hearsay evidence must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence.

Appeal from the District Court for Douglas County: MICHAEL MCGILL, Judge. Reversed and remanded for a new trial.

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, FAHRNBRUCH, and LANPHIER, JJ., and MORAN, D.J., Retired.

WHITE, J.

Roy T. Hughes appeals from jury verdicts finding him guilty of first degree murder and use of a firearm to commit a felony. Appellant, Hughes, was sentenced to life imprisonment on the murder conviction and 5 to 10 years' imprisonment on the firearm conviction. We reverse the judgment and remand the cause for a new trial.

Appellant alleges that the district court erred in (1) admitting into evidence an inculpatory out-of-court statement, (2) allowing the prosecution to improperly question a character witness, and (3) finding that sufficient evidence existed to support a guilty verdict. Our holding on appellant's first assignment of error is dispositive of the appeal, and our discussion therefore will be limited to those facts which are relevant to the admission of the out-of-court statement.

On August 30, 1991, Forrest Pointer was fatally shot. Prior to the shooting, at about 2:30 a.m. on August 30, Pointer had been in an altercation with appellant and three other individuals—Michael Floyd, Deandre Smith, and Nolan Berry—at the Tommie Rose Garden Apartments. Pointer waved a loaded shotgun at the four individuals, and Floyd later gave appellant a .22-caliber gun. Appellant testified that he fired the .22-caliber gun in the air and in the direction of Pointer to scare him away. An off-duty private security guard, who was present at the Tommie Rose Garden Apartments, made a 911 call regarding this altercation. According to the guard's testimony, while he was on the telephone with police, he heard gunshots and then watched Pointer leave the Tommie Rose Garden Apartments parking lot. Shortly after Pointer left the parking lot, the guard observed a white car and a red car appear to follow Pointer. The guard did not see who was in either of those two cars.

According to appellant, after Pointer left, Floyd said he knew where Pointer lived, and the four men decided to go looking for Pointer. Appellant testified that they never found Pointer and that they returned to the Tommie Rose Garden Apartments.

Smith's testimony was similar to appellant's. According to Smith, after Pointer left the Tommie Rose Garden Apartments, the four men got into a red car driven by Floyd and went to look for Pointer. Smith testified that he saw appellant with a .22-caliber pistol while they were in the car. Smith testified that they never found Pointer.

In contrast, Floyd testified that they found Pointer. According to Floyd, when they found Pointer, he was standing by the trunk of his car on Spaulding Street. Floyd stated that he

slowed down the car and that appellant reached under the seat, pulled out a gun, and shot Pointer. Floyd stated that Pointer was about 2 to 5 feet from their car when he was shot. Floyd testified that he did not know a gun was under the seat and did not know what had happened to the gun since the shooting. Floyd testified that after appellant fired the gun, the cylinder and bullets fell to the ground. Floyd stated that after the shot was fired, they drove back to the Tommie Rose Garden Apartments.

Pointer was found by his girl friend, Linda Bailey, in front of her house on Spaulding Street at about 5 a.m. on August 30. Pointer was brought by ambulance to St. Joseph Hospital, where he died later that afternoon. The pathologist who performed an autopsy on Pointer testified that Pointer died as the result of a gunshot wound to the head. The pathologist testified that because of the discoloration around the wound, the shot must have been fired while the gun was within inches of, if not actually in contact with, Pointer's head. The pathologist testified that the wound was probably caused by a .38-caliber bullet; however, the pathologist did not conduct any specific tests to determine the actual size of the bullet removed from Pointer's head. At the scene of the shooting, police recovered one spent .38-caliber round, five live .38-caliber rounds, and a six-shot cylinder for a .38-caliber revolver.

Appellant's first assignment of error concerns the admissibility of an out-of-court statement made by Berry. Specifically, appellant contends that the statement did not fall within the hearsay exception for statements against penal interests and that its use violated his confrontation and due process rights under the U.S. and Nebraska Constitutions.

Berry did not testify at trial because he asserted his Fifth Amendment right against self-incrimination. Over defense counsel's timely objections, the trial court ruled that because of Berry's assertion, he was exempt from testifying and, therefore, unavailable within the meaning of Neb. Rev. Stat. § 27-804(1)(a) (Reissue 1989). The court permitted the prosecution to admit into evidence an out-of-court statement made by Berry on September 5, 1991. The court found that the statement fell within the hearsay exception regarding

statements against penal interests. The following constitutes a recitation of the facts surrounding the three statements.

On September 4, 1991, at about 11:51 p.m., police brought Berry to the police station so they could interrogate him regarding the Pointer shooting. The officer who interrogated Berry stated that he read Berry his *Miranda* rights and that Berry signed a waiver of rights form. The officer testified that he talked with Berry for about 2 hours before he began tape recording Berry's statement. The officer further testified that during this 2-hour period, he told Berry that he, Berry, must have been the shooter. The officer stated that he said this to Berry because the officer wanted to scare Berry into making a statement. When the tape recorder was finally turned on, Berry made a statement in response to the officer's specific questions. The interrogation ended at 2:13 a.m. on September 5.

According to Berry's tape-recorded statement, the four men went to find Pointer after the first altercation. Berry stated that they found Pointer and that appellant shot Pointer from the front seat of a red car driven by Floyd. Berry stated that appellant fired several shots at Pointer and that Pointer was a few feet from the car when he was shot. Berry stated that he did not know where the gun came from or what had happened to it since the shooting.

On March 13, 1992, Berry returned to the police station and made a second statement. In this second statement, Berry told police that he had lied in his first statement because the police officers had told him that he, Berry, would be charged with the murder if he did not name somebody else for the crime. In this second statement, Berry also said that he witnessed part of the first altercation with Pointer, but that he did not go with Floyd, Smith, and appellant to find Pointer. Berry stated that he did not witness the shooting and did not know whether appellant had shot Pointer.

On August 13, Berry made a third statement. This third statement was made at the offices of appellant's attorney. Berry gave this sworn statement in the presence of his mother, appellant's attorney, a court reporter, two private detectives, and a paralegal. In his third statement, Berry reiterated what he had told police in his second statement. According to Berry, he

had lied during his first statement because he feared that the police would charge him with the murder. Berry claimed that he was not with Floyd, Smith, and appellant when they allegedly went after Pointer and that he did not see anybody shoot Pointer. The second and third statements were entered into evidence solely for the purpose of counteracting the court's decision to overrule appellant's objection to the admission of the first statement.

" '[I]n all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by the Nebraska Evidence Rules, not judicial discretion, except in those instances under the Nebraska Evidence Rules when judicial discretion is a factor involved in admissibility of evidence . . . .' " *State v. Thompson, ante* p. 375, 394, 507 N.W.2d 253, 267 (1993). Accord, *State v. Toney*, 243 Neb. 237, 498 N.W.2d 544 (1993). See, also, *State v. Jacob*, 242 Neb. 176, 494 N.W.2d 109 (1993) (stating that the admissibility of hearsay evidence pursuant to an exception to the hearsay rule was no longer a matter within the discretion of the trial court); *State v. Messersmith*, 238 Neb. 924, 473 N.W.2d 83 (1991). " 'In a jury trial of a criminal case, whether an error in admitting or excluding evidence reaches a constitutional dimension or not, an erroneous evidential ruling results in prejudice to a defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt.' " *Toney*, 243 Neb. at 244, 498 N.W.2d at 550 (quoting *State v. Cox*, 231 Neb. 495, 437 N.W.2d 134 (1989)).

The State contends that Berry's statement falls within the hearsay exception for statements made against the declarant's penal interests. Section 27-804 provides that an out-of-court statement will not be excluded by the hearsay rule if (1) the out-of-court declarant is unavailable and (2) the statement is so contrary to the declarant's penal interests that a reasonable person in a similar position would not have made the statement unless he believed it to be true. § 27-804(1) and (2)(c); Proposed Neb. Evid. R. 804 (Tentative Draft 1973) (stating that the Nebraska rule is identical to Fed. R. Evid. 804 regarding statements against penal interests). For purposes of our analysis, we assume, first, that the declarant was unavailable to

testify because he invoked his Fifth Amendment right against self-incrimination, and second, that the statement was against his penal interests because it tended to subject him to criminal liability.

A third element must be satisfied if the statement implicates a *defendant's* penal interests as well as the *declarant's* penal interests. This third element requires the court to examine the totality of the circumstances surrounding the making of the statement to determine whether they indicate that the statement is trustworthy. This third element is designed to satisfy the defendant's confrontation rights. See, *U.S. v. Boyce*, 849 F.2d 833 (3d Cir. 1988); *United States v. Rasmussen*, 790 F.2d 55 (8th Cir. 1986).

The Confrontation Clause of the Sixth Amendment and art. I, § 11, of the Nebraska Constitution secure a defendant's right to confront and cross-examine witnesses brought against him. See *Dutton v. Evans*, 400 U.S. 74, 91 S. Ct. 210, 27 L. Ed. 2d 213 (1970) (applying the 6th Amendment to the states through the 14th Amendment). The purpose of cross-examination is to ensure that the trier of fact has a sufficient basis to assess the truthfulness of the evidence. *Lee v. Illinois*, 476 U.S. 530, 106 S. Ct. 2056, 90 L. Ed. 2d 514 (1986); *Ohio v. Roberts*, 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980); *State v. Warford*, 223 Neb. 368, 389 N.W.2d 575 (1986); *State v. Roy*, 214 Neb. 204, 333 N.W.2d 398 (1983). The Confrontation Clause should be abrogated only when the evidence is sufficiently reliable and trustworthy that it obviates the need to explore the state of mind of the declarant. *White v. Illinois*, ____ U.S. ____, 112 S. Ct. 736, 116 L. Ed. 2d 848 (1992); *Roberts, supra*; *Roy, supra*.

The U.S. Supreme Court recognized the difficulty in merging the Confrontation Clause and the hearsay rules:

> [W]hen a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of

particularized guarantees of trustworthiness. *Roberts*, 448 U.S. at 66. The analysis therefore requires a determination of whether the statement falls within a firmly rooted hearsay exception, and if it does not, then a determination of whether the statement has particularized guarantees of trustworthiness. Firmly rooted exceptions are presumptively reliable and trustworthy; therefore, inferring reliability of hearsay statements which fall within such an exception will not violate a defendant's confrontation rights. *Roberts, supra*; *U.S. v. Flores*, 985 F.2d 770 (5th Cir. 1993). However, the hearsay exception for statements made against the declarant's penal interests "defines too large a class for meaningful Confrontation Clause analysis." *Lee*, 476 U.S. at 544 n.5. See, also, *Flores, supra*.

Although the hearsay exception for statements against penal interests encompasses statements that may be inherently reliable, the exception also encompasses statements that are inherently unreliable. Particularly, statements made while the declarant is in police custody and in which the declarant implicates another party are highly suspect and presumptively unreliable. *Lee*, 476 U.S. at 541 (stating that "when one person accuses another of a crime under circumstances in which the declarant stands to gain by inculpating another, the accusation is presumptively suspect and must be subjected to the scrutiny of cross-examination"). Generally, the circumstances surrounding the making of these statements necessitate an exploration of the declarant's state of mind. It cannot be said, without a specific showing of trustworthiness, that such a statement should be admitted without an opportunity for cross-examination. See, *Lee, supra*; *Olson v. Green*, 668 F.2d 421 (8th Cir. 1982), *cert. denied* 456 U.S. 1009, 102 S. Ct. 2303, 73 L. Ed. 2d 1305.

Unlike other exceptions to the hearsay rule, statements made in response to police interrogation generally do not have inherent guarantees of reliability and trustworthiness. For example, the spontaneity of an excited utterance reduces the risk of inaccuracies because the statement is not the result of a declarant's conscious effort to make a statement. See *Idaho v. Wright*, 497 U.S. 805, 110 S. Ct. 3139, 111 L. Ed. 2d 638 (1990).

On the other hand, a statement made by a person subject to criminal liability, in which the declarant incriminates a third party, may be the result of the declarant's motivation and opportunity to curry favor with the authorities. *Lee, supra*; *Olson, supra*; *United States v. Riley*, 657 F.2d 1377 (8th Cir. 1981); *United States v. Love*, 592 F.2d 1022 (8th Cir. 1979); Proposed Neb. Evid. R. 804 notes (Tentative Draft 1973); Fed. R. Evid. 804, Notes of Advisory Committee on 1972 Proposed Rules. Thus, we hold that reliability of statements that fall within the hearsay exception for statements against penal interests may not be inferred, and the proponent of such evidence must carry the burden of demonstrating the trustworthiness and reliability of the statement. See, *Flores, supra*; *United States v. Rasmussen*, 790 F.2d 55 (8th Cir. 1986) (adding a third element to the analysis for statements against penal interests, which element requires a finding of trustworthiness for statements wherein the declarant implicates the accused, is intended to satisfy the accused's confrontation rights); *Olson, supra*; *State v. Palser*, 238 Neb. 193, 469 N.W.2d 753 (1991) (declining to infer reliability even though the statement fell within the exception for statements against penal interests).

To determine whether a statement against penal interests has particularized guarantees of trustworthiness, a court must examine the totality of the circumstances surrounding the making of the statement. *Wright, supra*; *U.S. v. Boyce*, 849 F.2d 833 (3d Cir. 1988); *Rasmussen, supra*; *Palser, supra*. Particularly relevant to the determination of trustworthiness is whether the declarant was in police custody when the statement was made, whether the declarant had a motive to mitigate his own criminal liability, and whether the declarant made the statement in response to leading questions. See, *Lee v. Illinois*, 476 U.S. 530, 106 S. Ct. 2056, 90 L. Ed. 2d 514 (1986); *Boyce, supra*; *Palser, supra*. These factors are similar to the factors this court has found relevant when considering whether a hearsay statement is sufficiently trustworthy to satisfy the residual exception to the hearsay rule. See *State v. Toney*, 243 Neb. 237, 245-46, 498 N.W.2d 544, 551 (1993) (stating that for purposes of the residual exception, a court should examine "whether the

statement is oral or written; whether a declarant had a motive to speak truthfully or untruthfully, which may involve an examination of the declarant's partiality and the relationship between the declarant and the witness; whether the statement was made under oath; whether the statement was spontaneous or in response to a leading question or questions; whether a declarant was subject to cross-examination when the statement was made; and whether a declarant has subsequently reaffirmed or recanted the statement").

When a court examines the totality of the circumstances, it must keep in mind that evidence tending to corroborate the content of a hearsay statement cannot "support a finding that the statement bears 'particularized guarantees of trustworthiness.' " *Wright*, 497 U.S. at 822. Accord *U.S. v. Flores*, 985 F.2d 770 (5th Cir. 1993). The hearsay evidence "must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence . . . ." *Wright*, 497 U.S. at 822. If the circumstances indicate a likelihood that the declarant had a motive to lie, there is a greater need to cross-examine the declarant, and corroborating evidence is not a substitute for that need to explore the declarant's motivation. *Wright, supra* (limiting and explaining the Court's decision in *Lee, supra*, regarding the factual similarity between the hearsay statement and the defendant's statement to determine whether the admission of the hearsay violated defendant's confrontation rights); *Flores, supra*.

This court has addressed in *Palser, supra*, the issue of whether an out-of-court statement contained sufficient indicia of trustworthiness to satisfy the Confrontation Clause. In *Palser*, the defendant was charged with distributing a controlled substance which he allegedly sold to the out-of-court declarant. The trial court permitted the State to admit into evidence a statement that the declarant had made to the police in which he said that he obtained the drugs from the defendant. This court declined to infer the reliability of the out-of-court statement and maintained that the statement must possess " 'particularized guarantees of reliability' " to satisfy the defendant's confrontation rights. *Palser*, 238 Neb. at 201, 469 N.W.2d at 758.

In determining that the statement in *Palser* possessed particularized guarantees of trustworthiness, this court examined the totality of the circumstances surrounding the making of the statement. Specifically, the court found that the declarant voluntarily went to the police, that the declarant was never in police custody or under arrest, that the police informed the declarant of the evidence they had against him concerning his role in the alleged drug sale, that the police informed the declarant of the criminal charges he could receive for that role, that the police told declarant he could serve as a cooperating witness or be charged for his role in the sale, that the declarant elected to be a cooperating witness and signed a cooperating witness agreement, and that the declarant wrote out his statement wherein he admitted his role in the sale. In finding that the statement was particularly trustworthy, the court reasoned that the declarant's motive to mitigate his criminal liability was absent.

In *U.S. v. Boyce*, 849 F.2d 833 (3d Cir. 1988), the district court admitted the out-of-court statement as a hearsay exception for statements against the declarant's penal interests. The declarant made the statement while he was in police custody and without the benefit of counsel. The police had advised the declarant of his *Miranda* rights before he wrote his statement. In the statement, the declarant wrote that he and two other individuals broke into a jewelry store and stole a large quantity of jewelry. The statement then described how the three left the store and that they fenced the goods. On appeal, the court of appeals held that the admission of the statement against the appellant was prejudicial error. The court of appeals stated that it could not find any evidence in the record that would negate the declarant's motivation to lie. Moreover, the court noted, after the declarant made the statement, he entered into a favorable plea bargain with prosecutors.

In the present case, the declarant's motive to fabricate has not been eliminated. When Berry made his first statement, he was in police custody. The police had picked up Berry and brought him to the police station to be interrogated regarding the Pointer shooting. Prior to questioning, the police read Berry his *Miranda* rights and Berry signed a waiver form. The

officer who interrogated Berry testified that he told Berry that Berry must be the shooter. The officer testified that he did this to scare Berry into talking. According to the officer, this conversation with Berry was not tape-recorded. The officer testified that he did not turn on the recorder until he had spent about 2 hours with Berry. The tape-recorded statement which was played for the jury involved Berry's response to direct police questioning.

A statement made to police by an alleged accomplice which incriminates another person is presumptively unreliable. The similarities between the statement and other evidence regarding the offense are irrelevant to whether the statement possesses particularized guarantees of trustworthiness. Unlike in *Palser*, the declarant here was in police custody when he made the statement, and the officer who interrogated Berry repeatedly told Berry that he "must be the shooter." Berry was not given a choice of admitting his crimes and becoming a cooperating witness; rather, he was in a position to deny the officer's accusations that he was the shooter. Berry had a motive to make a statement which identified another person as the shooter and thus relieve himself of that liability. This motive to fabricate can be explored only by a meaningful opportunity to cross-examine the witness at trial. Berry's statement was oral and was substantially in the form of answers to direct questions posed by the interrogating police officer. Additionally, Berry has recanted his first statement at least twice since September 5, 1991.

There is not enough indication of reliability and trustworthiness to obviate the need for cross-examination of the declarant. See, *Idaho v. Wright*, 497 U.S. 805, 110 S. Ct. 3139, 111 L. Ed. 2d 638 (1990); *Lee v. Illinois*, 476 U.S. 530, 106 S. Ct. 2056, 90 L. Ed. 2d 514 (1986); *Ohio v. Roberts*, 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980). The State has not demonstrated sufficient evidence regarding the circumstances surrounding the making of the statement to overcome the presumption of unreliability. We therefore find that the trial court erred in admitting the statement into evidence.

An erroneous admission of evidence is considered prejudicial to a criminal defendant unless the State demonstrates that the

error was harmless beyond a reasonable doubt. *State v. Toney*, 243 Neb. 237, 498 N.W.2d 544 (1993); *State v. Cox*, 231 Neb. 495, 437 N.W.2d 134 (1989). An error is harmless when the improper admission did not materially influence the jury to reach a verdict adverse to the substantial rights of the defendant. *Id.* After a review of the entire record, we cannot say that the State has proven beyond a reasonable doubt that the admission of Berry's statement was harmless. Appellant attempted to mitigate the effect of the admission of the first statement by introducing into evidence the two other statements made by Berry. We cannot say that appellant's use of the other statements diminished the harm caused by the erroneous admission of the first statement, and appellant's use of those statements solely for the purpose of counteracting the court's error does not constitute a waiver of appellant's confrontational rights. Cf. *State v. Bromwich*, 213 Neb. 827, 331 N.W.2d 537 (1983).

Because we direct that the convictions be reversed and the cause remanded for a new trial, we do not address the other assignments of error raised by appellant.

REVERSED AND REMANDED FOR A NEW TRIAL.

EUGENE AND CONNIE KUDLACEK, GUARDIANS AND CONSERVATORS OF CHRISTOPHER KUDLACEK, A PROTECTED PERSON, APPELLANTS AND CROSS-APPELLEES, V. FIAT S.P.A. AND FIAT MOTORS OF NORTH AMERICA, INC., APPELLEES AND CROSS-APPELLANTS.

509 N.W.2d 603

Filed January 7, 1994. No. S-91-435.

1. **Directed Verdict: Negligence: Liability: Appeal and Error.** In a court's review of a directed verdict, the party against whom a motion for a direction of liability is made is entitled to have every controverted fact resolved in his or her favor and to have the benefit of every inference which can reasonably be drawn from the evidence. If there is any evidence which will sustain a finding for the party against whom the motion is made, the case may not be decided as a matter of law. A directed verdict is proper only where reasonable minds cannot differ and can only draw one conclusion from the evidence. Where reasonable minds may

draw different conclusions from the evidence, the question of negligence is for determination by the jury.

2. **Products Liability: Negligence.** In products liability, there is a significant distinction between a manufacturer's liability for the manufactured product on account of strict liability in tort, as opposed to liability based on negligence.
3. **Products Liability: Actions: Negligence.** In a cause of action based on negligence, the question involves the manufacturer's conduct, that is, whether the manufacturer's conduct was reasonable in view of the foreseeable risk of injury, whereas in a cause of action based on strict liability in tort, the question involves the quality of the manufactured product, that is, whether the product was unreasonably dangerous.
4. **Products Liability: Proof.** To recover against the defendant on a claim of strict liability in a products liability case, the plaintiff must prove by a preponderance of the evidence: (1) The defendant placed the product on the market for use and knew, or in the exercise of reasonable care should have known, that the product would be used without inspection for defects; (2) the product was in a defective condition when it was placed on the market and left the defendant's possession; (3) the defect is the proximate or a proximately contributing cause of plaintiff's injury sustained while the product was being used in the way and for the general purpose for which it was designed and intended; (4) the defect, if existent, rendered the product unreasonably dangerous and unsafe for its intended use; and (5) plaintiff's damages were a direct and proximate result of the alleged defect.
5. **Products Liability: Words and Phrases.** "Unreasonably dangerous" means that the product has a propensity for causing physical harm beyond that which would be contemplated by the ordinary user or consumer who purchases it, with the ordinary knowledge common to the foreseeable class of users as to its characteristics.
6. **Products Liability: Motor Vehicles.** One who is injured as a result of a mechanical defect in a motor vehicle should be protected under the doctrine of strict liability, even though the defect was not the cause of the collision which precipitated the injury. Since collisions for whatever cause are foreseeable events, the scope of liability should be commensurate with the scope of the foreseeable risks.
7. **Products Liability: Motor Vehicles: Damages: Proof.** Under a theory of crashworthiness, the plaintiff must show that his injuries were enhanced as a result of the defective design of the vehicle, because the manufacturer is liable for only that portion of the damages caused as a result of the defective design.
8. _____: _____: _____: _____. In a crashworthiness claim, once the plaintiff establishes that the manufacturer's design was a substantial factor in producing the plaintiff's additional injuries, then the burden is on the defendant to show apportionment of damages.
9. **Products Liability: Motor Vehicles: Damages.** If the damages cannot be apportioned, then the defendant manufacturer may be held jointly and severally liable with the defendant responsible for the original collision.
10. **Products Liability: Proof.** Nebraska no longer requires proof of an alternative

design for a claimant to recover under a claim of defective design.

11. **Rules of Evidence.** In all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by the Nebraska Evidence Rules, not judicial discretion, except in those instances under the Nebraska Evidence Rules when judicial discretion is a factor involved in admissibility of evidence.
12. **Rules of Evidence: Appeal and Error.** An appellate court reviews a trial court's ruling on the admissibility of evidence for an abuse of discretion where the Nebraska Evidence Rules permit judicial discretion in assessing admissibility.
13. **Trial: Evidence.** Evidence relating to an illustrative experiment is admissible if a competent person conducted the experiment, an apparatus of suitable kind and condition was utilized, and the experiment was conducted fairly and honestly; substantial similarity is sufficient.
14. **Trial: Evidence: Appeal and Error.** The trial court has wide discretion in determining whether evidence relating to illustrative experiments should be received; a judgment will not be reversed on account of the admission or rejection of such testimony unless there has been a clear abuse of discretion.
15. **Trial: Evidence: Videotapes.** Where a videotape is offered not to re-create conditions similar to the accident, but merely to illustrate certain principles, differences in surrounding conditions are less relevant and do not require the videotape's exclusion; the dissimilarity of the test conditions to the accident conditions would go to the weight of the evidence and not to its admissibility.
16. **Jury Instructions: Evidence: New Trial.** Submission of an issue on which the evidence is insufficient to sustain an affirmative finding is generally prejudicial and results in a new trial.
17. **Jury Instructions: Appeal and Error.** All the jury instructions 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.
18. **Trial: Evidence.** Computer-generated models or simulations are admissible upon a showing that (1) the computer is functioning properly; (2) the input and underlying equations are sufficiently complete and accurate and are disclosed to the opposing party, so that that party may challenge them; and (3) the program is generally accepted by the appropriate community of scientists.

Appeal from the District Court for Douglas County: LAWRENCE J. CORRIGAN, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

M.J. Bruckner, John V. Hendry, and Michael K. High, of Bruckner, O'Gara, Keating, Hendry, Davis & Nedved, P.C., for appellants.

Gerald L. Friedrichsen, of Fitzgerald, Schorr, Barmettler & Brennan, and George J. Lavin, Jr., and Thomas J. Bradley, of Lavin, Coleman, Finarelli & Gray, for appellees.

HASTINGS, C.J., BOSLAUGH, CAPORALE, FAHRNBRUCH, and LANPHIER, JJ.

LANPHIER, J.

Eugene and Connie Kudlacek brought this product liability action against Fiat S.p.A. and Fiat Motors of North America, Inc. (hereinafter jointly Fiat), as guardians and conservators of their son, Christopher Kudlacek, for injuries sustained by Christopher Kudlacek in an accident in which he was an automobile passenger. Plaintiffs presented evidence to support their claims that (1) the Fiat X1/9 automobile was defectively designed because it did not provide adequate protection for the passengers during a rollover and side-impact collision with an object (crashworthiness claim), (2) the Fiat X1/9 was designed with poor handling stability, and (3) Fiat failed to warn of the handling defect. After the plaintiffs presented their evidence, the defendants moved for a directed verdict. The court granted the motion on the issue of crashworthiness on both negligence and strict liability theories on the basis that there was no evidence of the extent of the enhanced injuries attributable to the alleged defect in the occupant-protection characteristics of the vehicle and no evidence that plaintiffs' alternative design would have resulted in different injuries. The remaining issues were submitted to the jury, and it found for the defendants.

The plaintiffs appeal, and the defendants cross-appeal. Plaintiffs assert the trial court erred (1) in dismissing their crashworthiness claim; (2) in receiving the videotapes of tests conducted on other vehicles; and (3) in submitting to the jury, and improperly instructing it on, the "state-of-the-art" defense. On cross-appeal, defendants assert the trial court erred (1) in overruling the directed verdict on plaintiffs' allegations of strict liability under Neb. Rev. Stat. § 25-21,181 (Reissue 1989), (2) in overruling a motion for directed verdict on grounds of insufficient evidence presented by the plaintiffs, and (3) in permitting plaintiffs' accident reconstruction expert to testify concerning computer simulation of the path of the Fiat X1/9 during the accident. We affirm in part, reverse in part, and remand for further proceedings.

FACTUAL BACKGROUND

The record presents the following facts: On the evening of September 22, 1980, Christopher Kudlacek was a passenger in a Fiat X1/9 driven by Arlan Broome, Jr. Broome testified they were traveling north on 144th Street, by Dodge Street in Omaha, at a speed between 40 and 55 miles per hour. Broome testified that when he saw an animal crossing the road in front of the vehicle, he turned into the southbound lane to avoid hitting the animal, and lifted his foot off the accelerator. When Broome attempted to steer the vehicle back to the northbound lane, the vehicle began to fishtail. The vehicle remained out of control and ultimately slid sideways off the west side of 144th Street down the embankment of a ditch. Broome could not remember what happened after the vehicle left the road. Reconstruction experts testified that after reaching the bottom of the ditch, the vehicle tripped, rolled upside down, launched itself in the air, and struck a group of trees on Kudlacek's side of the vehicle. Finally, the vehicle rebounded from the trees and came to rest right side up. As a result of the impact to Kudlacek's side of the vehicle, the upper portion of the passenger door was crushed into the passenger compartment approximately 19 inches.

INJURIES FROM ACCIDENT

Kudlacek sustained several injuries, the most serious of which was a brain injury which left him permanently and totally disabled. Plaintiffs offered the testimony of several medical, as well as automotive, experts to support their claims. Plaintiffs introduced testimony of two doctors who treated Kudlacek on the night of the accident: Dr. Leslie Hellbusch, a neurosurgeon, and Dr. James R. Adwers, who performed abdominal surgery. On the night of the accident, Dr. Hellbusch diagnosed Kudlacek as suffering from several conditions, including a possible cerebral hypoxic injury, an injury to the brain caused by lack of oxygen or lack of blood to carry oxygen to the brain; cervical spine fractures of the middle portion of the back of his neck; pneumomediastinum, air in the chest; right pneumothorax, wherein air leaks outside the lung because of a punctured lung; a possible left-arm fracture and a right-leg

fracture; cuts and scrapes; and an intra-abdominal injury. A basilar skull fracture, which is a crack or fracture in the bone surrounding the brain; a possible cerebral contusion; and a fractured jaw were discovered the following day by Dr. Hellbusch.

On the night of the accident, Dr. Adwers performed emergency abdominal surgery on Kudlacek to determine the source of Kudlacek's bleeding and to control it. During this surgery, Dr. Adwers found approximately 1,500 cubic centimeters of blood in Kudlacek's abdomen, which is approximately three times the amount of blood normally given when a person is donating blood. According to Dr. Adwers, several sources for the bleeding were identified, but the two major sources of the bleeding were a laceration in the dome of the liver and a torn spleen. Dr. Adwers removed the spleen, and the liver injury resolved itself by forming a major blood clot.

Dr. F. Cleveland Trimble testified that the approximately 18-inch intrusion of the automobile's passenger door into Kudlacek's side of the vehicle was a substantial contributing cause of Kudlacek's brain injury because it resulted in a deficient blood flow and a lack of oxygen to Kudlacek's brain.

Automotive Expert Testimony

The plaintiffs also called Harley Copp and William N. Weins, Ph.D., to testify as experts on automotive design and handling. Michael Dickinson was the plaintiffs' reconstruction expert. Dickinson presented a computerized simulation of the Fiat X1/9's path during the accident. Weins and Copp testified that they found the Fiat X1/9 was defective and unreasonably dangerous because it made a rapid transition from understeer to oversteer when the driver lifted his foot off the throttle, during sharp cornering or emergency maneuvering, at or near the car's limit of control, making the vehicle uncontrollable. Understeering and oversteering refer to the handling characteristics of the vehicle. Weins explained that a vehicle which does not turn as much as the driver wants is an understeering vehicle. He further testified that understeering is a feature common among American-built cars. In contrast, an

oversteering vehicle would turn more than a driver would like, and therefore the vehicle will turn more sharply if it is an oversteering vehicle. Weins testified that in a situation in which the driver has lost control in an understeering vehicle, the vehicle will go forward, whereas an oversteering vehicle which is out of the control of the driver will turn sideways or spin.

At the close of the plaintiffs' case, defendants moved for a directed verdict. The court sustained the motion on plaintiffs' claim for crashworthiness on both negligence and strict liability theories, because plaintiffs' evidence was insufficient to establish a causal connection between the alleged defective design and Kudlacek's injuries and because no alternative design had been offered by the plaintiffs.

During their defense, defendants presented the expert testimony of Edward Heitzman, an automotive engineer. Heitzman testified, in part, on several tests conducted on the Fiat X1/9 as well as on other vehicles. Videotapes were made of all the testing performed. Plaintiffs' objections to the introduction of the videotapes showing the testing of the other vehicles were overruled.

At the close of all the evidence, plaintiffs withdrew their negligence claims against defendants, and the remaining issues of handling instability and failure to warn were submitted to the jury, under a theory of strict liability. The instructions to the jury included a state-of-the-art instruction, to which the plaintiffs objected. Further facts will be discussed as they become necessary to an understanding of the issues at hand.

CRASHWORTHINESS

Plaintiffs allege the court erred in directing a verdict in defendants' favor on the issue of crashworthiness under both negligence and strict liability theories. In a court's review of a directed verdict, the party against whom a motion for a direction of liability is made is entitled to have every controverted fact resolved in his or her favor and to have the benefit of every inference which can reasonably be drawn from the evidence. If there is any evidence which will sustain a finding for the party against whom the motion is made, the case may not be decided as a matter of law. A directed verdict is

proper only where reasonable minds cannot differ and can only draw one conclusion from the evidence. Where reasonable minds may draw different conclusions from the evidence, the question of negligence is for determination by the jury. *Stoco, Inc. v. Madison's, Inc.*, 235 Neb. 305, 454 N.W.2d 692 (1990); *Commerce Sav. Scottsbluff v. F.H. Schafer Elev.*, 231 Neb. 288, 436 N.W.2d 151 (1989); *Raben v. Dittenber*, 230 Neb. 822, 434 N.W.2d 11 (1989).

In products liability, there is a significant distinction between a manufacturer's liability for the manufactured product on account of strict liability in tort, as opposed to liability based on negligence. In a cause of action based on negligence, the question involves the manufacturer's conduct, that is, whether the manufacturer's conduct was reasonable in view of the foreseeable risk of injury, whereas in a cause of action based on strict liability in tort, the question involves the quality of the manufactured product, that is, whether the product was unreasonably dangerous. *Rahmig v. Mosley Machinery Co.*, 226 Neb. 423, 412 N.W.2d 56 (1987).

To recover against the defendant on a claim of strict liability, the plaintiff must prove by a preponderance of the evidence:

> (1) The defendant placed the product on the market for use and knew, or in the exercise of reasonable care should have known, that the product would be used without inspection for defects; (2) the product was in a defective condition when it was placed on the market and left the defendant's possession; (3) the defect is the proximate or a proximately contributing cause of plaintiff's injury sustained while the product was being used in the way and for the general purpose for which it was designed and intended; (4) the defect, if existent, rendered the product unreasonably dangerous and unsafe for its intended use; and (5) plaintiff's damages were a direct and proximate result of the alleged defect.

(Syllabus of the court.) *Rahmig v. Mosley Machinery Co., supra.*

"Unreasonably dangerous" means that the product has a propensity for causing physical harm beyond that which would be contemplated by the ordinary user or consumer who

purchases it, with the ordinary knowledge common to the foreseeable class of users as to its characteristics. *Rahmig v. Mosley Machinery Co., supra*; *Hancock v. Paccar, Inc.*, 204 Neb. 468, 283 N.W.2d 25 (1979).

Crashworthiness cases involve allegations that a defective design in the vehicle made the vehicle unsafe to occupy during a foreseeable collision, and because of this defect the plaintiff's injuries were enhanced. See, *Higginbotham v. Ford Motor Co.*, 540 F.2d 762 (5th Cir. 1976); *Glyn-Jones v. Bridgestone/Firestone, Inc.*, 857 S.W.2d 640 (Tex. App. 1993); *Reed v. Chrysler Corp.*, 494 N.W.2d 224 (Iowa 1992); *Jackson v. Warrum*, 535 N.E.2d 1207 (Ind. App. 1989); *Sumnicht v. Toyota Motor Sales*, 121 Wis. 2d 338, 360 N.W.2d 2 (1984). In *Friedrich v. Anderson*, 191 Neb. 724, 217 N.W.2d 831 (1974), we extended liability for defective design claims to encompass those based on the vehicle's crashworthiness. Relying on *Friedrich*, we later stated in *Hancock v. Paccar, Inc.*, 204 Neb. at 474-76, 283 N.W.2d at 32-33:

> "One who is injured as a result of a mechanical defect in a motor vehicle should be protected under the doctrine of strict liability even though the defect was not the cause of the collision which precipitated the injury. . . . Since collisions for whatever cause are foreseeable events, the scope of liability should be commensurate with the scope of the foreseeable risks."
>
> . . . .
>
> . . . No good reason exists for not applying the doctrine of strict liability to a case where the defective design results in an enhanced injury to the plaintiff even though the product [design] did not cause the initial collision.

Under a theory of crashworthiness, the manufacturer is liable for only that portion of the damages caused as a result of the defective design. Therefore, the plaintiff must show that his injuries were enhanced as a result of the defective design of the vehicle. *Harvey by Harvey v. General Motors Corp.*, 873 F.2d 1343 (10th Cir. 1989); *Huddell v. Levin*, 537 F.2d 726 (3d Cir. 1976); *Larsen v. General Motors Corp.*, 391 F.2d 495 (8th Cir. 1968). This case presents the question of what burden of proof is placed on a plaintiff to prove that the manufacturer's

defective design proximately caused his enhanced injuries.

Two approaches have been taken in determining the plaintiff's burden of proof in establishing that a manufacturer's defective design enhanced the plaintiff's injuries. In some jurisdictions, the plaintiff is required to show the specific injuries attributable to the defective design of the vehicle and present an alternative design which would have prevented those injuries. *Harvey by Harvey v. General Motors Corp., supra*; *Curtis v. General Motors Corp.*, 649 F.2d 808 (10th Cir. 1981) (applying Colorado law); *Stonehocker v. General Motors Corp.*, 587 F.2d 151 (4th Cir. 1978) (applying South Carolina law); *Huddell v. Levin, supra*; *Higginbotham v. Ford Motor Co., supra*; *Dorsett v. American Isuzu Motors, Inc.*, 805 F. Supp. 1212 (E.D. Pa. 1992); *Wernimont v. International Harvester Corp.*, 309 N.W.2d 137 (Iowa App. 1981). Under these theories, the plaintiff must show that the defective design was the sole cause of the plaintiff's enhanced injuries.

Another approach allows the plaintiff to recover where there is an "indivisible" injury, if he presents evidence that shows that the alleged defect was a "substantial factor" in causing the enhanced injuries. See, *Mitchell v. Volkswagenwerk, AG*, 669 F.2d 1199 (8th Cir. 1982) (applying Minnesota law); *Fox v. Ford Motor Co.*, 575 F.2d 774 (10th Cir. 1978) (applying Wyoming law); *Richardson v. Volkswagenwerk, A.G.*, 552 F. Supp. 73 (W.D. Mo. 1982); *Polston v. Boomershine Pontiac-GMC*, 262 Ga. 616, 423 S.E.2d 659 (1992); *Czarnecki v. Volkswagen of America*, 172 Ariz. 408, 837 P.2d 1143 (Ariz. App. 1991); *Jackson v. Warrum, supra*; *Fouche v. Chrysler Motors Corp.*, 103 Idaho 249, 646 P.2d 1020 (Idaho App. 1982), *aff'd* 107 Idaho 701, 692 P.2d 345 (1984). The plaintiff is not required to show the specific injuries he would have received in the absence of the alleged defect or which injuries would have occurred had an alternative design been used. *Id.* In these jurisdictions, the plaintiff need not show that the defective design was the sole cause of the plaintiff's additional injuries. Instead, the defendant is liable if the defective design was a substantial factor in producing the plaintiff's additional injuries. Once proximate cause is established, then the burden is on the defendant to show apportionment of damages. *Id.* However, if

the damages cannot be apportioned, then the defendant manufacturer may be held jointly and severally liable with the defendant responsible for the original collision. *Smith v. Fiat-Roosevelt Motors, Inc.*, 556 F.2d 728 (5th Cir. 1977) (applying Florida law); *Higginbotham v. Ford Motor Co., supra*; *Richardson v. Volkswagenwerk, A.G., supra.*

Defendants claim that plaintiffs failed to show an alternative design which would have resulted in less severe injuries. Nebraska no longer requires proof of an alternative design for a claimant to recover under a claim of defective design. See *Rahmig v. Mosley Machinery Co.*, 226 Neb. 423, 412 N.W.2d 56 (1987). In *Rahmig*, this court overruled *Nerud v. Haybuster Mfg.*, 215 Neb. 604, 340 N.W.2d 369 (1983), to the extent that it required a plaintiff to show an alternative design which would have made the product safer in order to recover in a defective design claim under strict liability and negligence theories. Although *Rahmig* involved a guillotine metal scrap shear, the same general principles apply to a claim of defective design where the design of a vehicle is at issue. For example, the court in *Nerud* relied on a reading of *Hancock v. Paccar, Inc.*, 204 Neb. 468, 283 N.W.2d 25 (1979), to determine that a showing of an alternative design was necessary to establish a claim of product liability. The court suggested that *Hancock*, a case involving an allegedly defectively designed vehicle, hinted that a plaintiff was required to show an alternative design.

Furthermore, in *Hancock v. Paccar*, 204 Neb. at 476, 283 N.W.2d at 33, this court stated that the rule regarding strict liability, as stated in Restatement (Second) of Torts § 402 A, comment *d.* (1965),

> "extends to any product sold in the condition, or substantially the same condition, in which it is expected to reach the ultimate user or consumer. Thus the rule stated applies to an automobile, a tire, an airplane, a grinding wheel, a water heater, a gas stove, a power tool, a riveting machine, a chair, and an insecticide. . . ."

Because of the foregoing discussion, we see no reason why a separate standard of proof should apply to vehicles on claims of defective design.

PROXIMATE CAUSE IN NEBRASKA

As to proximate causation, we find that the substantial factor standard harmonizes with Nebraska law. In Nebraska, a defendant's negligence is not actionable unless it is the proximate cause of the plaintiff's injuries or is a cause which proximately contributed to them. *Miles v. Box Butte County*, 241 Neb. 588, 489 N.W.2d 829 (1992). The substantial factor test has been used in Nebraska to determine proximate cause. See, *Travelers Indemnity Co. v. Center Bank*, 202 Neb. 294, 275 N.W.2d 73 (1979); *Pendleton Woolen Mills v. Vending Associates, Inc.*, 195 Neb. 46, 237 N.W.2d 99 (1975); *Landmesser v. Ahlberg*, 184 Neb. 182, 166 N.W.2d 124 (1969). In addition, where two causes produce a single indivisible injury, joint and several liability attaches. *Lindgren v. City of Gering*, 206 Neb. 360, 292 N.W.2d 921 (1980); *English v. Bruin Engineering, Inc.*, 201 Neb. 791, 272 N.W.2d 753 (1978); *Zavoral v. Pacific Intermountain Express*, 181 Neb. 40, 146 N.W.2d 796 (1966). If the effects of a defendant's negligence actively and continuously operate to bring about harm to another, the fact that the active negligence of a third person is also a substantial factor in bringing about the harm does not protect the defendant from liability; furthermore, if the separate and independent acts of negligence by different persons combine to produce a single injury, each participant is liable for the damage, although one of them alone could not have caused the result. *Miles v. Box Butte County, supra.*

KUDLACEKS' BURDEN OF PROOF

The trial court granted a directed verdict after finding that plaintiffs' evidence was insufficient as a matter of law to establish a causal connection. Specifically, the trial court stated:

> [T]here is no evidence to show the actual extent of the enhanced injuries attributable to the alleged defect in the design of the occupant protection — protective characteristics.
>
> Furthermore, that there is no evidence that had the plaintiffs' alternative design of occupant protective characteristics been on the vehicle, the injury outcome would have been any different.

Using the substantial factor test, we find there was sufficient evidence to submit the issue of crashworthiness to the jury. As stated, in a court's review of a directed verdict, all controverted facts must be construed in favor of the party against whom the verdict was entered. *Raben v. Dittenber*, 230 Neb. 822, 434 N.W.2d 11 (1989). Dr. Trimble testified as to the causal relationship between the 18 1/2-inch intrusion of the vehicle's passenger door and the injuries sustained by Kudlacek. According to Dr. Trimble's testimony, the implosion caused a blunt injury which affected multiple systems in Kudlacek's body. The injuries, such as those of the liver and spleen, caused a diminished blood flow to the brain and were a substantial contributing cause of Kudlacek's brain injury. Dr. Adwers lent support to Dr. Trimble's testimony. He testified that the cause of the ruptured spleen and the laceration on the dome on the right side of the liver was a direct trauma to the spleen or liver from the ribs. He explained that a rib is flexible enough to bend far back enough to tear the liver and spleen in the same manner in which Kudlacek's was torn. Dr. Adwers further explained that because there was no external puncture, he concluded that either a rib fracture or rib compression caused the injuries to the liver and spleen.

Plaintiffs also offered the testimony of Copp, who testified as to the crashworthiness claim set forth by the plaintiffs. According to Copp's testimony, the Fiat X1/9 was unreasonably dangerous because the fiberglass roof, which served only as a wind or rain cover, resulted in excessive deformations in the passenger door.

Copp also testified regarding an alternative design. However, as this court has abandoned this element as part of the plaintiff's burden of proving defective design, we do not discuss it.

ADMISSION OF VIDEOTAPES

A substantial number of tests were conducted in preparation for the trial of this action. Out of many hours of testing videotape, short selections were made by Heitzman, the defendants' automotive expert, to highlight the results of the various tests. The plaintiffs contend that the defendants failed

to establish proper foundation for the introduction of three videotapes which showed the handling and steering tests performed by Heitzman on a Fiat X1/9 and several other vehicles.

In all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by the Nebraska Evidence Rules, not judicial discretion, except in those instances under the Nebraska Evidence Rules when judicial discretion is a factor involved in admissibility of evidence. *Petska v. Olson Gravel, Inc.*, 243 Neb. 568, 500 N.W.2d 828 (1993). This court reviews a trial court's ruling on the admissibility of evidence for an abuse of discretion where the Nebraska Evidence Rules permit judicial discretion in assessing admissibility. *Behm v. Northwestern Bell Tel. Co.*, 241 Neb. 838, 491 N.W.2d 334 (1992). Evidence relating to an illustrative experiment is admissible if a competent person conducted the experiment, *an apparatus of suitable kind and condition was utilized*, and the experiment was conducted fairly and honestly. *Kluender v. Mattea*, 214 Neb. 327, 334 N.W.2d 416 (1983); *Shover v. General Motors Corp.*, 198 Neb. 470, 253 N.W.2d 299 (1977). The trial court has wide discretion in determining whether evidence relating to illustrative experiments should be received. A judgment will not be reversed on account of the admission or rejection of such testimony unless there has been a clear abuse of discretion. *Id.*

When defendants questioned Heitzman about the results of the tests of the other vehicles, plaintiffs objected for lack of foundation with respect to comparative testing. See *id.*

Plaintiffs cite *Kluender* and *Shover* in support of their position. This reliance is misplaced. *Kluender* and *Shover* involved foundational questions where the videotape attempted to re-create the accident conditions. Other jurisdictions have found that where the videotape is offered not to re-create conditions similar to the accident, but merely to illustrate certain principles, differences in surrounding conditions are less relevant and do not require the videotape's exclusion. See, *Gilbert v. Cosco Inc.*, 989 F.2d 399 (10th Cir. 1993); *Four Corners Helicopters, Inc. v. Turbomeca, S.A.*, 979 F.2d 1434 (10th Cir. 1992); *Dorsett v. American Isuzu Motors, Inc.*, 805 F.

Supp. 1212 (E.D. Pa. 1992) (admissible even if no similarity because difference in conditions so obvious, there is no danger of confusing the jury); *Loevsky v. Carter*, 70 Haw. 419, 773 P.2d 1120 (1989) (videotapes inadmissible as a veiled attempt at re-creation); *Zolber v. Winters*, 109 Idaho 824, 712 P.2d 525 (1985); *Gorelick v Dep't of Highways*, 127 Mich. App. 324, 339 N.W.2d 635 (1983); *Green v General Motors Corp*, 104 Mich. App. 447, 304 N.W.2d 600 (1981) (videotape served as a visual aid); *Hueper v. Goodrich*, 263 N.W.2d 408 (Minn. 1978) (videotape admissible where purpose was not to portray area or conditions of accident). Other courts have allowed the videotape as an illustration where the judge has told the jury that the videotape is only a visual illustration and not proof. See, *Harvey by Harvey v. General Motors Corp.*, 873 F.2d 1343 (10th Cir. 1989); *Palmer by Diacon v. Farmers Ins. Exchange*, 233 Mont. 515, 761 P.2d 401 (1988). When allowing videotapes to be shown, courts have found the lack of similarity to go to the weight of the evidence rather than to its admissibility. See, *Gilbert v. Cosco Inc., supra*; *Four Corners Helicopters, Inc. v. Turbomeca, S.A., supra*; *Kramer v. J.I. Case Mfg. Co.*, 62 Wash. App. 544, 815 P.2d 798 (1991) (involving videotape of backhoe).

It is clear that Heitzman's videotapes were not meant to re-create the accident, but merely to rebut the plaintiffs' contention that the Fiat X1/9 was unique in its tendency to spin when the throttle was taken off as it reached its limits of handling.

Heitzman described his work as measuring, defining, and describing automobile handling. He addressed several questions regarding the handling characteristics of the Fiat X1/9. One question was whether the Fiat X1/9 handled differently from other cars in normal maneuvers at 45 to 65 miles per hour.

In order to answer this question, Heitzman developed several questions to be answered by the testing conducted at the Transportation Research Center (TRC):

> Q. This testing which you did at TRC, what was it designed — what questions was it designed to answer?
>
> A. Well, the first question was will all these cars spin in

liftoff — when you acc- — at the ragged edge of their capabilities of — of their limit.

If you lift off, will they — will they spin out?

Second question is if they're not at the limit of their capabilities, will they spin out?

Q. Uh-huh.

A. The third question is how do — how do they compare in — in their — in their understeer behavior — the transient understeer behavior?

Q. Uh-huh.

A. And then just comparison. We were trying to compare the six cars, and as a — to — to see if any of them differed much from any of the others or if they were all pretty much the same in performance.

A series of tests was done on the Fiat X1/9 and other vehicles at the TRC on June 20, 21, 29, and 30, 1990. Heitzman testified that Weins, plaintiff's automotive expert, was present during the testing on these dates. Heitzman testified that he was the driver in all of the tests and that in addition to the Fiat X1/9, he tested a 1984 Fiero with a four-cylinder engine, a 1987 Fiero GT with a six-cylinder engine, a 1987 IROC Z Camaro, a 1975 Pontiac Trans Am, and a 1979 Datsun 280ZX. A Subaru wagon was also tested, but the results were incomplete due to a malfunction of the vehicle. The results for the Trans Am were also incomplete. The 1984 Fiero was tested because Weins had tested it previously. The 1987 Fiero was tested because it was the latest development by General Motors of the mid-engine concept. The 280ZX and the Trans Am were considered by Heitzman to be high-performance contemporaries of the Fiat X1/9 and were owned by the Broome family. The IROC Z was tested because it was a state-of-the-art V-8 front-engine, rear-drive sedan. In general, these vehicles were chosen because they were all high-performance, sporty vehicles designed to have a larger than usual performance limit as compared with six-passenger vehicles or sedans.

The following tests were performed on the Fiat X1/9 as well as on the other vehicles: a constant radius test, a step response test, a lane change test, and a frequency response test. The constant radius test consists of driving around a circle and

constantly increasing speeds and measuring steering wheel angle changes to determine the understeer gradient or the amount of understeer. This test requires increasing the speed of the vehicle until it reaches its limit of control. Since the limits of each vehicle are different, the speed of each vehicle was different. The frequency response test measures the sensitivity of the car insofar as how much it turns when the steering wheel is turned, and the response time. This test was conducted on the Fiat X1/9 at the research runway of the aerospace mechanical science department at Princeton University at the end of 1988. The testing surface at Princeton, as well as the surface at the TRC, was asphalt. The testing surface for the TRC was also very flat and smooth. In a step response test, the vehicle is driven in a straight line at 50 miles per hour and the driver puts in increasing steer until the car's limit of control is reached. The test was performed on all vehicles, with the throttle on and the throttle off, and with the same rate of turn of 200 to 500 degrees per second. The speed at which the vehicles were tested was the same, 50 miles per hour.

To address the foundation question, defense counsel asked Heitzman if the same test protocol was used for each vehicle, if the instrumentation was the same, and if the same surface, same driver, and the same analysis method were used. He was also asked whether the data recordation methodology was the same. Each car was subjected to constant radius tests with drop throttle and no drop throttle. Each vehicle did the J-turn-type testing (step response test with and without throttle). Heitzman testified that the same speeds were used for most of the tests. However, in the constant radius test, he explained, the object is to reach the vehicle's limit and see if it spins when it reaches its limit. Since the limit of control is different for each vehicle, it would be reached at different speeds.

On voir dire, Heitzman conceded that some of the vehicles tested were front-engine vehicles and some were mid-engine vehicles, and the size and pressure of the tires would also vary. Nevertheless, the purpose of the testing was to demonstrate the principle that the Fiat X1/9 reacted similarly to other high-performance vehicles when they reached their limits. The dissimilarity of the test conditions to the accident conditions

would go to the weight of the evidence and not to its admissibility. *Gilbert v. Cosco Inc.*, 989 F.2d 399 (10th Cir. 1993); *Four Corners Helicopters, Inc. v. Turbomeca, S.A.*, 979 F.2d 1434 (10th Cir. 1992); *Champeau v. Fruehauf Corp.*, 814 F.2d 1271 (8th Cir. 1987).

In *Gilbert*, the defendant introduced tests to refute testimony by the plaintiffs' expert that defendant's design had caused a "springboard effect" in the child-restraint seat manufactured by the defendants. The appellate court stated that when experiments do not simulate actual events at issue, the jury should be instructed that the evidence is admitted for the limited purpose or principles. No limiting instruction was given to the jury. However, the court upheld the admission of the tests because the trial court heard testimony regarding the purpose of the tests, it considered arguments by both sides and the relevancy of the data, and it allowed the plaintiffs' attorney to question the expert to determine relevancy and prejudicial impact. The appellate court also found the credibility of the expert's conclusions was attacked by the plaintiffs' attorney's pointing out inconsistencies and that the jury could consider this in weighing the evidence.

No limiting instruction was provided for the jury in the case before us. However, the trial court also heard testimony regarding the purposes of the tests conducted on the other vehicles. Defendants advised the court that inferences had been created by plaintiffs' expert that if a vehicle spins, it is defective, and that the Fiat X1/9 spins more quickly than American cars. The tests therefore were introduced to show that all cars will start to spin when they reach their limit of control. Plaintiffs' counsel was also able to question Heitzman on the differences in vehicles before the jury. Through this questioning the jury could determine how much weight to give the tests.

Under these circumstances, we cannot say that the trial court abused its discretion in admitting the videotapes depicting tests run on vehicles other than the Fiat X1/9.

JURY INSTRUCTIONS

STATE-OF-THE-ART DEFENSE

The plaintiffs next allege that the trial court erred in

submitting the state-of-the-art defense to the jury and in failing to properly instruct the jury on this defense.

Submission of an issue on which the evidence is insufficient to sustain an affirmative finding is generally prejudicial and results in a new trial. *Vredeveld v. Clark, ante* p. 46, 504 N.W.2d 292 (1993).

Contrary to the allegations of the plaintiffs, the defendants did offer evidence that the Fiat X1/9 was in conformity with the technology reasonably available at the time. Heitzman testified that the Fiat X1/9 met the specifications concerning oversteer and understeer of the "research safety vehicle," an idealized car with optimized safety for the 1980's. Michael Pocobello, an automotive engineer and defendants' expert, testified that the margin of safety that the Fiat X1/9 provides a driver in terms of handling capability was at the top of the technology for that period in which the Fiat X1/9 was manufactured. He also stated that the Fiat X1/9 was "on the top of the heap" as to technology available in the late seventies. Testimony by these experts provided a sufficient basis to submit the state-of-the-art defense to the jury.

TENDERED INSTRUCTIONS

Plaintiffs' second contention concerning the jury instructions is that the trial court improperly instructed the jury on the state-of-the-art defense. This court has stated that all the jury instructions 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. See *Kozeny v. Miller*, 243 Neb. 402, 499 N.W.2d 75 (1993).

We find no merit in this assignment. Neb. Rev. Stat. § 25-21,182 (Reissue 1989) states:

> In any product liability action based upon negligent or defective design, testing, or labeling, proof establishing that such design, testing, or labeling was in conformity with the generally recognized and prevailing state of the art in the industry at the time the specific product involved in the action was first sold to any person not engaged in the business of selling such product shall be a defense. State of

> the art as used in this section shall be defined as the best technology reasonably available at the time.

The challenged jury instruction incorporates almost verbatim the burden placed on the defendants to establish a state-of-the-art defense under § 25-21,182. It requires the defendants prove that the design of the Fiat X1/9 "conformed with the generally recognized and prevailing state of the art at the time that it was first sold by the defendants in 1980." It also defines, as does § 25-21,182, "state of the art" as "the best technology reasonably available at the time."

Plaintiffs argue that the instruction failed to make the distinction between state of the art and the standard of the industry. Plaintiffs rely on *Hancock v. Paccar, Inc.*, 204 Neb. 468, 479-80, 283 N.W.2d 25, 35 (1979), wherein we stated:

> While the jury may consider, as evidence of the state of the art, the fact that no manufacturer is doing that which it is claimed could be done, such evidence will not establish conclusively the state of the art. Obviously, the inaction of all the manufacturers in an area should not be the standard by which the state of the art should be determined. Whether the design represents the state of the art is still a question of fact to be determined by the jury.

Hancock did not involve a challenge to the jury instruction, but the propriety of submitting the issue to the jury. The challenged instruction in this instance clearly states that state of the art refers not to the technology the manufacturers are employing, but to "the best technology reasonably available at the time." Plaintiffs' assertion to the contrary is mistaken.

CROSS-APPEAL

On cross-appeal, the defendants assert the trial court erred (1) in overruling their motion for a directed verdict on plaintiffs' strict liability claim against Fiat Motors of North America and (2) in permitting plaintiffs' accident reconstruction expert to testify concerning a computer simulation of the path of the Fiat X1/9 on the roadway.

DIRECTED VERDICT

At the close of plaintiffs' case, defendant Fiat Motors of North America, Inc., moved for a directed verdict on plaintiffs'

claims based on strict liability. The trial court denied the motion. Defendants claim that § 25-21,181 bars any action based on strict liability against the seller unless the seller is also a manufacturer.

Section 25-21,181 states:

> No product liability action based on the doctrine of strict liability in tort shall be commenced or maintained against any seller or lessor of a product which is alleged to contain or possess a defective condition unreasonably dangerous to the buyer, user, or consumer unless the seller or lessor is also the manufacturer of this product or the part thereof claimed to be defective.

Plaintiffs assert that Fiat Motors of North America was a manufacturer for purposes of a strict liability suit. After the plaintiffs presented their case, they were granted leave to amend their third amended petition to include allegations that at the time of the accident, Fiat Motors of North America was a wholly owned subsidiary of Fiat S.p.A., the car manufacturer, and that Fiat Motors of North America was the sole importer and distributor of Fiat S.p.A. Plaintiffs claim these allegations are sufficient to find Fiat Motors of North America liable as a manufacturer.

Plaintiffs' claim fails for two reasons. At trial, plaintiffs failed to set forth any evidence which would support these allegations. Plaintiffs claim that Fiat Motors of North America stipulated to the aforementioned allegations. No such stipulation could be found in the record. At the time of the request for leave to amend, plaintiffs' counsel read the proposed amendment to the petition. Fiat Motors of North America did not object to the amendment. Plaintiffs cite Fiat Motors of North America's lack of objection at the time the plaintiffs requested to amend their third petition as amounting to a stipulation to such allegations. This contention is not supported by the record.

In any event, § 25-21,181 bars any action based on strict liability in tort brought against the seller or lessor of a defective or unreasonably dangerous product unless the seller is also the manufacturer of the product. Because the plaintiffs failed to present evidence establishing Fiat Motors of North America as

a manufacturer of the defective product, Fiat Motors of North America was entitled to a directed verdict on the issue of strict liability.

COMPUTER SIMULATION

Defendants next complain that plaintiffs' expert's testimony regarding a computer simulation of the path of the Fiat X1/9 on the roadway was erroneously admitted. Evidence relating to an illustrative experiment is admissible if a competent person conducted the experiment, an apparatus of suitable kind and condition was utilized, and the experiment was conducted fairly and honestly. *Kluender v. Mattea*, 214 Neb. 327, 334 N.W.2d 416 (1983); *Shover v. General Motors Corp.*, 198 Neb. 470, 253 N.W.2d 299 (1977). It is not essential that conditions existing at the time of the experiment be identical with those existing at the time of the occurrence. Substantial similarity is sufficient. *Id.*

Other jurisdictions have permitted the use of computer simulations to aid the trier of fact. See, *Perma Research and Development v. Singer Co.*, 542 F.2d 111 (2d Cir. 1976), *cert. denied* 429 U.S. 987, 97 S. Ct. 507, 50 L. Ed. 2d 598; *Commercial Union Ins. Co. v. Boston Edison Co.*, 412 Mass. 545, 591 N.E.2d 165 (1992); *Messex v. Louisiana Department of Highways*, 302 So. 2d 40 (La. App. 1974). In *Commercial Union Ins. Co. v. Boston Edison Co.*, 412 Mass. at 549, 591 N.E.2d at 168, the court conditioned the use of computer simulations on several factors:

> [W]e treat computer-generated models or simulations like other scientific tests, and condition admissibility on a sufficient showing that: (1) the computer is functioning properly; (2) the input and underlying equations are sufficiently complete and accurate (and disclosed to the opposing party, so that they may challenge them); and (3) the program is generally accepted by the appropriate community of scientists.

We find the simulation meets the requirements necessary to be admissible evidence. Dickinson, the plaintiffs' accident reconstruction expert, generated the simulation of the accident through a computer program called Engineering Dynamics Single Vehicle Simulator. Dickinson testified that this program

or model is used regularly by members of the reconstruction group company Failure Analysis Associates, possibly the largest failure analysis firm in the world, and is generally relied upon by experts in the reconstruction field for single-vehicle accident simulation. He also stated the program is used either to reconstruct an entire accident or to evaluate driver-vehicle interaction prior to an impact with an object or another car.

Dickinson described the authentication process used with this model. The dimensions of the Fiat X1/9 were measured in order to accurately represent the various dimensions that were to be input into the model. Those dimensions which were not available through direct measurement, such as the steering angle input and acceleration, were taken from the input data from the track tests as reported by Weins and Heitzman.

Track test data was used by Dickinson for verification purposes. Dickinson compared the J-turn and the constant radius skid-pad tests track tests performed by Weins and Heitzman, respectively, to the computer simulation of those tests in order to have an independent validation of the computer model. These simulations were done to validate the computer model, which was developed through measurement of vehicle properties and comparison to track test data, to show that in an off-throttle step-steer type maneuver, the computer model accurately represents the vehicle, the Fiat X1/9. Once the computer model is validated, an accurate simulation of the accident may be achieved.

In order to simulate the accident, Dickinson testified, he ran simulations using the model developed to compare the track test of the vehicle on the roadway, which allowed him to review the vehicle behavior and the vehicle trajectory and compare those to the marks on the roadway, the road exit speed, the angle at which the vehicle left the roadway, and the elements Broome described to him.

Fiat argues that the simulation was invalid because it was based on actions by Broome that were contrary to Broome's testimony and on factual assumptions which had no support in the evidence. Specifically, Fiat argues that the simulation is invalid because Broome testified that he thought he downshifted and that he attempted to brake at the time of the

accident, and those elements were not placed in the computer simulation. We disagree. Broome testified that he thought he had downshifted and that he tried to apply the brakes but was unsure he had succeeded in doing either.

Dickinson explained his decision to not use those elements in the simulation by stating that a reconstructionist evaluates the witnesses' or driver's testimony against the physical evidence and against the simulation. The control elements were developed through runs of the simulation and were performed to best match the physical data that was available from the accident, which included the marks on the road, the road exit speeds, the angle exiting the road, and Broome's testimony of swerving to miss the animal on the road, lifting his foot off the accelerator, and attempting to steer back into his lane. Dickinson explained the simulation did not include braking because there was no evidence on the roadway that Broome succeeded in applying the brakes. Under these circumstances, we find the simulation accurately reflected the accident and was therefore correctly admitted by the trial court.

CONCLUSION

We find the trial court erred in sustaining the defendants' motion for a directed verdict on the issue of crashworthiness. We further find the trial court did not abuse its discretion in admitting the videotapes of the several vehicles. On the cross-appeal, we find that the trial court erred in not granting a directed verdict for Fiat Motors of North America. Finally, we find the trial court was correct in admitting the testimony and videotape on the computer simulation of the accident. We reverse, and remand the cause for further proceedings consistent with this opinion.

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

WHITE and SHANAHAN, JJ., not participating.

JOE KOPECKY AND MICHELE KOPECKY, HUSBAND AND WIFE, APPELLEES, V. NATIONAL FARMS, INC., A DELAWARE CORPORATION, DOING BUSINESS AS NATIONAL FARM PRODUCTS, AND O.N. CORPORATION, A NEBRASKA CORPORATION, APPELLANTS.

510 N.W.2d 41

Filed January 7, 1994. No. S-91-633.

1. **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 such party the benefit of all reasonable inferences deducible from the evidence.
2. **Jury Instructions: Proof: Appeal and Error.** In an appeal based on the claim of an erroneous instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.
3. _____: _____: _____. To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction. Furthermore, 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.
4. **Nuisances: Real Estate.** An intentional invasion of another's interest in the use and enjoyment of land is unreasonable if (1) the gravity of the harm outweighs the utility of the actor's conduct, or (2) the harm caused by the conduct is serious and the financial burden of compensating for this and similar harm to others would not make the continuation of the conduct not feasible.
5. **Judgments: Appeal and Error.** With regard to questions of law, an appellate court is obligated to reach a conclusion independent from the trial court's conclusion.
6. **Collateral Estoppel.** There are four conditions that must exist for the doctrine of collateral estoppel to apply: (1) The identical issue was decided in a prior action, (2) there was a judgment on the merits which was final, (3) the party against whom the rule is applied was a party or in privity with a party to the prior action, and (4) there was an opportunity to fully and fairly litigate the issue in the prior action.
7. **Actions: Judicial Notice.** Where cases are interwoven and interdependent and the controversy involved has already been considered and determined in a prior proceeding involving one of the parties now before the court, the court has a right to examine its own records and take judicial notice of its own proceedings and judgment in the prior action.
8. **Collateral Estoppel: Words and Phrases.** For the purposes of applying the doctrine of collateral estoppel, an issue is considered to be the "identical issue" in the absence of a significant factual change.

9. **Trial: Juries.** A motion to inspect the premises under Neb. Rev. Stat. § 25-1108 (Reissue 1989) is, by the terms of the statute, left to the discretion of the trial court.
10. **Judges: Words and Phrases: Appeal and Error.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or to refrain from action, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system.
11. **Nuisances: Jury Instructions.** In a nuisance case, when the issue of unreasonableness is submitted to the jury, the jury is to be instructed pursuant to the Restatement (Second) of Torts § 826 (1979), which subsumes evidence on social utility.
12. **Rules of the Supreme Court: Evidence: Parties.** Neb. Ct. R. of Discovery 34 (rev. 1992) is limited in scope. It applies only to parties to the action.
13. **Motions for New Trial: Appeal and Error.** A district court's denial of a motion for new trial will be affirmed when the court's decision is neither prejudicial nor an abuse of discretion.
14. **Verdicts: Appeal and Error.** A verdict will not be set aside on appeal unless it is so clearly exorbitant as to indicate that it was the result of passion, prejudice, or mistake, or it is clear that the trier of fact disregarded the evidence or rules of law.
15. **Motions for New Trial: Juror Misconduct: Verdicts: Proof.** In a motion for new trial, allegations of misconduct by jurors must be substantiated by competent evidence. The misconduct complained of must relate to a disputed matter that is relevant to the issues in the case and must have influenced the jurors in arriving at the verdict.
16. **Rules of Evidence: Verdicts: Jurors: Affidavits.** Neb. Rev. Stat. § 27-606(2) (Reissue 1989) prohibits admission of a juror's affidavit to impeach a verdict on the basis of the jury's motives, methods, misunderstanding, thought processes, or discussions during deliberations, which enter into the verdict.

Appeal from the District Court for Holt County: EDWARD E. HANNON, Judge. Affirmed.

David A. Domina, of Domina & Copple, P.C., for appellants.

Steven D. Burns, of Burns & Associates, for appellees.

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

LANPHIER, J.

National Farms, Inc., and its wholly owned subsidiary O.N. Corporation appeal the rulings and judgment of the Holt County District Court whereby, following a trial to a jury, their

swine-raising operation was determined to be a private nuisance because of odor and flies, and the appellees, Joe and Michele Kopecky, were awarded damages. National Farms and O.N. claim the district court erred in refusing their offer to present evidence to the jury on the social utility of their swine-raising operation and by improperly instructing the jury on the issues of nuisance and damages. National Farms and O.N. claim the district court erred in granting partial summary judgment against them based on an earlier nuisance suit in which their swine-raising facility was determined to constitute a nuisance. National Farms and O.N. claim the district court erred in allowing evidence of a Colorado swine-raising facility operated by an affiliate corporation and in not allowing the jury to inspect the Holt County operation. National Farms and O.N. submit an affidavit and allege juror misconduct.

BACKGROUND

At the time of trial, Joe and Michele Kopecky resided about 2 1/4 miles northwest of National Farms and O.N.'s swine-raising facility. The Kopeckys complained that from August 15, 1985, to August 15, 1989, National Farms and O.N.'s means of disposing of the waste (manure and urine) from the 85,000 to 90,000 animals housed in the facility created a nuisance: an intolerable odor and an unreasonable number of flies.

National Farms and O.N. used water to flush the animal waste out of each confinement building. The waste was then passed over a system of screens which separated the solid waste from the liquid waste. A manure spreader was used to distribute the solid waste over adjacent fields owned by National Farms and O.N. The liquid waste was pumped into a series of lagoons. During the growing season, the liquid waste from the lagoons was mixed with varying amounts of water, and center-pivot irrigation systems sprayed the mixture over National Farms and O.N.'s fields. During the winter, the liquid waste was stored in the lagoons.

The Kopeckys claimed it was this method of waste utilization and removal which created an intolerable odor and an unreasonable number of flies at their home. Michele Kopecky

described the odor as a "gagging smell . . . a nauseating, burning odor." Joe Kopecky, who previously worked for National Farms and O.N. and was familiar with the odors associated with hog production, testified that the odor was "very strong" as compared to what he would normally expect from a typical swine-raising operation. He also testified that since National Farms and O.N.'s swine-raising facility was built, the number of flies at the Kopeckys' home had increased. Michele Kopecky testified that the odor and the number of flies interfered with the use of their home. She testified that when she smelled the odor, she would go into the house and close all the windows. However, she testified that even this did not always keep the odor out. She also testified that her children had been forced to play inside because of the odor and that the Kopeckys could no longer have family picnics.

Subsequently, the Kopeckys brought this action for nuisance. Prior to trial, the district court granted partial summary judgment, determining that a 1986 case, Kaup v. National Farms, Inc., and O.N. Corporation, Holt County District Court, case No. 18235, established (1) that during the period from August 15, 1985, to September 18, 1986, an unreasonable amount of odor and flies came from the National Farms and O.N. swine-raising facility; (2) that during the period from August 15, 1985, to September 18, 1986, National Farms and O.N. were operating the facility with the knowledge that the unreasonable odor and flies interfered with the use and enjoyment of some surrounding property; and (3) that during any period of time from August 15, 1985, to the date of the verdict in that case, National Farms and O.N. were legally responsible for any damage that any person received from unreasonable odor or flies coming from the swine-raising facility.

Also prior to trial, National Farms and O.N., pursuant to Neb. Rev. Stat. § 25-1108 (Reissue 1989), moved to allow the jury to inspect their swine-raising facility. At trial, the motion was renewed, but was denied.

Over the objection of National Farms and O.N., the court received evidence offered by the Kopeckys on a Colorado swine-raising facility operated by another wholly owned

subsidiary of National Farms.

At trial, National Farms and O.N. offered evidence on the economic impact and social utility of their swine-raising operation, but the court refused this evidence.

After the jury returned its verdict, National Farms and O.N. moved for a new trial, offering an affidavit of the jury foreperson as evidence of jury misconduct. The affidavit stated that the jury awarded damages of $500 per day for each "smelly" day and $100 per day for all other days. The affidavit was refused, and the motion was denied.

ASSIGNMENTS OF ERROR

National Farms contends that the district court erred (1) in granting partial summary judgment in favor of the Kopeckys, (2) in overruling National Farms and O.N.'s motion for inspection of the subject premises pursuant to § 25-1108, (3) in permitting discovery and introduction of evidence concerning the Colorado swine-raising facility, (4) in refusing National Farms and O.N.'s tendered evidence concerning the social utility of its swine operations, (5) in erroneously instructing the jury on the law of nuisance, (6) in erroneously instructing the jury on the issue of proximate cause, (7) in erroneously instructing the jury on damages, (8) in refusing to receive the affidavit of the jury foreperson upon hearing National Farms and O.N.'s motion for new trial, and (9) in overruling National Farms and O.N.'s motion for new trial.

STANDARD OF REVIEW

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. *Ev. Luth. Soc. v. Buffalo Cty. Bd. of Equal.*, 243 Neb. 351, 500 N.W.2d 520 (1993). In an appeal based on the claim of an erroneous instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant. *Petska v. Olson Gravel, Inc.*, 243 Neb. 568, 500 N.W.2d 828 (1993); *Kozeny v. Miller*, 243 Neb. 402, 499 N.W.2d 75 (1993); *Sikyta v. Arrow Stage Lines*, 238 Neb. 289, 470 N.W.2d 724 (1991). To establish

reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction. *Kozeny v. Miller, supra.* Furthermore, 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.*

NUISANCE INSTRUCTIONS

National Farms and O.N. claim the trial court erroneously instructed the jury concerning liability for private nuisance.

National Farms and O.N.'s assertion that the instructions given do not reflect the law as stated in *Hall v. Phillips*, 231 Neb. 269, 436 N.W.2d 139 (1989), is correct.

In *Hall*, we expressly adopted the law of nuisance as articulated in the Restatement (Second) of Torts (1979). We stated:

> For a law action tried to a jury, where a court may be required to fashion instructions specifying the requirements for an actionable private nuisance and consequent liability, we are persuaded that the Restatement (Second) of Torts § 822 (1979) expresses a suitable standard to determine when one may be subject to liability and provides more guidance to a jury than do the present expressions concerning existence of a private nuisance as currently characterized in Nebraska equity cases.

Hall v. Phillips, 231 Neb. at 278, 436 N.W.2d at 145.

In the case at hand, the trial court, apparently pursuant to NJI2d Civ. 17.01, instructed the jury that the interference would be unreasonable if "1) [t]he damage was greater than the plaintiffs should be required to bear without compensation; or 2) [t]he defendants could have avoided the harm in whole or in part without undue hardship."

The first alternative in that instruction was obviously

fashioned after the Restatement, *supra*, § 829 A at 135, which states: "An intentional invasion of another's interest in the use and enjoyment of land is unreasonable if the harm resulting from the invasion is severe and greater than the other should be required to bear without compensation."

The second alternative was apparently modeled after the Restatement, *supra*, § 830 at 136: "An intentional invasion of another's interest in the use and enjoyment of land is unreasonable if the harm is significant and it would be practicable for the actor to avoid the harm in whole or in part without undue hardship."

However, contrary to the comment to NJI2d 17.01 and the assertions of both National Farms and O.N. and the Kopeckys, comment *b.* to several sections of the Restatement, *supra*, shows that the authors of the Restatement did not intend that the rules contained within §§ 829 through 831 be used to instruct a jury. Rather, the authors of the Restatement clearly intended that the rules contained within §§ 829 through 831 be used to guide judges in those cases where it is appropriate to determine that an intentional interference is unreasonable as a matter of law. See, the Restatement, *supra*, §§ 826 and 829 through 831, comment *b.*

The authors of the Restatement explain: "When it is doubtful whether the facts of a case bring it within the rule here stated, the unreasonableness of the invasion is determined by the trier of fact under the general rule stated in § 826." The Restatement, *supra*, § 829, comment *b.* at 134. Accord, the Restatement, *supra*, §§ 829 A through 831, comment *b.* (the authors use language similar to that quoted above).

Section 826 at 119 states:

> An intentional invasion of another's interest in the use and enjoyment of land is unreasonable if
>
> (a) the gravity of the harm outweighs the utility of the actor's conduct, or
>
> (b) the harm caused by the conduct is serious and the financial burden of compensating for this and similar harm to others would not make the continuation of the conduct not feasible.

As comment *d.* to § 826 explains, factors to consider when

determining the "gravity of the harm" and the "utility of the actor's conduct" are listed in the Restatement, *supra*, §§ 827 and 828, respectively.

Section 827 at 124 states:

> In determining the gravity of the harm from an intentional invasion of another's interest in the use and enjoyment of land, the following factors are important:
>
> (a) The extent of the harm involved;
>
> (b) the character of the harm involved;
>
> (c) the social value that the law attaches to the type of use or enjoyment invaded;
>
> (d) the suitability of the particular use or enjoyment invaded to the character of the locality; and
>
> (e) the burden on the person harmed of avoiding the harm.

Section 828 at 129 states:

> In determining the utility of conduct that causes an intentional invasion of another's interest in the use and enjoyment of land, the following factors are important:
>
> (a) the social value that the law attaches to the primary purpose of the conduct;
>
> (b) the suitability of the conduct to the character of the locality; and
>
> (c) the impracticability of preventing or avoiding the invasion.

Thus, whether the facts of a particular case fit within one of the rules contained in §§ 829 through 831 is a question of law and, as such, must be decided by the court. The jury, therefore, should not have been instructed as it was according to §§ 829A and 830. When the judge is unable to determine that an invasion is unreasonable as a matter of law under §§ 829 through 831, the jury decides pursuant to § 826. The jury should then be instructed pursuant to § 826.

If the judgment in the earlier case, Kaup v. National Farms, Inc., and O.N. Corporation, Holt County District Court, case No. 18235, is binding in this case because of the application of collateral estoppel, then the issue of nuisance would not be a matter submitted to the jury. The applicability of the doctrine of collateral estoppel to this case constitutes a question of law.

Petska v. Olson Gravel, Inc., 243 Neb. 568, 500 N.W.2d 828 (1993). With regard to questions of law, this court is obligated to reach a conclusion independent from the trial court's conclusion. *Id.*; *Nebraska Builders Prod. Co. v. Industrial Erectors*, 239 Neb. 744, 478 N.W.2d 257 (1992).

There are four conditions that must exist for the doctrine of collateral estoppel to apply: (1) The identical issue was decided in a prior action, (2) there was a judgment on the merits which was final, (3) the party against whom the rule is applied was a party or in privity with a party to the prior action, and (4) there was an opportunity to fully and fairly litigate the issue in the prior action. *McCook Nat. Bank v. Myers*, 243 Neb. 853, 503 N.W.2d 200 (1993); *State on behalf of J.R. v. Mendoza*, 240 Neb. 149, 481 N.W.2d 165 (1992).

National Farms and O.N. argue that the issue decided here was not identical to the one decided in the Kaup case. National Farms and O.N. suggest that since the plaintiffs in the Kaup case lived approximately a mile nearer to the swine-raising facility and in the opposite direction from the Kopeckys, the issue of nuisance is not identical.

Faced with similar cases, other courts have applied a rule which says that in the absence of a substantial factual change, neither the same facts nor identical facts may be relitigated. *McHugh v. City of Wichita*, 1 Kan. App. 2d 180, 563 P.2d 497 (1977) (nuisance case in which collateral estoppel was not applicable because of a substantial and material change in circumstances). See, also, *Riblet v. Ideal Cement Co.*, 54 Wash. 2d 779, 345 P.2d 173 (1959) (nuisance case where, in the absence of a major factual change, prior judgment bound the parties). But see *Hill v. Stokely-Van Camp, Inc.*, 260 Minn. 315, 109 N.W.2d 749 (1961) (determination, in prior action against defendant, that defendant had created a private nuisance as regarded plaintiff in that action was not res judicata as to existence of private nuisance in later action by a different plaintiff).

Although we have never considered this precise issue in the context of a continuing tort, we have considered the application of the doctrine of collateral estoppel in the context of negligence. See *Peterson v. The Nebraska Nat. Gas Co.*, 204

Neb. 136, 281 N.W.2d 525 (1979). In *Peterson*, the plaintiff sued the defendant, The Nebraska Natural Gas Co., alleging that the gas company's negligence had caused extensive damage to his building. Prior to the trial in *Peterson*, the gas company had been sued by Louise Hammond, the owner of the Pathfinder Hotel, for negligently causing an explosion which destroyed that hotel. See *Hammond v. The Nebraska Nat. Gas Co.*, 204 Neb. 80, 281 N.W.2d 520 (1979). Asserting that the same explosion had caused the damage to his building a block away, Peterson moved for summary judgment on the issues of negligence and proximate cause. In affirming the trial court's grant of summary judgment, we stated:

> [W]here cases are interwoven and interdependent and the controversy involved has already been considered and determined in a prior proceeding involving one of the parties now before the court, the court has a right to examine its own records and take judicial notice of its own proceedings and judgment in the prior action.

Peterson v. The Nebraska Nat. Gas Co., 204 Neb. at 138, 281 N.W.2d at 527. The grant of summary judgment on the issues of negligence and proximate cause was insufficient alone for Peterson to prevail, but when we considered it with the evidence on damages adduced at trial, we affirmed the district court's judgment in favor of Peterson.

We have determined that a similar approach should have been employed here. That is, we find that the procedure approved of in *Peterson* is also appropriate in the context of a continuing tort. Thus, for the purposes of applying the doctrine of collateral estoppel, an issue is considered to be the "identical issue" in the absence of a significant factual change.

It appears that the trial court initially intended to determine the extent to which the judgment in Kaup v. National Farms, Inc., and O.N. Corporation, Holt County District Court, case No. 18235, precluded relitigation of the existence of the nuisance after that judgment. At the start of the trial in this case, the court orally informed the jury that one of the material facts it was to determine was "whether the swine-raising facility was substantially changed after September 18, 1986 [the date of the Kaup verdict], so that unreasonable odors and flies ceased

to come from the facility after that date." However, a review of the jury instructions reveals that the jury was never required to make such a determination in order to arrive at a verdict. The issue of substantial change is only relevant to the applicability of the doctrine of collateral estoppel. Whether the doctrine of collateral estoppel applies is a question of law. Therefore, whether there was a substantial factual change in this case should have been decided by the court. The parties clearly addressed the issue during the course of the trial; however, nothing in the record discloses that the trial judge ever made the determination.

Accordingly, the issues we must address are whether there was a substantial change in the level of odors and flies after the date of the verdict in the Kaup case and also whether the Kopeckys are situated similarly enough to the Kaups, the plaintiffs in that case, so that the Kaup case should be applied as a matter of law.

The Kaups lived a mile nearer to the swine-raising facility and in the opposite direction from the Kopeckys. A review of the evidence shows that the wind blows in the direction of the Kopeckys, northwesterly, approximately 11 percent of the time, and the wind blows in the Kaups' direction, southeasterly, roughly 13 percent of the time. One of the Kopeckys' neighbors, Larry Ogden, who lived in the same general direction from the swine-raising facility, but approximately 1 1/2 miles further away than the Kopeckys, testified that the odor he smelled at his residence was about the same strength as the odor he could detect at the Kopecky residence. Another neighbor, Jay Seger, who lived approximately 2 1/2 miles north of National Farms and O.N.'s facility, described the odor that he received at his property as "just plain offensive." There was similar testimony from several others, confirming that the odor and flies could be detected at least as far away as the Kopeckys lived.

Even when viewing this evidence in the light most favorable to National Farms and O.N., we cannot conclude that the slight difference in wind frequency or the small difference in distance constitutes a substantial factual change of the sort necessitating relitigation of the nuisance during the period in which the case at hand overlaps with the Kaup case.

National Farms and O.N. adduced evidence showing that they stopped recycling the water they used to flush waste from their buildings in October 1990. They added screening stations outside the farrowing units and changed the screens to ones with smaller openings, which prevent more of the solids from flowing into the lagoon. Four center-pivot irrigation systems were also added. Some of the center-pivot irrigation systems were changed from a Rain Bird-type arrangement to a droplet type, which drops the effluent closer to the ground instead of shooting it up into the air. Feeders in the "grower/finisher" units were replaced. They were replaced so less feed would get into the waste disposal system, thereby reducing the potential for odor. National Farms and O.N. stopped pumping out of the primary finishing lagoon and started pumping from the secondary lagoon only. They also discontinued drawing down the lagoons below recommended levels. National Farms and O.N. thus showed that changes were made. The question at issue, however, is whether the changes were "substantial."

National Farms and O.N. showed they undertook efforts designed to reduce odors. They failed to adduce any evidence showing that their efforts actually reduced the odors emitted, that there ceased to be an invasion, or that the invasion was lessened to any degree. In this context, "substantial" must refer to the effect of the changes. The only evidence adduced at trial was that the odors emanating from the swine-raising facility had not changed. Michele Kopecky testified that neither the frequency nor the intensity of the odors changed at all after the Kaup decision. Dr. Leon Chesnin, the plaintiff's expert, who visited the facility in question in 1986 and in 1990, when asked "whether there has been a significant difference between 1986 and 1990 in the way in which the defendants have operated the waste treatment facility," replied: "My opinion is that as far as the human environment is concerned, in the neighborhood of the O.N. facility, the impact will be the same."

Given this testimony, the only evidence adduced at trial was that the changes made to the swine-raising facility were not substantial. In the absence of a substantial factual change, National Farms and O.N., as a matter of law, are bound by the prior determination on the issue of nuisance. The issue of

liability, therefore, never should have been submitted to the jury. Thus, any error committed in instructing the jury on the law of nuisance was harmless. See *Plambeck v. Union Pacific RR. Co.*, 232 Neb. 590, 441 N.W.2d 614 (1989).

SUMMARY JUDGMENT

In light of our holding above that National Farms and O.N. are estopped from denying the existence of the nuisance, we need not reach the assignment of error pertaining to the grant of partial summary judgment.

MOTION TO INSPECT

National Farms and O.N. contend that the trial court abused its discretion by arbitrarily denying their motion to allow the jury to view their swine-raising facility. A motion to inspect the premises under § 25-1108 is, by the terms of the statute, left to the discretion of the trial court. A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or to refrain from action, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system. *Wulff v. Wulff*, 243 Neb. 616, 500 N.W.2d 845 (1993). The denial of the motion was tenable and in no way deprived National Farms and O.N. of a substantial right or just result and, therefore, was not an abuse of discretion.

EVIDENCE OF SOCIAL UTILITY

National Farms and O.N. next complain that the trial court erred in refusing to admit the evidence tendered on the social utility of their swine-raising operation. Since, as the case was tried, unreasonableness was at issue, and since that issue was given to the jury to decide, the proffered evidence on social utility should have been admitted. As we explained above, in a nuisance case, when the issue of unreasonableness is submitted to the jury, the jury is to be instructed pursuant to the Restatement (Second) of Torts § 826 (1979), which subsumes evidence on social utility.

Although the proffered evidence addressed the social utility of swine-raising in general, and not the social utility of the

incumbent waste disposal specifically, it should have been admitted. The authors of the Restatement obviously did not intend that an activity be broken down into discrete parts, but, rather, that the social utility of an act in its entirety be considered. The authors wrote:

> The process of weighing the gravity of the harm against the utility of the conduct assesses the social value of the actor's activity in general. Thus in the case of noise and other harassment created by the operation of an airport, the utility depends upon the social value of aviation and the need for air transportation. In the case of a cement factory polluting the air with dust, the utility may be reflected in society's need for building materials.

The Restatement, *supra*, § 826, comment *f.* at 122-23. See, also, *Soukup v. Republic Steel Corp.*, 78 Ohio App. 87, 66 N.E.2d 334 (1946) (steel manufacturer's part in the war effort was admissible evidence with regard to the issue of unreasonableness). We therefore hold that the evidence regarding the social utility of the swine-raising facility should have been admitted. This error, however, is a harmless one, since liability was established pursuant to the doctrine of collateral estoppel.

COLORADO FACILITY

Next, National Farms and O.N. argue that the court erred in allowing the Kopeckys' witness to inspect and later to testify about the Colorado swine-raising facility of a wholly owned subsidiary of National Farms. Both parties assert that entry upon land for inspection is controlled by Neb. Ct. R. of Discovery 34 (rev. 1992). However, rule 34, which follows Fed. R. Civ. P. 34, is limited in scope. It applies only to parties to the action. See *Trans Pacific Ins. Co. v. Trans-Pacific Ins. Co.*, 136 F.R.D. 385 (E.D. Pa. 1991). See, also, *Miner v. Punch*, 838 F.2d 1407, 1409 (5th Cir. 1988) (since the provisions of federal rule 34 "apply only to the parties to the pending litigation," the court declined to order the Ohio superintendent of insurance, who was not a party, to produce records of an insurance company in liquidation); *Hatch v. Reliance Ins. Co.*, 758 F.2d 409 (9th Cir. 1985), *cert. denied* 474 U.S. 1021, 106 S. Ct. 571, 88 L. Ed. 2d

555 (federal rule 34, governing production of documents and things for inspection, copying, or photographing, may not be used to discover matters from a nonparty); *Pollitt v. Mobay Chemical Corp.*, 95 F.R.D. 101, 106 (S.D. Ohio 1982) ("it is well settled that Rule 34 provides this Court with no authority to order a *non*-party to permit entry on land"); *Huynh v. Werke*, 90 F.R.D. 447 (S.D. Ohio 1981) (federal rule 34 expressly applies to discovery among parties only). National Farms' wholly owned subsidiary in Colorado is not a party to this action. Under the federal rules, entry upon the land of a nonparty for inspection is governed by Fed. R. Civ. P. 45, as amended in 1991. There is no Nebraska discovery rule which serves as a counterpart to federal rule 45. However, the advisory committee's notes to rule 45 state:

> [T]he revised rule authorizes the issuance of a subpoena to compel the inspection of premises in the possession of a non-party. Rule 34 has authorized such inspections of premises in the possession of a party as discovery compelled under Rule 37, but prior practice required an independent proceeding to secure such relief ancillary to the federal proceeding when the premises were not in the possession of a party.

Nebraska's rule 34(c) addresses persons, not parties, and states: "This rule does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land."

Thus, the trial court should have required the Kopeckys to initiate a discovery action against the wholly owned subsidiary in Colorado. The court erred in ordering the inspection. This error, however, and any error in presenting to the jury the evidence obtained from the inspection, are harmless, since liability is established as a matter of law pursuant to the doctrine of collateral estoppel.

PROXIMATE CAUSE INSTRUCTION

National Farms and O.N. assert that the court improperly instructed the jury on the issue of proximate cause. We disagree. As we have frequently stated, all the jury instructions 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. *Kozeny v. Miller*, 243 Neb. 402, 499 N.W.2d 75 (1993).

With regard to proximate cause, the court instructed the jury:

> A proximate cause is [a] cause that produces a result in a natural and continuous sequence, and without which the result would not have occurred.
>
> It need not, however, be the immediate cause; it may be enough that the acts complained of set in motion a series of events through which it produced damage.

The court just added the second sentence to the proximate cause instruction found in NJI2d Civ. 3.41. The second sentence is an accurate statement of the law. See, *Rose v. Buffalo Air Service*, 170 Neb. 806, 104 N.W.2d 431 (1960); *Coyle v. Stopak*, 165 Neb. 594, 86 N.W.2d 758 (1957); *Colvin v. Powell & Co., Inc.*, 163 Neb. 112, 77 N.W.2d 900 (1956); *Kroeger v. Safranek*, 161 Neb. 182, 72 N.W.2d 831 (1955); *McClelland v. Interstate Transit Lines*, 142 Neb. 439, 6 N.W.2d 384 (1942); *Johnson v. Mallory*, 123 Neb. 706, 243 N.W. 872 (1932); *St. Joseph & G.I.R. Co. v. Hedge*, 44 Neb. 448, 62 N.W. 887 (1895). Furthermore, we cannot see how the combination of these two sentences would mislead the jury. This instruction was proper.

INSTRUCTION ON DAMAGES

National Farms and O.N. assert that instruction No. 3, concerning damages, erroneously allowed a "double recovery" for the plaintiffs. Specifically, National Farms and O.N. object to the following language:

> There are two plaintiffs in this action, and they both own their land together. You may award damages for any damages suffered by either of them, and any that might be suffered in common. If you find for the plaintiffs, you must determine on [a] dollar figure for all of the damage suffered by both plaintiffs.

Having read this instruction in conjunction with all the others, we are not convinced that this language allowed a double recovery.

MOTION FOR NEW TRIAL

Finally, National Farms and O.N. submit that the trial court erred in overruling their motion for new trial. As consolidated, two grounds have been asserted by National Farms and O.N. in support of their motion for new trial: (1) that the verdict was excessive and (2) that there was juror misconduct.

A district court's denial of a motion for new trial will be affirmed when the court's decision is neither prejudicial nor an abuse of discretion. *Nichols v. Busse*, 243 Neb. 811, 503 N.W.2d 173 (1993).

With regard to allegedly excessive verdicts, we have held that a verdict will not be set aside on appeal unless it is so clearly exorbitant as to indicate that it was the result of passion, prejudice, or mistake, or it is clear that the trier of fact disregarded the evidence or rules of law. *Rahmig v. Mosley Machinery Co.*, 226 Neb. 423, 412 N.W.2d 56 (1987). We are not persuaded that the verdict in this case was excessive.

In a motion for new trial, allegations of misconduct by jurors must be substantiated by competent evidence. The misconduct complained of must relate to a disputed matter that is relevant to the issues in the case and must have influenced the jurors in arriving at the verdict. *Nichols v. Busse, supra.* Here, the only evidence offered in support of National Farms and O.N.'s allegation is the affidavit of the jury foreperson, which affidavit the trial court refused. The trial court's denial of the motion for new trial, therefore, was proper if the affidavit was properly refused.

Neb. Rev. Stat. § 27-606(2) (Reissue 1989) controls the use of juror affidavits to impeach a verdict. It 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 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.

It is clear that § 27-606(2) prohibits admission of a juror's affidavit to impeach a verdict on the basis of the jury's motives, methods, misunderstanding, thought processes, or discussions during deliberations, which enter into the verdict. *Rahmig v. Mosley Machinery Co., supra.* Despite National Farms and O.N.'s intimations to the contrary, we find that the affidavit directly addressed the jury's thought processes and discussions during deliberations and was therefore properly excluded. Since without the affidavit there is no evidence of juror misconduct, we affirm the trial court's denial of the motion for new trial.

CONCLUSION

Although the trial court's instruction on the issue of unreasonableness was erroneous, and although the evidence on social utility should have been admitted, the judgment of the district court is affirmed, since those errors were harmless.

AFFIRMED.

SHANAHAN, J., not participating in the decision.

WHITE and FAHRNBRUCH, JJ., concur.

ROBERT ROHDE AND MARGARET ROHDE, APPELLEES, V. FARMERS ALLIANCE MUTUAL INSURANCE COMPANY, APPELLANT.

509 N.W.2d 618

Filed January 7, 1994. No. S-91-1242.

1. **Jurisdiction.** Lack of subject matter jurisdiction may be raised sua sponte by a court; the parties cannot confer subject matter jurisdiction upon a judicial tribunal by either acquiescence or consent, nor may subject matter jurisdiction be created by waiver, estoppel, consent, or conduct of the parties.
2. **Jurisdiction: Appeal and Error.** Whether a question is raised by the parties concerning jurisdiction of a lower court or tribunal, it is not only within the

power but the duty of an appellate court to determine whether the appellate court has jurisdiction over the matter before it.

3. **Final Orders: Appeal and Error.** There are three types of final orders which may be reviewed on appeal. Neb. Rev. Stat. §§ 25-1902 (Reissue 1989) and 25-1911 (Cum. Supp. 1992). The three types are (1) an order which affects a substantial right and which determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after a judgment is rendered.
4. **Final Orders: Words and Phrases.** To be a "final order" that determines the action and prevents a judgment, an order must dispose of the whole merits of the case and must leave nothing for further consideration of the court, and thus, the order is final when no further action of the court is required to dispose of the pending cause; however, if the cause is retained for further action, the order is interlocutory.
5. **Final Orders: Appeal and Error.** If a party's substantial rights are not determined by the court's order and the cause is retained for further action, the order is not final for purposes of appeal.
6. **Final Orders: Words and Phrases.** A substantial right is an essential legal right, not a mere technical right.
7. **Courts: Final Orders: Appeal and Error.** A judgment of the district court on appeal from a final order of an inferior court, which leaves nothing further to be done in that district court, is a final order, even though the case is remanded for further proceedings below.
8. **Final Orders: Appeal and Error: Case Overruled.** *Martin v. Zweygardt*, 199 Neb. 770, 771, 261 N.W.2d 379, 380 (1978), in which the Nebraska Supreme Court stated, "[A] judgment of reversal with a remand for further proceedings is not final for the purposes of appeal," is overruled to the extent that it is construed to provide that an order of a district court reversing a final order of the trial court and remanding the case for a trial on the merits is never a final order.
9. **Directed Verdict: Appeal and Error.** In reviewing the action of a trial court, an appellate court must treat a motion for directed verdict as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed. Such being the case, the party against whom the motion is directed is entitled to have every controverted fact resolved in its favor and to have the benefit of every inference which can reasonably be deduced from the evidence.
10. **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 from the evidence.
11. **Insurance: Breach of Contract: Claims: Proof.** When asserting a breach of an insurance contract, the plaintiff has the burden of bringing his claim within the limitations of the policy.
12. **Circumstantial Evidence: Verdicts.** Circumstantial evidence is not sufficient to sustain a verdict depending solely thereon for support, unless the circumstances

proved by the evidence are of such a nature and so related to each other that the conclusion reached by the jury is the only one that can fairly and reasonably be drawn therefrom.

13. **Damages: Circumstantial Evidence.** When there is direct evidence sufficient to refute all theories of the cause of damage except the one established solely by circumstantial evidence, there then remains but one inference deducible from the facts under the circumstances, and it is within the province of the trier of fact to make this determination.

14. **Intent: Damages: Property: Presumptions.** Malice may be presumed from an intentional act if damage of some kind to some property should or could have been reasonably expected to result from such act.

Petition for further review from the Nebraska Court of Appeals, CONNOLLY and WRIGHT, Judges, and WARREN, District Judge, Retired, on appeal thereto from the District Court for Buffalo County, JOHN P. ICENOGLE, Judge, on appeal thereto from the County Court for Buffalo County, GERALD R. JORGENSEN, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Thomas W. Tye II and, on brief, Michael J. Synek, of Tye, Hopkins & Tye, for appellant.

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

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

LANPHIER, J.

Appellees, Robert and Margaret Rohde, filed suit for breach of contract against their insurance company, appellant, Farmers Alliance Mutual Insurance Company. The Rohdes had suffered damage to a power unit, which operated a center-pivot irrigation system, when the unit was lubricated with oil contaminated by water. The Rohdes contend that the only way the oil, kept in a sealed drum in a storage building, could become contaminated was through vandalism or mischief. They attempted to recover from Farmers under the vandalism or mischief coverage of their insurance policy. At the close of the Rohdes' case, the Buffalo County Court granted Farmers' motion for a directed verdict, finding the evidence presented was insufficient as a matter of law to support the Rohdes'

claim. The Rohdes appealed to the district court, which reversed the judgment and remanded the case to the county court for trial on the merits.

Farmers appealed the decision of the district court, and the Nebraska Court of Appeals dismissed the appeal for lack of jurisdiction on the grounds that the order was not a final order. See, *Rohde v. Farmers Alliance Mut. Ins. Co.*, 4 NCA 69 (1993). We granted further review. We reverse, and remand with directions.

BACKGROUND

Robert and Margaret Rohde owned farmland in Buffalo County, Nebraska, improved by a center-pivot irrigation system. In 1984, the Rohdes purchased an insurance policy from Farmers Alliance Mutual Insurance Company, which insured against direct loss to covered farm personal property, including the irrigation system, by vandalism or malicious mischief.

The center-pivot irrigation system was operated by a John Deere power unit. The servicing of this unit was performed exclusively by Robert Rohde and the Rohdes' employee, Eugene Revelenski, approximately three times per year. In the spring of 1985, the Rohdes purchased a 30-gallon drum of Mobil Delvac 1330 lubricating oil for the purpose of servicing the irrigation system. The oil from the drum was also used to lubricate a smaller power unit located in another area. The oil drum was sealed when Robert Rohde received it, and it was stored in a Quonset hut on the farm. The Quonset hut was located approximately 450 feet from a county road. As a matter of convenience, the Quonset hut was not kept locked, and the gate to a fence surrounding the area was kept open during the summer.

During the summer, Robert Rohde changed the oil in the larger unit two or three times with the oil from the new oil drum. The oil was extracted from the barrel by pumping the oil from the bottom of the barrel. Approximately 5 gallons of oil were required for each oil change. The first 18 gallons used in the irrigation system power units produced no mechanical difficulties. However, in August 1985, when Revelenski made a

final oil change, the larger unit began to smoke after running for 15 minutes. After shutting off the unit, Revelenski checked the oil in the unit and noticed a discoloration of the oil. He then changed the oil, using a different source. After this oil change, the unit was seldom used for the remainder of the year. In the spring or summer of 1986, when Robert Rohde started up the power unit, it began to smoke and to use excessive oil.

The Rohdes had the unit repaired by Ken Kirschner, who testified at trial that the unit was damaged due to poor lubrication resulting from water contamination of the oil. The oil in the barrel was also tested twice and found to contain either 2 or .2 percent water. Randolph Baer, a lubrication engineer with Mobil Oil, testified that the contaminant guidelines for Mobil Delvac 1330 oil indicated that any water contamination exceeding .2 percent would make the oil unsuitable for use in lubrication. Mark Callaway, an expert in lubricating oil, tested the oil in the drum and reported that the oil was judged unsatisfactory as a lubricating oil because it contained at least .2 percent water. Both Robert Rohde and Revelenski testified they were the exclusive users of the oil. In addition, Baer and Callaway both reported that it was unlikely that the amount of water in the oil could have been caused by condensation in a barrel stored indoors.

The Rohdes submitted a claim to Farmers on July 6, 1987, under the vandalism and malicious mischief coverage of their insurance policy. Farmers denied the claim. The Rohdes filed a suit against Farmers for breach of contract in the Buffalo County Court.

At the close of the Rohdes' case, the trial court granted Farmers' motion for a directed verdict, finding the evidence presented insufficient as a matter of law to support the Rohdes' claim. The Rohdes appealed to the district court, which reversed the judgment and remanded the case to the county court for a trial on the merits.

Farmers appealed the decision of the district court, and the Court of Appeals dismissed the appeal for lack of jurisdiction after finding the district court's order was not a final one. Farmers assigned the following as error: (1) The district court erred, abused its discretion, and exceeded its scope of review in

determining plaintiffs' evidence was sufficient as a matter of law with regard to the alleged vandalism for the case to have been submitted to the trier of fact and by reversing the lower court's entry of a directed verdict, and (2) the district court misconstrued certain factual evidence and incorrectly applied the law to the facts, specifically in finding the existence of a willful or deliberate act, malicious intent, and proximate causation.

JURISDICTION

Although neither of the parties objected to the jurisdiction of the Court of Appeals, it was the duty of the Court of Appeals to determine whether or not it had jurisdiction over the matter. Lack of subject matter jurisdiction may be raised sua sponte by a court. The parties cannot confer subject matter jurisdiction upon a judicial tribunal by either acquiescence or consent, nor may subject matter jurisdiction be created by waiver, estoppel, consent, or conduct of the parties. *Anderson v. HMO Nebraska, ante* p. 237, 505 N.W.2d 700 (1993). Whether a question is raised by the parties concerning jurisdiction of a lower court or tribunal, it is not only within the power but the duty of an appellate court to determine whether the appellate court has jurisdiction over the matter before it. *In re Interest of D.M.B.*, 240 Neb. 349, 481 N.W.2d 905 (1992).

> There are three types of final orders which may be reviewed on appeal. Neb. Rev. Stat. §§ 25-1902 (Reissue 1989) and 25-1911 (Cum. Supp. 1992). The three types are (1) an order which affects a substantial right and which determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after judgment is rendered.

Jarrett v. Eichler, ante p. 310, 313, 506 N.W.2d 682, 684 (1993).

To be a "final order" under the first type of reviewable order, an order must dispose of the whole merits of the case and must leave nothing for further consideration of the court, and thus, the order is final when no further action of the court is required to dispose of the pending cause; however, if the cause is retained

for further action, the order is interlocutory. *In re Interest of L. W.*, 241 Neb. 84, 486 N.W.2d 486 (1992). Moreover, if a party's substantial rights are not determined by the court's order and the cause is retained for further action, the order is not final for purposes of appeal. *Larsen v. Ralston Bank*, 236 Neb. 880, 464 N.W.2d 329 (1991).

SUBSTANTIAL RIGHT

We find a substantial right of Farmers' was affected. A substantial right is an essential legal right, not a mere technical right. *Jarrett v. Eichler, supra*. The trial court had granted a directed verdict to Farmers. The district court's order reversing the judgment of the trial court and remanding the case for a trial on the merits took away a judgment that had been rendered in Farmers' favor.

FINAL ORDER

The district court's order was a final order for purposes of appeal because its judgment could be executed without any further action by the district court. In *Ribble v. Furmin*, 69 Neb. 38, 94 N.W. 967 (1903), we held that a judgment of the district court on appeal from a final order of an inferior court, which leaves nothing further to be done in that district court, is a final order, even though the case is remanded for further proceedings below. At issue in *Ribble v. Furmin* was the propriety of this court's reviewing an order of the district court reversing an order of the county court denying leave to file a claim in an estate proceeding. The district court reversed the order of the county court and ordered the county court to permit the petitioner to file the claim. The district court's order was appealed. The claimant moved to dismiss on the ground that the district court's order was not a final order.

In *Ribble v. Furmin*, we stated that a judgment or order which precludes further inquiry into the rights of the parties in the court *in which it is rendered* is final. Therefore, because the district court's order at issue in *Ribble v. Furmin* precluded any further inquiry by the district court as to the rights of the parties, it was a final order.

A petition in error in the district court to review a judgment or order of an inferior tribunal is an

> independent proceeding, having for its immediate object a reversal of the judgment or order complained of. Hence, a judgment of reversal in such a case may be reviewed in this court, notwithstanding the cause stands for trial on its merits in the district court . . . . As the immediate object of the proceeding is to reverse the judgment or order of the inferior tribunal, the proceeding is regarded as fully terminated when that judgment is reversed, and the original cause remains for trial in the district court after reversal, not the independent error proceeding.

Ribble v. Furmin, 69 Neb. at 41-42, 94 N.W. at 969. Accord, *Tootle, Hosea & Co. v. Jones*, 19 Neb. 588, 27 N.W. 635 (1886); *Banks v. Uhl*, 5 Neb. 240 (1876).

The court in *Ribble v. Furmin* added:

> [W]hen, on appeal, the judgment of reversal also remands the cause for further proceedings in the inferior tribunal, it is manifest that the cause is fully disposed of so far as the district court is concerned. It has nothing more to do. *Its judgment may be executed fully without any further action.* All further inquiry into the rights of the parties in that court is precluded. The judgment of the district court is final because it terminates the proceedings in that court and leaves nothing pending therein.

(Emphasis supplied.) 69 Neb. at 43, 94 N.W. at 969.

In the case before us, once the district court rendered a judgment remanding the case for a trial on the merits in the lower court, its judgment was final because it terminated the proceedings in the district court, and its judgment reversing the trial court's order could be fully executed without any further action by the district court.

MARTIN V. ZWEYGARDT

The Court of Appeals found it had no jurisdiction to hear the appeal because the decision of the district court was not a final, appealable order. The Court of Appeals cited *Martin v. Zweygardt*, 199 Neb. 770, 771, 261 N.W.2d 379, 380 (1978), in which this court stated, "[A] judgment of reversal with a remand for further proceedings is not final for the purposes of appeal." However, we find that *Martin v. Zweygardt* is

inconsistent with prior decisions regarding final orders. *Martin v. Zweygardt* distinguished *Ribble v. Furmin, supra*, stating that the order in the latter case was appealable because a proceeding for leave to file a claim was distinct from a hearing on the merits of the claim at the trial court level. This distinction is unwarranted. The issue in both cases was whether an order of the district court reversing a county court's final order, resulting in a full hearing on the merits of the claim in the county court, is a final order. In concluding such an order of the district court was a final order, this court focused, in *Ribble v. Furmin*, on whether the district court had retained the cause for any further action by the district court, not on whether the proceeding for leave to file the claim was separate from the hearing on the claim. This court found that since the district court did not retain the cause for further action, the district court's order remanding the case for further proceedings was a final order. This is a correct statement of the law. To the extent that *Martin v. Zweygardt* is construed to provide that an order of a district court reversing a final order of the trial court and remanding the case for a trial on the merits is never a final order, it is overruled.

Since we find that the district court's judgment of reversal with a remand for further proceedings was a final order, this court has jurisdiction to review the issues raised on appeal by the parties.

DIRECTED VERDICT

In reviewing the action of a trial court, an appellate court must treat a motion for directed verdict as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed. Such being the case, the party against whom the motion is directed is entitled to have every controverted fact resolved in its favor and to have the benefit of every inference which can reasonably be deduced from the evidence. *Wilson v. Misko, ante* p. 526, 508 N.W.2d 238 (1993). 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 from the evidence. *Id.*

VANDALISM OR MALICIOUS MISCHIEF

Farmers contends the district court erred in remanding the case for a trial on the merits because the Rohdes failed to present sufficient evidence to show that the water in the oil barrel had resulted from an intentional, malicious act, as required under the insurance coverage.

The policy states in relevant part: "This policy under this form insures against direct loss to the property covered by the following perils . . . . **Vandalism or Malicious Mischief,** meaning only the wilful and malicious damage to or destruction of the property covered . . . ."

When asserting a breach of an insurance contract, the plaintiff has the burden of bringing his claim within the limitations of the policy. The Rohdes must therefore prove both that the loss was the result of the vandalism and that it was accompanied by intent and malice. See *Craig v. Farmers Mut. Ins. Co.*, 239 Neb. 271, 476 N.W.2d 529 (1991). See, also, *Ditloff v. State Farm Fire & Cas. Co.*, 225 Neb. 375, 406 N.W.2d 101 (1987); *Swedberg v. Battle Creek Mut. Ins. Co.*, 218 Neb. 447, 356 N.W.2d 456 (1984).

We have addressed the issue of coverage under the vandalism and mischief clause of an insurance policy in several cases. See, *Craig v. Farmers Mut. Ins. Co., supra*; *Ditloff v. State Farm Fire & Cas. Co., supra*; *Swedberg v. Battle Creek Mut. Ins. Co., supra.*

In *Swedberg v. Battle Creek Mut. Ins. Co.*, we held that to recover under a policy insuring against loss caused by vandalism and malicious mischief, the plaintiff must show by a preponderance of the evidence, direct or circumstantial, that the damage was caused by acts intended to damage the property in question.

Circumstantial evidence is not sufficient to sustain a verdict depending solely thereon for support, unless the circumstances proved by the evidence are of such a nature and so related to each other that the conclusion reached by the jury is the only one that can fairly and reasonably be drawn therefrom. *Ditloff v. State Farm Fire & Cas. Co., supra.*

In *Ditloff v. State Farm Fire & Cas. Co.*, we addressed the issues of intent and malice. The plaintiffs sought payment from

their insurance company under a substantially similar clause to the one at issue in this case. They alleged that vandals had willfully and maliciously opened the gate on one of their grain trailers, causing corn to flow from the trailer onto the ground. Some of the plaintiffs' cattle ate excessive quantities of corn and died.

INTENT

In *Ditloff v. State Farm Fire & Cas. Co.*, the plaintiffs offered no direct proof of who opened the gate. Instead, they sought to prove it was an unidentified person by ruling out other possible actors, to wit, the cattle, or the two men who fed the cattle. We found the plaintiffs presented sufficient direct evidence to refute the two other possible theories of who or what opened the gate to the grain.

> When there is direct evidence sufficient to refute all theories of the cause of damage except the one established solely by circumstantial evidence, there then remains but one inference deducible from the facts under the circumstances, and it is within the province of the trier of fact to make this determination.

Ditloff v. State Farm Fire & Cas. Co., 225 Neb. at 380, 406 N.W.2d at 105.

In the present case, the Rohdes presented sufficient direct evidence to refute Farmers' theory that the water in the oil drum had resulted from condensation. The Rohdes presented evidence that the oil drum was not contaminated prior to arriving at the farm. The oil drum was sealed when Robert Rohde received it, and the oil was used two or three times without causing damage to either of the power units. The damaged power unit was serviced exclusively by Robert Rohde and Eugene Revelenski. Although Randolph Baer stated that an oil barrel would be more prone to condensation once the factory seal was broken and that a half-filled drum of oil was more prone to condensation, he also stated that even if condensation did occur, it would be highly unlikely that the condensation would result in the amount of water found in the oil drum. We find the evidence presented by the Rohdes sufficiently refutes the alternative theory set forth by Farmers

and raises the inference that someone intentionally contaminated the oil drum with water.

MALICE

We now turn to the issue of malice. Citing *Swedberg v. Battle Creek Mut. Ins. Co.*, 218 Neb. 447, 356 N.W.2d 456 (1984), we recognized in *Ditloff v. State Farm Fire & Cas. Co.* that malice can be presumed from the mere doing of an act. In *Swedberg v. Battle Creek Mut. Ins. Co.*, the insured's cattle died after ingesting a poisonous substance found in a bucket. The bucket with the poisonous substance had been discarded on a portion of the insured's property which had other discarded material on it. There was no evidence of who had discarded the substance, and the insured admitted he did not believe anyone intended to harm him or his livestock.

The court in *Swedberg v. Battle Creek Mut. Ins. Co.* found that in order to recover under the policy, the plaintiff had to present evidence which showed the bucket with the poison was placed there intentionally and with a malicious intent. While finding intent in the act of discarding the material, the court found there was insufficient evidence to prove malice. The evidence established that the area in which the poison was discarded had been previously used to discard other material. The court also found no evidence to suggest the person discarding the material knew or should have known that the cattle were within the immediate area and would be harmed by the substance. However, the court noted:

> Certainly, if a can of poisonous substance is placed on the front steps of a home or near the feeding troughs of livestock, both places where one would not expect to find such a substance, the intent of doing harm may be presumed and malice established by reason of the act of placing the poison.

Swedberg v. Battle Creek Mut. Ins. Co., 218 Neb. at 451, 356 N.W.2d at 460.

We find the court's example in *Swedberg v. Battle Creek Mut. Ins. Co.* analogous to the situation in the case before us. No one would expect anyone to pour water into a drum containing oil. Certainly, the Rohdes did not expect to find

water inside the oil drum, especially since the oil had been used at least twice before without any problems. Furthermore, we held in *Ditloff v. State Farm Fire & Cas. Co.*, 225 Neb. at 384, 406 N.W.2d at 106, that "malice may be presumed from an intentional act if damage of some kind to some property should or could have been reasonably expected to result from such act." It would be reasonable to expect that the oil for lubrication contained in the drum, when contaminated with water, would cause damage when used to service the power units. Under these facts, a presumption of malice arises. A directed verdict should not have been granted by the trial court.

CONCLUSION

The order of the district court reversing the county court's judgment and remanding the case for a trial on the merits was a final and appealable order because no further action of the district court was required to dispose of it and because it affected a substantial right of Farmers'. In addition, we find that the Rohdes presented sufficient evidence to overcome a directed verdict. Therefore, we reverse the decision of the Court of Appeals and remand the cause to that court with directions to remand the cause consistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. JULIUS C. ICE, APPELLANT.

509 N.W.2d 407

Filed January 7, 1994. No. S-93-191.

1. **Juvenile Courts: Jurisdiction: Waiver: Pleas: Appeal and Error.** A voluntary guilty plea following the denial of a motion to waive jurisdiction to the juvenile court does not preclude a challenge to such action on appeal.
2. **Courts: Juvenile Courts: Jurisdiction: Appeal and Error.** The standard applied when reviewing a trial court's denial of a motion to transfer the proceedings to juvenile court is abuse of discretion.
3. **Criminal Law: Courts: Juvenile Courts: Jurisdiction: Waiver.** In deciding whether to grant a requested waiver and to transfer the proceedings to juvenile court, the court having jurisdiction over a pending criminal prosecution must

carefully consider the juvenile's request in light of the criteria set forth in Neb. Rev. Stat. § 43-276 (Reissue 1988).

4. **Courts: Juvenile Courts: Jurisdiction.** Consideration of the criteria in Neb. Rev. Stat. § 43-276 (Reissue 1988) is a balancing test, and the court need not decide all these criteria against a juvenile before it may deny a motion to transfer proceedings to the juvenile court.
5. **Sentences: Appeal and Error.** An appellate court will not disturb a sentence that falls within the statutory limits unless the sentence constitutes an abuse of discretion.
6. **Criminal Law: Motions for Continuance: Appeal and Error.** A decision whether to grant a continuance in a criminal case is within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion.

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

Stanford L. Sipple, of DeCamp Legal Services, P.C., for appellant.

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

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

WHITE, J.

Julius C. Ice appeals from an order of the district court denying his motion to transfer the proceedings to juvenile court, and from the sentences imposed after he pled guilty to one count of robbery and one count of terroristic threats.

On July 11, 1992, two passengers traveling with appellant jumped out of the car and began beating a young man. Appellant allegedly participated in the beating. The three then took approximately $40 from the young man and left. Later, still accompanied by the two passengers, appellant pulled a gun on another young man and threatened him.

Appellant was charged with robbery, theft, and terroristic threats. Appellant, who was 15 years old at the time of the alleged offenses, moved in the district court to transfer the proceedings to juvenile court. In support of that motion, appellant presented evidence that he was amenable to treatment and that appropriate treatment facilities were available within the juvenile court system. The court denied the motion and

found, in part, that the treatment appellant required was not available through the juvenile court system, particularly because he would require treatment and supervision beyond the age of majority. The court also noted that the alleged offenses were carried out in a violent and premeditated manner and that appellant had previously been in several juvenile programs without any successful results.

Appellant then pled guilty to one count of robbery and one count of terroristic threats. The court sentenced appellant to 4 to 10 years' imprisonment for the robbery conviction and 1 to 3 years' imprisonment for the terroristic threats conviction. The court further ordered that the sentences be served consecutively. The court refused appellant's request to continue the sentencing until after appellant entered and completed a rehabilitation program.

Appellant contends that the district court erred in (1) failing to transfer the proceedings to juvenile court, (2) imposing an excessive sentence, and (3) refusing to continue the sentence until after appellant entered and completed a rehabilitation program.

At the outset, we note that appellant's voluntary guilty pleas following the denial of his motion to waive jurisdiction to the juvenile court do not preclude appellant's challenge to such action on appeal. See, *State v. Doyle*, 237 Neb. 944, 468 N.W.2d 594 (1991); *State v. Phinney*, 235 Neb. 486, 455 N.W.2d 795 (1990).

The standard applied when reviewing a trial court's denial of a motion to transfer the proceedings to juvenile court is abuse of discretion. *Id.*; *State v. Nevels*, 235 Neb. 39, 453 N.W.2d 579 (1990); *State v. Thieszen*, 232 Neb. 952, 442 N.W.2d 887 (1989). In deciding whether to grant the requested waiver and to transfer the proceedings to juvenile court, the court having jurisdiction over a pending criminal prosecution must carefully consider the juvenile's request in light of the criteria set forth in Neb. Rev. Stat. § 43-276 (Reissue 1988). See Neb. Rev. Stat. § 29-1816 (Reissue 1989); *Doyle, supra*; *Phinney, supra*; *Thieszen, supra*.

Section 43-276 requires that the court consider:

(1) The type of treatment such juvenile would most likely

> be amenable to; (2) whether there is evidence that the alleged offense included violence or was committed in an aggressive and premeditated manner; (3) the motivation for the commission of the offense; (4) the age of the juvenile and the ages and circumstances of any others involved in the offense; (5) the previous history of the juvenile, including whether he or she had been convicted of any previous offenses or adjudicated in juvenile court, and, if so, whether such offenses were crimes against the person or relating to property, and other previous history of antisocial behavior, if any, including any patterns of physical violence; (6) the sophistication and maturity of the juvenile as determined by consideration of his or her home, school activities, emotional attitude and desire to be treated as an adult, pattern of living, and whether he or she has had previous contact with law enforcement agencies and courts and the nature thereof; (7) whether there are facilities particularly available to the juvenile court for treatment and rehabilitation of the juvenile; (8) whether the best interests of the juvenile and the security of the public may require that the juvenile continue in custody or under supervision for a period extending beyond his or her minority and, if so, the available alternatives best suited to this purpose; and (9) such other matters as the county attorney deems relevant to his or her decision.

Accord, *Doyle, supra*; *Phinney, supra*; *Thieszen, supra*. The consideration of the criteria in § 43-276 is a balancing test, and the court need not decide all these criteria against the juvenile before it may deny the motion. See, *Phinney, supra*; *Thieszen, supra*.

The district court held a hearing at which evidence was presented regarding the criteria outlined above. In reaching its decision, the district court considered the evidence and made findings of fact in light of each criterion. The following constitutes a brief summary of the district court's findings.

The court determined that appellant's behavior and substance abuse problems require treatment that is not available in the juvenile court system. The court stated that the

offenses alleged by the county attorney, if true, are of a particularly violent and aggressive nature. Moreover, the court noted that the alleged acts were perpetrated against persons rather than property. The court reviewed appellant's prior involvements with the juvenile court system and noted that prior treatment within the juvenile system was not successful. The court found that appellant conducts himself as an emancipated minor, rather than a minor who is dependent on family and school. The court determined that appellant requires treatment and supervision for an extended period of time, beyond the age of majority. Finally, the court stated that appellant's best interests in being treated and rehabilitated, and society's best interests, require that appellant's case not be transferred to the juvenile court system.

Our review of the record indicates that the court properly considered the mandatory criteria together with the relevant evidence. The decision not to transfer the proceeding to the juvenile court is supported by the appropriate evidence, and we therefore find that the court did not abuse its discretion when it denied appellant's motion to transfer.

Appellant next contends that the sentence imposed by the district court is excessive and constitutes an abuse of discretion. Appellant was sentenced to 4 to 10 years' imprisonment for the robbery conviction and 1 to 3 years' imprisonment for the terroristic threats conviction. In connection with the sentencing, appellant also contends that the district court abused its discretion when it refused to continue the sentencing hearing so that appellant could participate in a rehabilitation program.

An appellate court will not disturb a sentence that falls within the statutory limits unless the sentence constitutes an abuse of discretion. *State v. Thieszen*, 232 Neb. 952, 442 N.W.2d 887 (1989). Similarly, the decision whether to grant a continuance in a criminal case is within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *State v. Valdez*, 239 Neb. 453, 476 N.W.2d 814 (1991).

The statutory penalty for the robbery conviction is not less than 1 nor more than 50 years' imprisonment. See Neb. Rev.

Stat. §§ 28-324 and 28-105 (Reissue 1989). The statutory penalty for the terroristic threats conviction is up to 5 years' imprisonment, a $10,000 fine, or both. See Neb. Rev. Stat. §§ 28-311.01 (Reissue 1989) and 28-105. The sentences imposed on appellant are well within the statutory limits, and in light of the record, the sentences do not constitute an abuse of discretion. See *State v. Doyle*, 237 Neb. 944, 468 N.W.2d 594 (1991).

The district court denied appellant's motion to continue the sentencing until appellant had entered and completed a rehabilitation program. The record reflects that appellant has had several opportunities to take advantage of rehabilitation alternatives, without success. The district court was aware of this when it found that appellant's best interests require supervision and treatment within the adult penal system. After a review of the record, we find that the district court did not abuse its discretion when it overruled appellant's motion to continue the sentencing.

We therefore affirm the decision of the district court.

AFFIRMED.

STATE OF NEBRASKA ON BEHALF OF MINOR CHILD S.M., APPELLEE, V. ROBERT E. OGLESBY, APPELLANT.

510 N.W.2d 53*

Filed January 14, 1994. Nos. S-91-646, S-91-824.

1. **Paternity: Limitations of Actions.** Under the provisions of Neb. Rev. Stat. § 43-1411 (Reissue 1988), actions brought by a guardian or next friend on behalf of children born out of wedlock may be brought within 18 years after the child's birth.
2. **Paternity: Equal Protection.** Neb. Rev. Stat. § 43-1411 (Reissue 1988) does not violate the Equal Protection Clause of either the U.S. Constitution or the Nebraska Constitution.
3. **Paternity: Limitations of Actions.** Neb. Rev. Stat. § 43-1411 (Reissue 1988) does not extend the statute of limitations for anyone other than the minor child involved.
4. **Paternity: Child Support.** Child support in a paternity action is to be determined

in the same manner as in cases of children born in lawful wedlock.

5. **Paternity: Child Support: Appeal and Error.** A trial court's award of child support in a paternity case will not be disturbed on appeal in the absence of an abuse of discretion by the trial court.

Appeal from the District Court for Lancaster County: EARL J. WITTHOFF, Judge. Judgment in No. S-91-646 affirmed as modified. Judgment in No. S-91-824 reversed, and cause remanded for further proceedings.

Lori L. Wilson, of Johnson & Wilson, for appellant.

Gary E. Lacey, Lancaster County Attorney, and Andrew R. Jacobsen for appellee.

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

GRANT, J., Retired.

These two cases were initiated by the filing of a single petition by the State of Nebraska on behalf of minor child S.M. against defendant-appellant, Robert E. Oglesby. The petition, filed August 1, 1989, alleged that the child was born out of wedlock on June 24, 1977, and was the child of Lori Jo Tretts and defendant. The petition further alleged that the State had paid the medical expenses in connection with the birth of the child; that the child was a dependent child; and that Tretts had received "public assistance, commonly known as ADC payments." The State asked for judgment establishing that defendant was the natural father of the minor child; for support of the child from August 1, 1987; and for medical expenses in connection with the child's birth.

Defendant, by answer, generally denied the allegations of the petition and alleged that Neb. Rev. Stat. §§ 43-1406, 43-1407, 43-1411, and 43-1412 (Reissue 1988) were unconstitutional, in that such statutes authorized this action which was instituted more than 12 years after the child's birth.

Trial was held on June 26, 1990. On May 21, 1991, the court entered its order determining that defendant was the natural father of the minor child; that the statutes in question were constitutional; that defendant should pay $50 per month child support beginning on May 1, 1991; and that defendant should

pay $570 "for medical expenses incurred in relation to the pregnancy, confinement and recovery of Lori Jo Tretts in the birth of [the child]." The trial court set a date to review defendant's child support obligation. Defendant timely appealed this judgment in case No. S-91-646.

On June 13, 1991, a hearing was held on the issue of the amount of defendant's child support. After trial, defendant was ordered to pay $230 per month for support of the child, beginning July 1, 1991. Defendant timely appealed this judgment in case No. S-91-824.

In this court, since case No. S-91-646 involved the constitutionality of a statute, the appeal was treated as a direct appeal to this court. See Neb. Rev. Stat. § 24-1106(1) (Cum. Supp. 1992). The appeal in case No. S-91-824 also raised the issue of the constitutionality of the same statutes, as well as the question of the appropriateness of the strict application of this court's child support guidelines. The two cases were joined for disposition in this court.

CASE NO. S-91-646

In this case, evidence was adduced that the child was born on June 24, 1977, and that defendant and Tretts had sexual intercourse on three occasions in September 1976. Tretts testified that defendant was the father of the child. Evidence of blood tests on defendant, Tretts, and the child was received without objection. That evidence showed "the probability of paternity [of defendant] is 99.25%."

The trial court found that defendant was the father of the child and entered an order as set out above.

Defendant timely appealed and, in this court, assigns a single error, alleging that "Nebr. Rev. Stats. Sections 43-1406-07, 43-1411, and 43-4112 [sic] [are] unconstitutional and void because they deny defendant his right to due process of law and equal protection . . . ." We affirm, as herein modified.

The appeal is directed primarily against § 43-1411 (Reissue 1988), which provided:

> A civil proceeding to establish the paternity of a child may be instituted, in any district court of the district where the child is domiciled or found, by (1) the mother or the

> alleged father of such child, either during pregnancy or within four years after the child's birth . . . or (2) the guardian or next friend of such child within eighteen years after the child's birth.

We note that § 43-1411 was amended by 1991 Neb. Laws, L.B. 457, § 16, and 1993 Neb. Laws, L.B. 500, § 54, in ways not affecting our determination in this case.

Defendant's position is that "[t]his statute provides for a four year limitation of a mother's or a father's right to establish paternity, yet, allows someone else to bring the action on behalf of the child within eighteen years." Brief for appellant in case No. S-91-646 at 5.

Our determination in this case was foreshadowed by our decision in *Doak v. Milbauer*, 216 Neb. 331, 343 N.W.2d 751 (1984). In that case, we considered the constitutionality of Neb. Rev. Stat. § 13-111 (Reissue 1977). Section 13-111 is now § 43-1411, which is the statute at issue in this case. In *Doak*, 216 Neb. at 334-35, 343 N.W.2d at 753, we stated:

> The clear import of the language of § 13-111 is that the mother's cause of action to establish the paternity of her child in order to recover her damages is barred 4 years after the child's birth. There is, however, no such limitation on a cause of action brought on the child's behalf by a guardian or next friend to establish paternity and secure the child's rights.

In *Doak*, we held that a parent's right to initiate actions in connection with children born out of wedlock is barred after 4 years, and in this case, we hold that under the provisions of § 43-1411, actions brought by a guardian or next friend on behalf of children born out of wedlock may be brought within 18 years after the child's birth.

Defendant contends that § 43-1411 and related statutes constitute an unconstitutional "statutory scheme for the bringing of paternity actions" because of the different treatment of children, mothers, and putative fathers who do not require public assistance. Brief for appellant in case No. S-91-646 at 6. That contention is without merit. Section 43-1411 provides that *any* child, through a guardian or next friend, may assert rights to knowledge of paternity and to support for 18

years after the child's birth. Such a statute complies completely with the State's "parens patriae" role in protecting the rights of minors who are under a legal disability to sue on their own behalf. Any guardian or next friend, including the State, can bring such actions. *Drennen v. Drennen*, 229 Neb. 204, 426 N.W.2d 252 (1988), relied on by defendant, does not support defendant's position. *Drennen* held that a statutory scheme providing for different systems for handling the cases of minor children receiving public assistance and minor children not receiving public assistance was "unconstitutional as violating the equal protection clause of the U.S. Constitution and Neb. Const. art. I, § 13 and art. III, § 18." 229 Neb. at 218, 426 N.W.2d at 260. Section 43-1411 does not violate the Equal Protection Clause of either the U.S. Constitution or the Nebraska Constitution. The determination of the trial court that § 43-1411 is constitutional is affirmed.

We do note, however, that a part of the relief granted by the trial court was improper. In addition to determining the child's natural father and providing for support of the child, the trial court ordered judgment "for medical expenses incurred in relation to the pregnancy, confinement and recovery of Lori Jo Tretts in the birth of [the child]." That part of the judgment is not based on the rights of the child, but is in relation to the rights of the child's mother. As such, it was barred by the applicable 4-year statute of limitations affecting the rights of the mother or the mother's assignee. Section 43-1411 does not extend the statute of limitations for anyone other than the minor child involved.

CASE NO. S-91-824

In case No. S-91-646, above, the court ordered defendant to pay $50 per month as support for the minor child beginning on May 1, 1991, and ordered a later review of that amount. The amount of that monthly payment was not challenged by defendant. After the review hearing, the court ordered defendant to pay $230 per month as support, effective July 1, 1991.

Defendant timely appealed that order and in this court assigns a single error: "The trial court abused its discretion in

failing to find that the strict application of the Nebraska Supreme Court child support guidelines would result in an unjust and inequitable child support order." We agree, and we reverse the order and remand the cause for further proceedings.

In its brief, the State alleges that the court applied the child support guidelines in setting the support payment. Under our Nebraska Child Support Guidelines, paragraph C, this court has provided that the guidelines shall be applied as a rebuttable presumption and that child support orders shall be established in accordance with the guidelines unless one or both parties have produced sufficient evidence to rebut the presumption that the guidelines should be applied. Paragraph C(5) of the guidelines provides that deviations are permissible "whenever the application of the guidelines in an individual case would be unjust or inappropriate."

This rule was enacted by the Supreme Court pursuant to the authority of Neb. Rev. Stat. § 42-364.16 (Reissue 1988), which provides:

> The Supreme Court shall provide by court rule, as a rebuttable presumption, guidelines for the establishment of all child support obligations. Child support shall be established in accordance with such guidelines unless the court finds that one or both parties have produced sufficient evidence to rebut the presumption that the application of the guidelines will result in a fair and equitable child support order.

It is clear that child support in a paternity action is to be determined in the same manner as in cases of children born in lawful wedlock. Neb. Rev. Stat. § 43-1402 (Reissue 1988). It is further established that the trial court's award of child support in a paternity case will not be disturbed on appeal in the absence of an abuse of discretion by the trial court. *State v. Smith*, 231 Neb. 740, 437 N.W.2d 803 (1989).

The evidence before the trial court showed that the minor child in question was born to Tretts on June 24, 1977. As set out above, on May 21, 1991, defendant was determined by the court to be the father of the child. Evidence was adduced at the trial to set support for the child. The evidence showed the amount of income for both parents. The evidence also showed

that the child's mother could not remember if she had ever told defendant directly that he was the father of the child, but that "basically everybody knew." The mother testified that she and defendant did not live together, but had had sexual intercourse three times in September 1976. The child's mother was sure that defendant was the father and further testified that defendant had seen the child once in 1980 and again in 1989, at the time blood tests were taken. The child's mother testified that she would not have brought the action before the State filed because she did not want defendant involved in the child's life. The mother further testified: "I don't like what's going on. [Defendant] doesn't want to be here. I really don't want to be here. And [the child] has met [defendant] one time that he can remember."

Defendant testified that he was married in 1980 to a different woman and divorced in 1983. Defendant further testified he remarried in 1985 and that three children were born of that marriage. Defendant was supporting that family of five—himself, his wife, and the three children. Defendant further testified that he and his family lived "pay check to pay check" and had no savings.

In their briefs, both parties state that the trial court used the child support guidelines in calculating the support payment due from defendant. Our calculations do not result in the same dollar figure determined as support, but it is clear that if the guidelines were followed, defendant's support of his present family did not qualify as a deduction in calculating appropriate child support for the minor child involved herein. Worksheet 1, "Basic Net Income and Support Calculation," set out in the guidelines provides a deduction for "[c]hild support previously ordered for children not of this marriage." Defendant is living with and supporting a family and has not previously been ordered to pay child support. If the support ordered by the court in this case gives no consideration at all to the present children, we find that the trial court abused its discretion in not first determining that, under the particular facts of this case, the strict application of the guidelines would be unjust or inappropriate, as set out in the Nebraska Child Support Guidelines, paragraph C(5).

If the State of Nebraska or the mother of the child in question had petitioned for the relief sought in this case at any time between the birth of the child in 1977 and defendant's marriage to the mother of his three children in 1985, defendant would have been in a position to responsibly fulfill his obligation to the child who is the subject of this action and to the children of his later marriage. Evidence showed that the State was aware in 1977 of the mother's contention that defendant was the father of the child.

By this holding, we do not in any way hold that defendant should not be required to pay support for the minor child in this action. We hold only that under the particular facts in this case, consideration should be given to defendant's obligations to the children of his marriage.

The judgment as to the child support ordered in the modification order of July 31, 1991, is reversed, and the cause is remanded, on that issue, for further proceedings.

JUDGMENT IN NO. S-91-646 AFFIRMED AS MODIFIED.
JUDGMENT IN NO. S-91-824 REVERSED, AND CAUSE REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA EX REL. DON STENBERG, ATTORNEY GENERAL, APPELLEE, V. AMERICAN MIDLANDS, INC., A NEBRASKA CORPORATION, DOING BUSINESS AS AMERICAN MIDLANDS OF NEBRASKA, INC., A NEBRASKA CORPORATION, ET AL., APPELLEE, AND JAMES C. BAZEMORE, INDIVIDUALLY AND AS AN OFFICER OF SAID AMERICAN MIDLANDS, INC., AND JEANINE J. BAZEMORE, ALSO KNOWN AS JEANINE J. REIFSCHNEIDER, INDIVIDUALLY AND AS AN OFFICER OR DIRECTOR OF SAID AMERICAN MIDLANDS, INC., APPELLANTS.

509 N.W.2d 633

Filed January 14, 1994. No. S-91-741.

1. **Consumer Protection: Penalties and Forfeitures.** The Attorney General of the State of Nebraska may bring an action to recover a civil penalty for a violation of Neb. Rev. Stat. § 59-1602 (Reissue 1988).

2. **Constitutional Law: Consumer Protection: Penalties and Forfeitures.** The Consumer Protection Act is not invalid because it does not specify that any civil penalty recovered by the State shall be paid to the appropriate school fund as required by article VII, § 5, of the Nebraska Constitution.
3. **Consumer Protection: Penalties and Forfeitures.** Civil penalties assessed by a district court for each violation of the Consumer Protection Act by defendants are not excessive although in excess of the amount defendants can afford to pay.

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

E. Terry Sibbernsen, P.C., for appellants.

Don Stenberg, Attorney General, and Mark D. Starr for appellee State.

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

BOSLAUGH, J.

The plaintiff-appellee, State of Nebraska, through its Attorney General, originated this action in 1981 pursuant to Nebraska's Consumer Protection Act, Neb. Rev. Stat. § 59-1601 et seq. (Reissue 1988). The State sought to enjoin the defendants from continuing to engage in unfair trade practices and also sought the assessment of civil penalties for such practices. Named as defendants in the action were the appellants, James C. and Jeanine J. Bazemore, along with numerous other individuals and corporations, including American Midlands, Inc., a Nebraska corporation. On January 5, 1983, after having previously issued a temporary restraining order, the district court sustained the State's motion for partial summary judgment and granted the injunction sought by the State. Due to the Bazemores' bankruptcy proceedings, the hearing on the issue of civil penalties was delayed until 1991. After that hearing, the district court assessed civil penalties for which, by the district court's order, the Bazemores and the corporate defendants were jointly and severally liable. The portion of the civil penalties which is at issue in this appeal amounts to $788,000.

On May 3, 1991, following the district court's assessment of civil penalties, the Bazemores moved for a new trial. The

corporate defendants did not join in that motion. On June 25, 1991, the district court overruled the motion for new trial, and the Bazemores, but not the corporate defendants, have timely appealed. The Bazemores assert that the district court erred in assessing civil penalties for violations of § 59-1602 in an action brought by the Attorney General and that the district court abused its discretion by imposing excessive civil penalties.

In its April 24, 1991, order assessing civil penalties, the district court stated:

> American Midlands was headquartered in Omaha, Nebraska. In ads placed or circulated across the country it advertised the availability of agricultural loans. The telephone number given in its advertisements was answered in Omaha. American Midlands' employees, called loan correspondents, would be notified if interested parties had telephoned and would follow up by calling upon the prospect. If this follow-up proved successful, the American Midlands' representative would collect a fee of up to $7,500.00 in advance for services the company purported to render in finding a loan for its "client".
>
> Beginning in mid July, 1980, a new client contract began to be used by American Midlands which indicated the advance fee would be placed in escrow and would be drawn against only as services were rendered. The contract also included a fee schedule which set forth the charges for the various services.
>
> It appears that at most a handful of the hundreds of clients seeking loans ever obtained one. More effort and design appears to have gone into cultivating and maintaining a relationship with the client and reaping its benefits than in obtaining loans. Additional details of the company's operations and a discussion of the Bazemores' personal responsibility and liability for such operations may be found in this court's Order of January 5, 1983, which granted the State's Motion for Partial Summary Judgment on the issue of liability. Unfair or deceptive acts or practices prohibited by the Nebraska Consumer Protection Act were found to have been committed in connection with the "escrow" accounts . . . .

. . . .

American Midlands was the brainchild of James Bazemore. He had worked for a similar loan-finding business before starting his own company and, consequently, had some opportunity to become aware of the nature of the business and some of its problems. Because of his central role, he bears the greatest share of the responsibility for what transpired. Jeanine Bazemore, his wife, did have check writing authority over the business checking account and was in a decisionmaking position. She also bears some of the responsibility, particularly with regard to the escrow account. . . .

The district court's January 5, 1983, order, which is referenced above, states:

American Midlands, Inc. held itself out to the public as a loan finder. When clients applied for their services, a contract was executed and American Midlands, Inc. collected an advance fee, termed a service fee, from the client. There was also an origination fee involved.

The contract provided that the service fee was to be held in escrow. The company provided the loan correspondents with rubber stamps reading "American Midlands Escrow Account No. 11-201-1" and the client's check was stamped at the time the contract was executed.

The client's advance payment check was mailed to the American Midlands' Office in Nebraska and deposited in its bank account at various financial institutions within Nebraska including the Nebraska State Bank, Ashland Bank and Southwest Bank of Omaha.

None of these financial institutions were escrow agents and none of the accounts were escrow accounts. The authorized signers on these accounts were Mr. and Mrs. Bazemore. Upon deposit a portion of the advance payment was then transfered [sic] to another account from which the funds were used for the normal operating expenses of the company. A sum in the amount of 20% of the advance fees collected were remitted to loan agents, and part of the balance was used to purchase airplanes and automobiles to which the title was held by Jeanine J.

> Reifschneider and J. J. B. Leasing, apparently a subsidiary of American Midlands.
>
> Due to the above and other transactions, the escrow accounts were reduced to a negative balance leaving numerous claims of clients for amounts owed them and no funds from which to make refunds.
>
> . . . .
>
> The salaries of James C. Bazemore and his wife were not fixed and funds would be withdrawn at their own discretion when available.
>
> An escrow account is one in which withdrawals from the account are subject to a condition [and] the accounts labeled escrow accounts by defendants here were not such accounts.

The Bazemores first argue that the Consumer Protection Act does not authorize civil penalties for violations of § 59-1602 in an action brought by the Attorney General. Section 59-1602 states: "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce shall be unlawful." In addition, § 59-1608 provides that "[t]he Attorney General may bring an action in the name of the state against any person to restrain and prevent the doing of any act prohibited by sections 59-1601 to 59-1622 . . . ."

In light of §§ 59-1602 and 59-1608, the Bazemores agree that the Attorney General properly brought this action to prevent them from continuing to engage in unfair trade practices. However, the Bazemores argue that the section authorizing civil penalties, § 59-1614, does not authorize the Attorney General to seek civil penalties for violations of § 59-1602. Section 59-1614 states in relevant part:

> Any person who violates section 59-1603 or 59-1604 or the terms of any injunction issued as provided in sections 59-1601 to 59-1622, shall forfeit and pay a civil penalty of not more than twenty-five thousand dollars.
>
> Any person who violates section 59-1602 shall pay a civil penalty of not more than two thousand dollars for each violation . . . .
>
> For the purpose of this section, the district court which issues *any injunction* shall retain jurisdiction, and the

> cause shall be continued, and in such cases the Attorney General acting in the name of the state may petition for the recovery of civil penalties.
>
> With respect to violations of sections 59-1603 and 59-1604, the Attorney General, acting in the name of the state, may seek recovery of such penalties in a civil action.

(Emphasis supplied.)

The Bazemores argue that because the last paragraph of § 59-1614 specifically authorizes the Attorney General to seek civil penalties for violations of §§ 59-1603 and 59-1604, the statute is ambiguous as to whether the Attorney General is authorized to seek civil penalties for violations of § 59-1602. The Bazemores then cite *Hancock v. State ex rel. Real Estate Comm.*, 213 Neb. 807, 331 N.W.2d 526 (1983), and conclude that since § 59-1614 is a penal statute which must be strictly construed and since, according to the Bazemores, that section is ambiguous, it cannot be construed to authorize the Attorney General to seek civil penalties for violations of § 59-1602. We cannot agree with this conclusion.

Section 59-1614 clearly states that "the district court which issues *any injunction* shall retain jurisdiction, and the cause shall be continued, and in such cases the Attorney General acting in the name of the state may petition for the recovery of civil penalties." In this instance, the district court issued an injunction to prevent the Bazemores from continuing to engage in unfair trade practices, and the Attorney General properly sought civil penalties for the Bazemores' violations of § 59-1602.

The Bazemores also assert that the imposition of civil penalties in this instance is prohibited by article VII, § 5, of the Nebraska Constitution. That section of the Constitution states in relevant part that "all . . . penalties . . . arising under the general laws of the state . . . shall belong and be paid over to the counties respectively where the same may be levied or imposed" and that all such penalties "shall be appropriated exclusively to the use and support of the common schools" of the respective counties. The Bazemores cite *Abel v. Conover*, 170 Neb. 926, 104 N.W.2d 684 (1960), and argue that Neb. Const. art. VII, § 5, prohibits the imposition of monetary penalties in a civil

action. It is clear, however, that statutes providing for the assessment of civil penalties are not repugnant to the Nebraska Constitution. See, e.g., *State ex rel. Grams v. Beach*, 243 Neb. 126, 498 N.W.2d 83 (1993).

In *Abel*, the court held that a statute which provides for a penalty in excess of actual damages to be paid to an injured party in a civil action violates article VII, § 5, of the Nebraska Constitution. Unlike *Abel*, the present case does not involve the payment of civil penalties to a private plaintiff. Although the district court's order did not designate how the penalty would be distributed, it is implicit in such an order that the penalty imposed will be distributed in conformance with the provisions of article VII, § 5, of the Nebraska Constitution.

The Bazemores also argue that the imposition of civil penalties in this instance violates article VII, § 5, of the Nebraska Constitution because the Consumer Protection Act fails to specify that any civil penalties recovered pursuant to that act must be paid to the appropriate school fund. Again, the Bazemores' assertion lacks merit. The fact that a statute is silent as to the distribution of possible civil penalties does not render it inconsistent with the provisions of article VII, § 5, of the Nebraska Constitution. See *In re Estate of Rogers*, 147 Neb. 1, 22 N.W.2d 297 (1946).

Finally, the Bazemores contend that the trial court abused its discretion by imposing excessive civil penalties. Section 59-1614 authorizes a civil penalty of not more than $2,000 for each violation of § 59-1602. The district court's April 24, 1991, order states the following in arriving at the damages assessed:

> American Midlands obtained checks from clients across the country totaling about 5.7 million dollars. [Over 1,300] clients gave American Midlands an advance fee payment pursuant to the revised contract containing the escrow account provision. Payment checks were deposited in a Nebraska bank. Payment was stopped on a number of these checks and the accounts on which some of them were drawn had insufficient funds, preventing the checks from being honored. Payment was collected on the checks of 788 of these clients, however. After deducting for stop payment checks, insufficient funds checks and

> refunds, the net amount collected from American Midlands' clients who had entered into contracts containing the escrow account provision was just over 2.9 million dollars. It does not appear that any of these paying clients obtained loans through the efforts of American Midlands. If any did, it is a negligible number.

The district court then assessed civil penalties of $788,000, representing a penalty of $1,000 for each violation relating to the escrow account in which funds were actually obtained from the client. The Bazemores argue that because of their limited assets and income, they are unable to pay the civil penalties imposed, and they contend that the civil penalties are therefore excessive. However, as stated in *Pennington v. Singleton*, 606 S.W.2d 682, 690 (Tex. 1980):

> A primary consideration in determining whether a fine is excessive is whether it is fixed with reference to the object it is to accomplish. . . . Large penalties for anticompetitive business practices and usurious interest rates have been upheld by Texas courts when considered in light of the abuse the penalties were designed to cure.

See, also, *State v. Ralph Williams*, 87 Wash. 2d 298, 553 P.2d 423 (1976) (substantial civil penalties imposed for deceptive trade practices).

With respect to the activities of American Midlands and the Bazemores, the record shows that the clause regarding the escrow account was inserted into the client contract and that the escrow account was established in order to make American Midlands' clients "feel secure" in paying an advance fee to the American Midlands representatives. According to the client contract, the advance fee paid by the client was to be held in an escrow account and that account was to be charged as services were rendered for the benefit of the client. It is apparent, however, that American Midlands and the Bazemores acted in total disregard of the escrow provision in the client contract and inserted that provision into the contract merely to lull the client into a false sense of security.

The advance fees charged by American Midlands ranged from $1,500 to $7,500. As previously described, rather than maintaining these fees in an escrow account as set forth in the

contract, this money was diverted to pay sales commissions and operating expenses of American Midlands. A portion of money was also used to pay the Bazemores' "salaries" and to purchase automobiles and airplanes. The record also contains evidence that American Midlands' activities created significant financial hardship for American Midlands' clients. Under these circumstances, we conclude that the penalties imposed by the district court were appropriate.

The judgment of the district court is affirmed.

AFFIRMED.

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

CATHRYN J.C. HICKLIN, APPELLANT AND CROSS-APPELLEE, V. DONNIE D. HICKLIN, APPELLEE AND CROSS-APPELLANT.

509 N.W.2d 627

Filed January 14, 1994. No. S-91-826.

1. **Marriage: Equity: Appeal and Error.** An action to annul a marriage sounds in equity. As such, an appellate court will review annulment cases de novo on the record and will reach independent conclusions without reference to the conclusions reached by the trial judge, but may give weight, where the evidence is in conflict, to the fact that the trial judge observed and heard the witnesses and accepted one version of the facts rather than another.
2. **Marriage: Divorce: Child Support: Appeal and Error.** In an action for dissolution or annulment, a parent may accept child support and yet appeal other issues in the decree. A parent's acceptance of child support does not preclude an appeal from a decree of dissolution or annulment.
3. **Marriage: Presumptions: Proof: Words and Phrases.** For purposes of Neb. Rev. Stat. § 42-378 (Reissue 1988), good faith means an honest and reasonable belief that the marriage was valid at the time of the ceremony. Whether a party acted in good faith depends on the facts and circumstances of the case. Good faith is presumed; the burden of proof rests squarely on the party charging bad faith. Good faith may result either from an error of fact or from an error of law.
4. **Marriage: Divorce.** Under Neb. Rev. Stat. § 42-378 (Reissue 1988), a party claiming good faith cannot close his or her eyes to suspicious circumstances; however, attending a divorce hearing does not trigger a duty to inquire as to the date on which the divorce will become final.

5. **Marriage.** Neb. Rev. Stat. § 42-378 (Reissue 1988) applies when one or both of the parties are innocent.

Petition for further review from the Nebraska Court of Appeals, CONNOLLY, HANNON, and MILLER-LERMAN, Judges, on appeal thereto from the District Court for Douglas County, PAUL J. HICKMAN, Judge. Judgment of Court of Appeals affirmed, and cause remanded with directions.

James R. Welsh, of Bradford, Coenen, Ashford & Welsh, for appellant.

P.F. Render for appellee.

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

WHITE, J.

This case arises from Cathryn J.C. Hicklin's petition for dissolution of marriage and Donnie D. Hicklin's cross-petition for annulment. The district court found that the marriage was void and dismissed the petition for dissolution. Cathryn Hicklin (petitioner) appealed to the Nebraska Court of Appeals, which reversed the decision of the district court. Donnie Hicklin (respondent) petitioned this court for further review. We affirm the decision of the Court of Appeals reversing the district court's judgment and remand the cause with directions.

In February 1981, respondent and petitioner began living together in Minnesota. Both parties knew respondent had been and was still married to Sandra Hicklin. In October 1981, respondent and petitioner moved to Nebraska.

On June 9, 1982, respondent and petitioner returned to Minnesota to attend respondent's divorce hearing. On July 4, respondent and petitioner participated in a marriage ceremony in Union Mills, Iowa. After a honeymoon in Iowa, respondent and petitioner returned to Nebraska. Respondent and petitioner's son, Jordan, was born 2 months after the wedding, on September 12. A second child, Jenna, was born on July 23, 1984.

In February 1990, petitioner filed a petition for dissolution of marriage. Respondent filed an answer and cross-petition for

annulment, alleging that he had not been legally divorced from Sandra Hicklin at the time of his purported marriage to petitioner.

At trial, both parties presented evidence regarding their knowledge of respondent's divorce. Respondent stipulated that at the time of the marriage ceremony, he believed he had been legally divorced. Petitioner testified that at the time of the marriage ceremony, she believed that respondent had been legally divorced. Petitioner further testified that prior to respondent's answer and cross-petition, she had never received any indication that their marriage was invalid.

The district court dismissed the petition for dissolution. The court found that under applicable Minnesota law, a decree of dissolution becomes final when entered. The court further found that the decree dissolving Sandra Hicklin and respondent's marriage was entered on July 13, 1982, 9 days after respondent and petitioner's purported marriage. The court concluded that respondent had not been legally divorced from Sandra Hicklin at the time of the purported marriage. Therefore, the marriage between respondent and petitioner was void. See Neb. Rev. Stat. § 42-103 (Cum. Supp. 1992).

The district court then turned to respondent's cross-petition for annulment. Although the district court did not explicitly annul the marriage, annulment clearly would have been proper on the ground that respondent had a spouse living at the time of his purported marriage to petitioner. See Neb. Rev. Stat. § 42-374(3) (Cum. Supp. 1992). The court noted that both parties had attempted to bring themselves within Neb. Rev. Stat. § 42-378 (Reissue 1988). That statute provides:

> When the court finds that a party entered into the contract of marriage in good faith supposing the other to be capable of contracting, and the marriage is declared a nullity, such fact shall be entered in the decree and the court may order such innocent party compensated as in the case of dissolution of marriage, including an award for costs and attorney fees.

The district court held that neither party was "innocent" within the meaning of this statute. The court found that respondent was presumed to know the law of Minnesota and

was not innocent. The court found that petitioner either knew or should have known that respondent was not legally divorced. The court stated that because petitioner had been divorced herself and had attended respondent's divorce hearing, she should have known that a decree of dissolution had to be issued by a court, should have known that no decree was issued on the day of the hearing, and should have demanded to see a decree prior to entering into marriage. The district court thus refused to compensate petitioner "as in the case of dissolution of marriage." See § 42-378.

The district court then turned to issues involving the two minor children. The court granted petitioner custody of both children. The court ordered respondent to pay a fixed amount of monthly child support, to contribute 73 percent of child-care expenses actually incurred, and to provide medical and hospital coverage for the children.

Both parties filed motions for new trial. Both motions were overruled. Petitioner appealed, and respondent cross-appealed. Additionally, respondent filed a motion to dismiss petitioner's appeal on the grounds that she had accepted the benefits of the decree.

The Court of Appeals reversed the trial court's decision. *Hicklin v. Hicklin*, 3 NCA 805 (1993). First, the Court of Appeals denied respondent's motion to dismiss. The court reasoned that petitioner had not accepted the benefits of the decree that she was appealing because the child support payments flowed from respondent's cross-petition for annulment and petitioner was appealing the dismissal of her petition for dissolution. Second, the Court of Appeals held that the district court had abused its discretion by failing to find that petitioner was innocent within the meaning of § 42-378. The Court of Appeals found no evidence to suggest that petitioner knew or should have known that respondent's divorce had not become final. Finally, the Court of Appeals remanded the cause with directions to adjudicate the petition for dissolution pursuant to § 42-378.

Respondent sought and was granted further review by this court. Respondent asserts, in essence, that the Court of Appeals erred (1) in denying his motion to dismiss, (2) in failing

to specifically affirm that the marriage was void, (3) in ordering application of § 42-378, and (4) in failing to consider the assignments of error set forth in respondent's brief on cross-appeal.

An action to annul a marriage sounds in equity. As such, an appellate court reviews annulment cases de novo on the record. *Guggenmos v. Guggenmos*, 218 Neb. 746, 359 N.W.2d 87 (1984); *Edmunds v. Edwards*, 205 Neb. 255, 287 N.W.2d 420 (1980). The reviewing court reaches "independent conclusions without reference to the conclusions reached by the trial judge." *Guggenmos*, 218 Neb. at 749, 359 N.W.2d at 91. See, Neb. Rev. Stat. § 25-1925 (Cum. Supp. 1992); *Edmunds, supra*. Where the evidence is in conflict on a material issue of fact, an appellate court considers and may give weight to the fact that the trial judge observed and heard the witnesses and accepted one version of the facts rather than another. *Richdale Dev. Co. v. McNeil Co., ante* p. 694, 508 N.W.2d 853 (1993).

In his first assignment of error, respondent claims that the Court of Appeals erred in denying his motion to dismiss. Respondent argues that because petitioner had accepted the benefits of the decree, her appeal should be barred. Respondent does not specify which benefits petitioner accepted. The only benefits awarded by the decree were child support, a percentage of child-care expenses, and health benefits for the children. We assume these are the benefits which petitioner accepted. We will refer to this combination of benefits loosely as "child support." Petitioner's appeal did not involve issues of child support.

The issue presented, then, is whether a parent's acceptance of child support should bar that parent from appealing other issues in a decree of dissolution or annulment. The answer is no.

In arguing that petitioner's appeal should be barred, respondent relies on our recent case *Shiers v. Shiers*, 240 Neb. 856, 485 N.W.2d 574 (1992). In *Shiers*, the wife had accepted property distributions and was attempting to appeal the amount of child support which she was to receive on behalf of the minor children. After a thorough discussion of the applicable case law, we formulated the following general rule: "[I]n 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." *Shiers*, 240 Neb. at 860, 485 N.W.2d at 576. Under this rule, a party to a dissolution action cannot, by accepting the benefits of the decree, waive the right to appeal issues which affect the "interests and welfare" of the children.

The rationale for the *Shiers* rule rests on the notion that the sins of the parents shall not be visited upon their children. A parent acting in his or her own best interests should not adversely affect the interests of the children. See *Reynek v. Reynek*, 193 Neb. 404, 227 N.W.2d 578 (1975) (holding that a parent who accepts property settlement payments may appeal child custody issues because the best interests of the child are at stake).

With this rationale as our guiding principle, we now hold that in an action for dissolution or annulment, a parent may accept child support and yet appeal other issues in the decree. See, *Coley v. Coley*, 128 Ga. 654, 58 S.E. 205 (1907); *Lemon v. Lemon*, 14 Ill. 2d 15, 150 N.E.2d 608 (1958); *Atwood v. Atwood*, 229 Minn. 333, 39 N.W.2d 103 (1949); *Sanford v. Sanford*, 295 N.W.2d 139 (N.D. 1980). To hold otherwise would force parents to choose between accepting child support and prosecuting an appeal. See *Coley*, 128 Ga. at 656, 58 S.E. at 205 ("we do not think it would be within either the spirit or the justice of the law to hold that [a mother] must repudiate [the judgment] entirely, and allow the child to suffer, in order to permit her to except to the refusal of alimony for her"). A parent's acceptance of child support, therefore, does not preclude an appeal from a decree of dissolution or annulment.

In his second assignment of error, respondent claims that the Court of Appeals erred in failing to specifically affirm that the marriage was void. We do not decide whether the Court of Appeals erred in this manner or whether such a failure would constitute error. Rather, we address this assignment of error only to clarify the status of the parties' purported marriage. The trial court found that respondent was not legally divorced from Sandra Hicklin at the time of his purported marriage to petitioner. Neither respondent nor petitioner has challenged this finding. The Court of Appeals found that Iowa law had not

been pled and could not be used to validate respondent and petitioner's union as a common-law marriage. Neither respondent nor petitioner has challenged this finding. Given these two undisputed findings by the lower courts, it is clear that respondent and petitioner's marriage was void. See § 42-103.

In his third assignment of error, respondent claims that the Court of Appeals erred in ordering application of § 42-378, under which an innocent party to a void marriage may be compensated as if the marriage had been valid. We find that the Court of Appeals properly ordered application of § 42-378.

In support of this third assignment of error, respondent first contends that petitioner is not an innocent party within the meaning of § 42-378. An innocent party is one who "entered into the contract of marriage in *good faith* supposing the other to be capable of contracting." (Emphasis supplied.) § 42-378. The meaning of good faith, within the context of this statute, has never been addressed by this court.

In order to determine the proper meaning of good faith, we look to the putative marriage doctrine. This doctrine, which has been adopted in many states either through case law or by statute, closely parallels § 42-378. See Christopher L. Blakesley, *The Putative Marriage Doctrine*, 60 Tul. L. Rev. 1 (1985).

The putative marriage doctrine provides that, when a marriage is declared a nullity, the civil effects of a legal marriage will continue to flow to the parties who contracted the marriage in good faith. *Id.* In other words, a putative spouse will have many of the rights of an actual spouse. See, e.g., *Mabry v. Mabry*, 452 So. 2d 248 (La. App. 1984) (putative spouse is entitled to alimony). The putative marriage doctrine enlists justice and equity to protect those who participate in a "marriage ceremony in the good faith belief that the marriage was valid and proper, when it was actually null due to some impediment." Blakesley, *supra*, at 6.

Good faith is the primary tenet of the putative marriage doctrine. Blakesley, *supra*. Good faith, in the context of a putative marriage, means an honest and reasonable belief that the marriage was valid at the time of the ceremony. See, *Funderburk v. Funderburk*, 214 La. 717, 38 So. 2d 502 (1949);

Mara v. Mara, 452 So. 2d 329 (La. App. 1984). Whether a party acted in good faith depends on the facts and circumstances of the case. *Succession of Chavis*, 211 La. 313, 29 So. 2d 860 (1947); *Mabry, supra*. Good faith is presumed; the burden of proof rests squarely on the party charging bad faith. *Brown v. Brown*, 274 Cal. App. 2d 178, 82 Cal. Rptr. 238 (1969); *Funderburk, supra*; *Mara, supra*. Good faith may result either from an error of fact or from an error of law. *Succession of Lynch v. United States*, 17 F. Supp. 674 (W.D. La. 1936) (putative wife erroneously believed that husband's conviction and sentencing to the state penitentiary gave her a divorce); *Succession of Pigg*, 228 La. 799, 84 So. 2d 196 (1955) (putative wife erroneously believed husband could divorce his prior wife, who was in an insane asylum); *Jones v. Equitable Life Assurance Society of U.S.*, 173 So. 2d 373 (La. App. 1965) (putative wife, an ex-mistress, erroneously believed that she could marry her adulterous partner). Accord *Kimball v. Folsom*, 150 F. Supp. 482 (W.D. La. 1957) (adage that "ignorance of the law is no excuse" does not apply to putative marriages).

In the present case, respondent has failed to demonstrate that petitioner acted in bad faith. At trial, respondent presented no evidence whatsoever that petitioner *knew* his divorce had not been finalized at the time of the purported marriage ceremony. Petitioner testified that she believed respondent was free to marry and that until the filing of respondent's answer and cross-petition, she had received no indication that her marriage might be invalid. This testimony was not rebutted; if anything, respondent confirmed petitioner's testimony by stipulating that he, too, had believed he was free to marry.

The district court found that petitioner *should have known* that respondent's divorce had not been finalized at the time of the purported marriage ceremony. The court reasoned that because petitioner attended respondent's divorce hearing, petitioner should have inquired as to the date on which respondent's divorce would become final. We are unwilling to place this burden on petitioner or one in her position. Although a party cannot close his or her eyes to suspicious circumstances, attending a divorce hearing does not trigger a duty to inquire.

Cf. *Funderburk, supra* (putative wife could not be charged with knowledge that her husband's divorce decree was void); *Howard v. Ingle*, 180 So. 248 (La. App. 1938) (putative wife was not required to question husband about his domestic past in order to uncover ex-wife from whom husband had not been divorced); *Tonti v. Chadwick*, 1 N.J. 531, 64 A.2d 436 (1949) (when husband had obtained a mail-order Mexican divorce in which he had no confidence, husband had duty to inquire as to validity of his own divorce), *overruled on other grounds, Kazin v. Kazin*, 81 N.J. 85, 405 A.2d 360 (1979); *Walker v. Walker's Estate*, 136 S.W. 1145 (Tex. Civ. App. 1911) (when woman's husband asserted that he had divorced her and when divorce records were located in the town in which woman resided, woman had duty to inquire as to validity of her own divorce).

The district court also found that "because [petitioner] was past her 7th month of pregnancy she was willing to overlook the issuance of a Decree in order to give the child a name." This finding is wholly unsupported by the evidence. We are mindful that the trial court observed and heard the witnesses. Nevertheless, such conjecture, founded on disbelief of a witness, cannot replace the proof required to rebut a presumption of good faith. See *Succession of Pigg, supra*.

We hold that petitioner was innocent within the meaning of § 42-378. The Court of Appeals properly determined that petitioner acted in good faith when she contracted marriage with respondent.

Respondent next contends that even if petitioner is innocent, § 42-378 does not apply. Respondent argues that § 42-378 only applies when one party is innocent and the other party is not innocent. Respondent further argues that if petitioner is innocent, he is likewise innocent, and the statute does not apply.

Respondent relies upon our decision in *Randall v. Randall*, 216 Neb. 541, 345 N.W.2d 319 (1984). In *Randall*, we held that neither the husband nor the wife was innocent and that § 42-378 did not apply. Simply stated, *Randall* does not address the issue at hand.

Respondent's argument runs contrary to the plain language of the statute, the purpose of the statute, and persuasive authority from other jurisdictions. First, the plain language of

the statute refers only to an innocent party; the statute does not mention or require a noninnocent party. Second, the purpose of the statute is not to punish a guilty party but to protect an innocent party. See *Lee v. Hunt*, 483 F. Supp. 826, 842 (W.D. La. 1978) ("equity demands that innocent persons not be injured through an innocent relationship"). Finally, jurisdictions which follow the putative marriage doctrine have held that the doctrine applies when one or both of the spouses are innocent. See, *Succession of Chavis*, 211 La. 313, 29 So. 2d 860 (1947); *Whaley v. Peat*, 377 S.W.2d 855 (Tex. Civ. App. 1964).

We hold that § 42-378 applies when one or both of the parties are innocent. The Court of Appeals properly ordered application of § 42-378.

In his fourth assignment of error, respondent claims that the Court of Appeals erred in failing to consider issues raised in his brief on cross-appeal. The Court of Appeals did not address these issues, finding that they would be addressed by the district court on remand. We agree.

In summary, we find that the Court of Appeals acted properly in denying respondent's motion to dismiss, in finding that the purported marriage was void, and in ordering application of § 42-378. We affirm the decision of the Court of Appeals reversing the decision of the district court. We remand the cause with directions to grant the petition for annulment and adjudicate the cause pursuant to § 42-378.

AFFIRMED AND REMANDED WITH DIRECTIONS.

SHANAHAN, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. DARREN LEE MYERS, APPELLANT.

510 N.W.2d 58

Filed January 14, 1994. No. S-92-1195.

1. **Appeal and Error.** Ordinarily, to be considered by an appellate court, errors must be assigned and discussed in the brief of the one claiming that prejudicial error has occurred.
2. _____. Although an appellate court does not consider assignments of error not listed and discussed in the briefs, it always reserves the right to note plain error which was not complained of at trial or on appeal but is plainly evident from the record, and which is of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process.
3. **Homicide: Lesser-Included Offenses: Jury Instructions.** When murder is charged, the court is required to charge on such lesser degrees of homicide as to which the evidence is properly applicable.
4. **Homicide: Intent.** The essential elements in the crime of murder in the second degree are that the killing be done purposely and maliciously.
5. **Trial: Judges: Jury Instructions.** It is the duty of the trial judge to instruct the jury on the pertinent law of the case, whether requested to do so or not, and an instruction or instructions which by the omission of certain elements has the effect of withdrawing from the jury an essential issue or element in the case is prejudicially erroneous.
6. **Jury Instructions: Appeal and Error.** Failure to object to a jury instruction after it has been submitted to counsel for review precludes raising an objection on appeal absent plain error indicative of a probable miscarriage of justice.
7. _____: _____. A party who does not request a desired jury instruction cannot complain on appeal about incomplete instructions.
8. _____: _____. When a trial court fails, after specific request by the defendant, to define in a jury instruction a word which makes up an essential element of the crime charged, such failure is prejudicial error requiring reversal.
9. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction.
10. **Jury Instructions: Appeal and Error.** If the jury instructions, when read together, correctly state the law, are not misleading, and adequately state the issues, there is no prejudicial error.
11. **Self-Defense.** A defendant asserting self-defense as justification for the use of force must have a reasonable and good faith belief in the necessity of such force.
12. _____. A defendant's claim of self-defense is a question of fact for the jury.
13. _____. The question of whether a defendant has a reasonable and good faith belief in the necessity to use force is a question of fact to be determined by a jury and is not to be determined solely by the defendant's own subjective belief in the necessity to use force.

14. _____. The law permits the use of deadly force only when the actor believes that such force is necessary to protect himself against death, serious bodily harm, kidnapping, or sexual intercourse compelled by force or threat.
15. **Trial: Evidence: Waiver: Appeal and Error.** If a party does not make a timely objection to the receipt of evidence at trial, the party waives the right on appeal to assert prejudicial error in the reception of such evidence.
16. **Trial: Verdicts: Rules of Evidence: Appeal and Error.** 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.
17. **Motions to Strike: Jury Instructions.** Ordinarily, when an objection to or motion to strike improper evidence is sustained and the jury is instructed to disregard it, such instruction is deemed sufficient to prevent prejudice.
18. **Jury Instructions: Evidence: Appeal and Error.** The test to determine whether an instruction to disregard improper evidence is sufficient to prevent prejudice to the defendant is whether the remark which the jury was instructed to disregard, when viewed against the backdrop of all the evidence, so tainted the entire proceedings that the accused did not have a fair trial.
19. **Due Process: Miranda Rights: Prosecuting Attorneys: Impeachment.** The Due Process Clause of the 14th Amendment forbids prosecutors from using a defendant's postarrest, post-*Miranda* silence for impeachment purposes.
20. **Trial: Waiver: Appeal and Error.** One may not waive an error, gamble on a favorable result, and, upon obtaining an unfavorable result, assert the previously waived error.
21. **Criminal Law: Trial: Prosecuting Attorneys: Juries.** It is highly improper and generally prejudicial for a prosecuting attorney in a criminal case to declare to the jury his personal belief in the guilt of a defendant, unless such belief is given as a deduction from evidence.
22. **Trial: Witnesses.** An interrogator may not inquire of a witness, "Isn't it true that you told X that you saw Y shoot Z?" leaving the impression that such was the case, and then not call X to establish that fact.
23. **Weapons: Sentences.** Using a firearm to commit a felony shall be treated as a separate and distinct offense from the felony being committed, and sentences imposed for using a firearm to commit a felony shall be consecutive to any other sentence imposed.

Appeal from the District Court for Adams County: STEPHEN ILLINGWORTH, Judge. Reversed and remanded for a new trial.

Arthur R. Langvardt for appellant.

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

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

FAHRNBRUCH, J.

Because it was plain error to omit the element of "malice" from the jury instructions defining second degree murder and to omit from the jury instructions that the kinds of homicides instructed upon were felonies, Darren Lee Myers' convictions of second degree murder and use of a firearm to commit a felony are reversed, and he is granted a new trial.

Myers was charged by information with first degree murder and use of a firearm to commit a felony. A jury in the district court for Adams County rejected Myers' self-defense claim and convicted him of second degree murder in the January 24, 1992, shooting death of Kervin Thomas. The jury also convicted Myers of use of a firearm to commit a felony. Myers was sentenced to life imprisonment for the homicide conviction and 5 to 15 years' imprisonment for the firearm conviction, the sentences to run concurrently.

Restated, Myers' complaints on appeal are that (1) the trial court erred in instructing the jury, (2) prosecutorial misconduct denied him a fair trial, (3) his sentence is excessive, and (4) the trial court erred in overruling his motion for a new trial.

JURY INSTRUCTIONS

Myers complains that although he had been charged with use of a firearm to commit a felony, the jury was not instructed that any of the other offenses submitted to the jury were, in fact, felonies. He also contends that the jury was improperly instructed on self-defense.

Before reviewing Myers' assignments of error, we note that the trial court omitted the element of malice from its instruction on second degree murder. Although Myers made no objection to that instruction, we find that omission to be plain error and elect to review that issue first.

SECOND DEGREE MURDER INSTRUCTION

We are not unmindful that ordinarily, to be considered by an appellate court, errors must be assigned and discussed in the brief of the one claiming that prejudicial error has occurred. See, Neb. Ct. R. of Prac. 9D(1)d (rev. 1992); *State v. Vermuele*, 241 Neb. 923, 492 N.W.2d 24 (1992). Although an appellate court does not consider assignments of error not listed and

discussed in the briefs, it always reserves the right to note plain error which was not complained of at trial or on appeal but is plainly evident from the record, and which is of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process. *Design Data Corp. v. Maryland Cas. Co.*, 243 Neb. 945, 503 N.W.2d 552 (1993). See, also, Neb. Rev. Stat. § 25-1919 (Cum. Supp. 1992).

In Myers' case, the court was correct in instructing the jury on the three kinds of homicide, that is, first degree murder and second degree murder, and manslaughter. See *State v. Morrow*, 237 Neb. 653, 467 N.W.2d 63 (1991) (holding that when murder is charged, the court is required to charge on such lesser degrees of homicide as to which the evidence is properly applicable). The record shows that, in its second degree murder instruction, the trial court neither included nor defined "malice" as an element of second degree murder.

Prior to the adoption of the current criminal code in 1977, the second degree murder statute defined such a killing as one done "purposely and maliciously." Neb. Rev. Stat. § 28-402 (Reissue 1975). The current code states that "[a] person commits murder in the second degree if he causes the death of a person intentionally, but without premeditation." Neb. Rev. Stat. § 28-304 (Reissue 1989). It does not mention malice.

However, this court has continued to require malice as an element of second degree murder. Section 28-304 became effective on January 1, 1979. See, 1977 Neb. Laws, L.B. 38, § 19; 1978 Neb. Laws, L.B. 748, § 54. In *State v. Rowe*, 214 Neb. 685, 335 N.W.2d 309 (1983), this court affirmed the defendant's second degree murder conviction for the May 1, 1980, slaying of his wife. Although the crime in *Rowe* occurred after the effective date of the new statute, this court held that the essential elements in the crime of murder in the second degree are that the killing be done purposely and maliciously. "Purposely" means "intentionally." *State v. Thompson, ante* p. 375, 507 N.W.2d 253 (1993); *State v. Williams*, 243 Neb. 959, 503 N.W.2d 561 (1993).

In our recent opinions, we have continued to declare that malice is an element of second degree murder. See, e.g., *State v.*

Franklin, 241 Neb. 579, 489 N.W.2d 552 (1992); *State v. Dean*, 237 Neb. 65, 464 N.W.2d 782 (1991). But see *State v. Williams*, 226 Neb. 647, 413 N.W.2d 907 (1987), *cert. denied* ____ U.S. ____, 113 S. Ct. 260, 121 L. Ed. 2d 191 (1992) (omitting mention of malice as element of second degree murder, but only issue on appeal was whether evidence was sufficient to support conviction for intentional killing rather than defendant's claim of self-defense).

It is the duty of the trial judge to instruct the jury on the pertinent law of the case, whether requested to do so or not, and an instruction or instructions which by the omission of certain elements has the effect of withdrawing from the jury an essential issue or element in the case is prejudicially erroneous. *State v. Breaker*, 178 Neb. 887, 136 N.W.2d 161 (1965).

By omitting the element of malice from the second degree murder instruction, the instruction in effect became one for the crime of intentional manslaughter as defined by this court in *State v. Pettit*, 233 Neb. 436, 445 N.W.2d 890 (1989). Malice is not an essential element of manslaughter. "A person commits manslaughter if he kills another *without malice*, either upon a sudden quarrel, *or* causes the death of another unintentionally while in the commission of an unlawful act." (Emphasis supplied.) Neb. Rev. Stat. § 28-305(1) (Reissue 1989).

The omission in the instructions on second degree murder of malice as an element of that crime was prejudicially erroneous and constituted plain error, thereby entitling Myers to reversal of his convictions and a new trial.

Instruction on Felonies

Myers also complains that, although he had been charged with use of a firearm to commit a felony, the jury was not instructed that any of the other offenses submitted to the jury were, in fact, felonies. As previously noted, the jury was instructed on first degree murder, second degree murder, and manslaughter.

The record reflects that the court gave two instructions on the firearm charge, one in the language of the statute, Neb. Rev. Stat. § 28-1205(1) (Reissue 1989), and one setting forth the elements of the offense, the burden of proof, and the standard

of proof. The defense made no objection to either instruction at the instruction conference, even though the trial court had omitted setting forth that each of the homicide charges upon which it had previously instructed were felonies. Nor did the defense request or submit a proposed instruction that first degree murder, second degree murder, and manslaughter were felonies for the purpose of the firearm charge.

Failure to object to a jury instruction after it has been submitted to counsel for review precludes raising an objection on appeal absent plain error indicative of a probable miscarriage of justice. *State v. Drinkwalter*, 242 Neb. 40, 493 N.W.2d 319 (1992). A party who does not request a desired jury instruction cannot complain on appeal about incomplete instructions. See *State v. Huffman*, 222 Neb. 512, 385 N.W.2d 85 (1986).

On the other hand, we held in *State v. Bridger*, 223 Neb. 250, 256, 388 N.W.2d 831, 835 (1986), that "[when] a trial court fails, *after specific request by the defendant*, to define a word which makes up an essential element of the crime charged, such failure is prejudicial error requiring reversal." (Emphasis supplied.) The case implies that the trial court is not required to define such terms if a definition is not requested by the defendant *and* the term has such a generally understood and accepted meaning that no instruction is necessary.

Myers argues that although the court and the attorneys knew that first and second degree murder and manslaughter were all felonies, the jury could not be presumed to know this. The word "felony" is a legal term of art and applies to numerous charges which cannot be said to have a generally understood and accepted meaning to the public at large. We agree with Myers that, in the absence of a definition of "felony," the jury was left to speculate as to an essential element of the firearm charge.

Once more exercising our prerogative to review the record for plain error, we again note that it is the duty of the trial judge to instruct the jury on the pertinent law of the case, *whether requested to do so or not*, and an instruction which by the omission of certain elements has the effect of withdrawing from the jury an essential issue or element in the case is prejudicially

erroneous. *State v. Breaker*, 178 Neb. 887, 136 N.W.2d 161 (1965).

Whether the crimes upon which the jury was instructed are felonies for the purpose of the firearm charge is part of the pertinent law of Myers' case. The trial court's failure to instruct the jury on that essential element of the case was prejudicially erroneous. This is plain error indicative of a probable miscarriage of justice and entitles Myers to reversal of his use of a firearm conviction and a new trial.

SELF-DEFENSE INSTRUCTIONS

We next turn to Myers' claim that the jury was improperly instructed on self-defense. At the jury instruction conference, the defense objected to jury instruction No. 15 on self-defense. That instruction stated that "[t]he defendant did not act in self defense if the state proved beyond a reasonable doubt that any one of the following did not occur: (1) Kervin Thomas threatened or attempted to cause death or serious bodily harm . . . ."

Myers submitted his proposed jury instruction No. 1, which stated that "the Defendant did not act in self-defense if the State proved beyond a reasonable doubt that any one of the following did not occur: [1] Kervin Thomas *attacked* Defendant *or* threatened Defendant with death or serious bodily harm . . . ." (Emphasis supplied.) The court overruled Myers' objection to instruction No. 15 and refused Myers' proposed instruction No. 1.

Myers' proposed instruction also defined deadly force as "force used with the intent to cause death or serious bodily harm or force used with the knowledge that its use would create a substantial risk of death or serious bodily harm." Otherwise, the instruction given and the proposed instruction were virtually the same. Both were based on the model jury instruction set forth in NJI2d Crim. 7.3, except for the proposed instruction's definition of deadly force, which was excerpted from NJI2d Crim. 7.2.

To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2)

the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction. *State v. Lowe, ante* p. 173, 505 N.W.2d 662 (1993).

If the jury instructions, when read together, correctly state the law, are not misleading, and adequately state the issues, there is no prejudicial error. *Id.*; *State v. Van Ackeren*, 242 Neb. 479, 495 N.W.2d 630 (1993).

Myers argues that the necessity for the use of deadly force in self-defense is determined by a subjective standard, that is, whether Myers himself believed deadly force to be necessary at the time in question. He contends that instruction No. 15 permitted the jury to find that he did not act in self-defense only if the jury did not believe that the victim was *in fact* attempting to kill or seriously harm Myers.

The law on self-defense in this state is clear. A defendant asserting self-defense as justification for the use of force must have a reasonable and good faith belief in the necessity of such force. *State v. Thompson, ante* p. 375, 507 N.W.2d 253 (1993). A defendant's claim of self-defense is a question of fact for the jury. *Id.* Thus, the question of whether a defendant has a reasonable and good faith belief in the necessity to use force is a question of fact to be determined by a jury and is not to be determined solely by the defendant's own subjective belief in the necessity to use force.

The law permits the use of deadly force only when the actor "believes that such force is necessary to protect himself against death, serious bodily harm, kidnapping or sexual intercourse compelled by force or threat." Neb. Rev. Stat. § 28-1409(4) (Reissue 1989). Myers' tendered instruction No. 1 is an incorrect statement of the law because it states in effect that the use of deadly force by Myers was justified if Thomas merely *attacked* Myers without regard to whether Thomas was threatening or attempting to cause death or serious bodily harm to Myers. The trial court correctly refused the proposed instruction.

Moreover, the instruction as given correctly states the law. This assignment of error is without merit.

PROSECUTORIAL MISCONDUCT

Myers alleges that he was denied a fair trial because of prosecutorial misconduct, in that the prosecutor (1) persistently and repeatedly put before the jury evidence of irrelevant and nonprobative evidence of drug use and drug dealing by Myers; (2) commented in questioning witnesses and in closing argument upon Myers' declining to give a statement to law enforcement authorities following his arrest; (3) stated his personal belief in Myers' guilt during closing argument; and (4) put to Myers a series of questions during cross-examination implying specific factual knowledge on the prosecutor's part which was in direct contradiction to Myers' testimony, knowing that he could not support the accusations implied in such questions with evidence. We consider each of Myers' allegations in turn.

EVIDENCE OF DRUG USE AND DRUG DEALING

Myers argues in his brief that the prosecutor repeatedly attempted to inject evidence of drug use and drug dealing into the trial without any evidence that such activities were connected to the crime in question. Four witnesses testified in regard to drug use or drug dealing by Myers, Thomas, and other persons. The record reflects that of those four witnesses, three were allowed to testify without objection by Myers.

It is a well-settled rule that if a party does not make a timely objection to the receipt of evidence at trial, the party waives the right on appeal to assert prejudicial error in the reception of such evidence. See, *State v. Schrein, ante* p. 136, 504 N.W.2d 827 (1993); *State v. Coleman*, 241 Neb. 731, 490 N.W.2d 222 (1992). "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." *State v. Cave*, 240 Neb. 783, 793, 484 N.W.2d 458, 466 (1992).

By failing to object to the testimony of three witnesses who testified regarding drug use and drug dealing by himself, Thomas, and other parties, Myers waived the right to assert prejudicial error in the reception of their testimony.

During a fourth witness' similar testimony about drug use

and drug dealing, defense counsel objected that such testimony lacked foundation, relevance, and probative value. The trial court overruled the objections and allowed the testimony. Later, at defense counsel's request, the witness' testimony about drug transactions was stricken from the record and the jury was instructed to disregard the testimony.

Ordinarily, when an objection to or motion to strike improper evidence is sustained and the jury is instructed to disregard it, such instruction is deemed sufficient to prevent prejudice. *State v. Palser*, 238 Neb. 193, 469 N.W.2d 753 (1991). The test to determine whether an instruction to disregard improper evidence is sufficient to prevent prejudice to the defendant is whether the remark which the jury was instructed to disregard, when viewed against the backdrop of all the evidence, so tainted the entire proceedings that the accused did not have a fair trial. *Id.*

In view of the fact that three other witnesses were allowed to testify about drug use and drug dealing without objection, any testimony to these same facts by a fourth witness would not have tainted the proceeding or prevented Myers from having a fair trial in any way. Therefore, the trial court's instruction to disregard the testimony was sufficient to prevent any prejudice to Myers.

Comments on Myers' Declining to Make Statement

Myers argues that the prosecution impermissibly violated his Fifth Amendment right to remain silent by eliciting testimony about his lack of explanation of the killing and by commenting on the same during closing argument. This argument is directed at three separate occurrences. The first occurrence was after a deputy sheriff had testified that Myers had said a trace metal test on his hands was not necessary because he had shot Thomas. The prosecutor asked, "When Mr. Myers made that statement in response to your request, did he offer any explanation or excuse for the action he had taken?" The deputy answered, "None." The defense made no objection to this question and answer.

The second occurrence was during the State's cross-examination of Myers. The prosecutor asked, "Did you

show the sheriff any marks on your neck from [Thomas] grabbing you by the neck?" Myers replied, "No, I didn't talk to anybody when I came in." Although Myers' answer following the word "no" is unresponsive to the question asked, there was no objection by defense counsel or motion to strike Myers' voluntary statement that he had not talked to anybody.

Finally, during closing argument, the prosecutor stated:

> [I]f a guy was claiming—if he were claiming that he shot a guy because he was defending himself from him, wouldn't he have said, "Look at the marks on my neck," or, "He was trying to get me," or, "Look at this, look what he did," or, "He was trying to knock me down." He didn't say that. He just said, "Why brother [sic] [with the trace metal test], I shot him." Now, you know, he's explained later what he says happened, but why didn't he explain that to the officer on the scene when he was first in custody in the sheriff's office?

The defense made no objections to these statements.

"[T]he due process clause of the 14th amendment forbids prosecutors from using a defendant's postarrest, post-*Miranda* silence for impeachment purposes." *State v. Lofquest*, 227 Neb. 567, 568, 418 N.W.2d 595, 596 (1988), citing *Doyle v. Ohio*, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976). It is clear from the record that the above testimony and comments about Myers' lack of explanation for the killing were in reference to a postarrest, post-*Miranda* timeframe. However, the crucial difference between *Lofquest* and the present case is the fact that the testimony and comments in *Lofquest* were objected to, while those in Myers' case were not.

Myers' brief and defense counsel's comments at oral argument indicate that the failure to object was a matter of trial strategy in at least some of the above instances. One may not waive an error, gamble on a favorable result, and, upon obtaining an unfavorable result, assert the previously waived error. *Wolfe v. Abraham, ante* p. 337, 506 N.W.2d 692 (1993).

Because all of the statements of which Myers now complains were not objected to at the time of trial, at least in part due to a consciously chosen trial strategy, Myers waived error in regard to the statements. We decline to further review this assignment of error.

PERSONAL BELIEF IN MYERS' GUILT

Myers also complains that, during closing and rebuttal arguments, the prosecutor expressed his personal belief that Myers had not killed Thomas in self-defense and that Myers was guilty of deliberately killing Thomas.

The record reflects that the comments of the prosecutor in his initial closing argument were as follows: "But he had an opportunity to avoid that situation, that is Myers did, and he didn't do it. He shot the man. *I think he shot him in cold blood. And I think you must find him guilty.*" (Emphasis supplied.)

Myers also claims the following comments by the prosecutor in his rebuttal argument were objectionable:

> Now this is a difficult decision. It's before you now. *I do not think he acted in self defense. My conclusion is that he deliberately killed this man. . . .*
>
> We're not trying David Jones [a witness who was present at the scene of the killing], *we're not determining* whether he - what he did or didn't do that night. *We've got to decide* whether what he told the officers and what he told you is supported by their conclusions. *I believe it was. And I believe that Darren Myers killed Kervin Thomas that evening, and it was not required for his self-defense, and that therefore you must find him guilty.*

(Emphasis supplied.)

There was no objection to the prosecutor's statements by the defense, nor was there a motion for mistrial. Myers first complained of the prosecutor's conduct in his appeal to this court.

It is highly improper and generally prejudicial for a prosecuting attorney in a criminal case to declare to the jury his personal belief in the guilt of a defendant, unless such belief is given as a deduction from evidence. *State v. Leonard*, 196 Neb. 731, 246 N.W.2d 68 (1976); *State v. Brooks*, 189 Neb. 592, 204 N.W.2d 86 (1973). If we were to review the prosecutor's comments, we might well find them objectionable. However, any objection to the prosecutor's arguments made after the jury has been instructed and has retired is untimely and will not be reviewed on appeal. *State v. Hernandez*, 242 Neb. 78, 493 N.W.2d 181 (1992); *State v. Garza*, 241 Neb. 934, 492 N.W.2d

32 (1992). Because Myers failed to timely object to the prosecutor's closing remarks, his complaint in this court on that subject will not be reviewed.

IMPROPER CROSS-EXAMINATION

Near the end of the State's cross-examination of Myers, the prosecutor asked Myers a series of questions which were apparently for the purpose of impeaching Myers' testimony that he had not talked to Thomas from October 1991 to the time of the killing in January 1992. Specifically, the State inquired as to whether Thomas had accompanied Myers in Myers' pickup truck to a certain woman's basement apartment a week or two before the killing. Myers denied riding anywhere with Thomas in the week or two preceding the killing. He further denied going to the woman's apartment or even being acquainted with the woman in question.

The defense made no objection to the line of questioning at the time. After the State put on no rebuttal evidence, Myers requested that the jury be instructed to disregard the questions because the State had failed to put on evidence that the meeting in the basement apartment had ever taken place in order to complete its impeachment of Myers. The court immediately instructed the jury to disregard the testimony on that issue entirely, as requested by the defense.

Such cross-examination is clearly improper. See *State v. Jackson*, 217 Neb. 363, 348 N.W.2d 876 (1984) (holding that an interrogator may not inquire of witness, "Isn't it true that you told X that you saw Y shoot Z?" leaving the impression that such was the case, and then not call X to establish that fact). The record reflects that the improper cross-examination was extremely brief, and when viewed against the backdrop of all the evidence, it did not taint the proceeding to the extent that Myers did not have a fair trial. The limiting instruction was sufficient to prevent any prejudice to Myers.

MOTION FOR NEW TRIAL

It is not necessary for us to reach the issue of whether the trial court properly overruled Myers' motion for new trial, inasmuch as we have already determined that Myers is entitled to a new trial.

EXCESSIVENESS OF SENTENCE

Finally, we turn to Myers' argument that his sentence is excessive and constitutes an abuse of judicial discretion.

Since we vacate Myers' judgments of conviction, this issue is also moot. However, because we are remanding the cause to the district court for retrial, we point out that the trial court committed plain error in its sentencing of Myers on the use of a firearm to commit a felony.

The trial court sentenced Myers to serve his firearm sentence *concurrently* with his life sentence for second degree murder. Section 28-1205(3) states, "[Using a firearm to commit a felony] shall be treated as a separate and distinct offense from the felony being committed, and sentences imposed under the provisions of this section shall be *consecutive* to any other sentence imposed." (Emphasis supplied.)

Under the terms of § 28-1205(3), it was plain error for the trial court to order Myers' firearm sentence to run concurrently with his life sentence.

CONCLUSION

There being plain error prejudicial to the defendant in the jury instructions on second degree murder and also in the jury instructions on use of a firearm to commit a felony, Myers' convictions are reversed, and the cause is remanded to the district court for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

SHANAHAN, J., not participating.

IN RE INTEREST OF J.A., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. J.A., APPELLANT.

510 N.W.2d 68

Filed January 14, 1994. No. S-93-165.

1. **Jurisdiction: Time: Appeal and Error.** Timeliness of an appeal is a jurisdictional necessity and may be raised by an appellate court sua sponte.
2. **Final Orders: Time: Appeal and Error.** When an appeal is taken from a final order, the time for appeal begins to run when the order is entered on the journal of the court.
3. **Final Orders: Records: Time.** Orders which are not announced in open court are not formalized until they have been entered on the journal.
4. **Judgments: Records.** The journal of the trial court is the official record of the judgments and orders of that court.
5. **Final Orders: Records: Time: Notice: Appeal and Error.** A notice of appeal must be filed within 30 days of the date the order was entered on the journal of the trial court.
6. **Judgments: Records: Time: Words and Phrases.** Rendition of judgment occurs when the court makes an oral pronouncement and accompanies that pronouncement with a notation on the trial docket. Failing a notation on the trial docket, a judgment is rendered when some written notation of the judgment is filed in the records of the court.
7. **Statutes: Appeal and Error.** Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below.
8. **Juvenile Courts: Appeal and Error.** An appellate court reviews juvenile proceedings de novo on the record and is thus required to reach a conclusion independent of the juvenile court's findings; provided, however, that where the evidence conflicts, an appellate court considers and may give weight to the juvenile court's observation of the witnesses and acceptance of one version of the facts over another.
9. **Juvenile Courts.** Under Neb. Rev. Stat. § 43-286 (Cum. Supp. 1992), a juvenile court has broad discretion as to the disposition of a delinquent juvenile.
10. **Juvenile Courts: Probation and Parole.** Neb. Rev. Stat. § 43-286(4)(f) (Cum. Supp. 1992), by its terms, applies only when a juvenile court revokes probation. In the absence of an order revoking probation, a juvenile court has no obligation to comply with § 43-286(4)(f).

Appeal from the Separate Juvenile Court of Sarpy County: WILLIAM H. NORTON, Judge. Affirmed.

Steven M. Delaney, of Hascall, Jungers, Garvey & Delaney, for appellant.

Michael D. Wellman, Sarpy County Attorney, and Mary Margaret Zerse Stevens for appellee.

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

WHITE, J.

J.A., a minor female, appeals an order of the juvenile court committing her to the Youth Development Center in Geneva, Nebraska. We affirm.

On June 25, 1992, the Sarpy County Attorney filed a petition in the juvenile court alleging that appellant had committed two misdemeanors: obstructing a police officer (count I) and disturbing the peace (count II). At the arraignment, appellant denied the allegations of the petition.

One month later, the county attorney filed an amended petition, adding a second allegation of disturbing the peace (count III). At the hearing, the court dismissed counts I and II on the motion of the county attorney. Appellant then admitted the allegations of count III, and the court accepted the admission. The court found that appellant was a juvenile as described in Neb. Rev. Stat. § 43-247(1) (Reissue 1988) and ordered her to attend a 30-day evaluation at the Youth Development Center-Geneva (Geneva). Finally, the court continued the matter for a disposition hearing following the 30-day evaluation.

From September 1992 through January 1993, the court held disposition hearings approximately once per month. After each hearing, the court issued an order continuing the matter for further disposition. After the October hearing, the court order not only continued the matter for further disposition, but also imposed certain terms and conditions upon appellant. Two such conditions are relevant here. First, appellant was ordered not to violate any laws or municipal ordinances, and second, appellant was ordered to abstain from consuming alcohol and from using controlled substances.

On January 19, 1993, the county attorney filed a motion to review appellant's disposition. The motion alleged that appellant had been arrested after fighting with her mother, that she had been drinking alcohol and sniffing paint, and that she

had been found with a blood alcohol content of .05.

On January 21, at the hearing to review appellant's disposition, appellant admitted the allegations in the motion. After hearing testimony regarding possible placements for appellant, the court took the matter under advisement. Four days later, the court issued an order committing appellant to Geneva. Appellant appeals from that order.

Before addressing the merits of this appeal, we first consider the timeliness of the appeal. Timeliness of an appeal is a jurisdictional necessity and may be raised by an appellate court sua sponte. See, *Anderson v. HMO Nebraska, ante* p. 237, 505 N.W.2d 700 (1993) (subject matter jurisdiction may be raised by a court sua sponte); *Moore v. Black*, 220 Neb. 122, 368 N.W.2d 488 (1985) (appellate court has no jurisdiction if time limit is not met).

The record before us contains the following: (1) the juvenile court's order, dated January 25, 1993, committing appellant to Geneva; (2) the juvenile court's journal entry, dated January 27, 1993, which entry reads "Finds and Order and Mittimus signed by Judge Norton on January 25, 1993"; and (3) a notice of appeal filed February 25, 1993.

A notice of appeal must be filed "within thirty days after the rendition of [a] judgment or decree or the making of [a] final order." Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 1992). To determine whether the present appeal was timely filed, we must first determine the date on which the time for filing an appeal began to run. If the time for filing an appeal began to run on January 25, the date of the order, then this appeal is barred; if the time for filing an appeal began to run on January 27, the date of the journal entry, then this appeal can be heard.

With respect to final orders, this court has never explicitly stated when the time for filing an appeal begins to run. Nevertheless, we believe that the answer is implicit within our statutes and case law: When an appeal is taken from a final order, the time for appeal begins to run when the order is entered on the journal of the court.

"All judgments and orders must be entered on the journal of the court, and specify clearly the relief granted or order made in the action." Neb. Rev. Stat. § 25-1318 (Reissue 1989). Orders

which are not announced in open court are not formalized until they have been entered on the journal. Cf. *In re Estate of Seidler*, 241 Neb. 402, 490 N.W.2d 453 (1992). The journal of the trial court is the official record of the judgments and orders of that court. Accord *Midwest Laundry Equipment Corp. v. Berg*, 174 Neb. 747, 119 N.W.2d 509 (1963). A notice of appeal, therefore, must be filed within 30 days of the date the order was entered on the journal of the trial court.

We note that this rule is in harmony with the rules concerning rendition of judgment. Rendition of judgment occurs when the court makes an oral pronouncement and accompanies that pronouncement with a notation on the trial docket. Neb. Rev. Stat. § 25-1301 (Reissue 1989). Failing a notation on the trial docket, a judgment is rendered when some written notation of the judgment is filed in the records of the court. *Federal Land Bank v. McElhose*, 222 Neb. 448, 384 N.W.2d 295 (1986); *Schmuecker Bros. Implement v. Sobotka*, 217 Neb. 114; 348 N.W.2d 130 (1984).

In the instant case, no showing having been made that an oral pronouncement was made in open court and noted on the trial docket, the order was first made a part of the record when it was entered on the journal on January 27, 1993. On January 27, therefore, the time for filing an appeal began to run. The notice of appeal was filed on February 25, 29 days after the journal entry. We conclude that the present appeal was timely filed.

Appellant claims that the juvenile court erred in committing her to Geneva without explicitly providing reasons for her commitment. Appellant asserts that the court was required to articulate such reasons. Appellant derives this requirement from the language of Neb. Rev. Stat. § 43-286(4)(f) (Cum. Supp. 1992) and from our decision in *In re Interest of A.M.H.*, 233 Neb. 610, 447 N.W.2d 40 (1989).

We first address appellant's claim as it relates to § 43-286(4)(f). Appellant contends that the juvenile court violated § 43-286(4)(f) by committing her to Geneva without articulating any reason why she should be so committed. We disagree.

In essence, appellant contends that § 43-286(4)(f) applies to the facts of her case. Statutory interpretation is a matter of law

in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below. *School Dist. of Waterloo v. Hutchinson, ante* p. 665, 508 N.W.2d 832 (1993); *Metropolitan Life Ins. Co. v. Kissinger Farms, ante* p. 620, 508 N.W.2d 568 (1993). An appellate court reviews juvenile proceedings

> de novo on the record and is thus required to reach a conclusion independent of the juvenile court's findings; provided, however, that where the evidence conflicts, [an appellate] court considers and may give weight to the juvenile court's observation of the witnesses and acceptance of one version of facts over another.

In re Interest of R.G., 238 Neb. 405, 424, 470 N.W.2d 780, 793 (1991). See *In re Interest of Jones*, 230 Neb. 462, 432 N.W.2d 46 (1988).

Section 43-286 applies when a child is adjudicated to be a juvenile as described in § 43-247(1), (2), (3)(b), or (4). The juvenile court found that appellant was a juvenile as described in § 43-247(1): a juvenile who has committed a misdemeanor or violated a city ordinance other than a traffic offense. This finding was based on appellant's admission that she had committed the misdemeanor offense of disturbing the peace.

Under § 43-286, a juvenile court has broad discretion as to the disposition of a delinquent juvenile. *In re Interest of Jones, supra*; *In re Interest of J.M.*, 223 Neb. 609, 391 N.W.2d 146 (1986). Specifically, § 43-286 provides that a juvenile court may continue the dispositional portion of the juvenile's hearing from time to time under such terms and conditions as the court may prescribe, may place the juvenile on probation, or may place the juvenile in a family home or institution. § 43-286(1). A juvenile court may also commit a juvenile to Geneva. § 43-286(2).

Under § 43-286(4), a juvenile court also has the power to change the juvenile's disposition. Section 43-286(4) provides, in relevant part:

> When a juvenile is placed on probation or under the supervision of the court . . . and it is alleged that the juvenile has violated a term of probation or supervision or

> that the juvenile has violated an order of the court, a motion to revoke probation or supervision or to change the disposition may be filed and proceedings held as follows:
>
> . . . .
>
> (f) *In cases when the court revokes probation*, it shall enter a written statement as to the evidence relied on and the reasons for revocation.

(Emphasis supplied.) In other words, subsection (4) outlines the procedures which must be followed when a court revokes probation, revokes supervision, or otherwise changes the juvenile's disposition. Subsection (4)(f) describes more particularly the procedures which must be followed when a court revokes probation.

In the instant case, the juvenile court continued the dispositional portion of appellant's hearing several times. At one point, as described above, the court imposed terms and conditions upon appellant. When appellant violated one of the terms set forth by the court, the court ordered her committed to Geneva. The court indisputably possessed the statutory authority, under § 43-286, to take each of these actions.

Appellant contends that although the court had the power to act as it did, the court was required, by virtue of § 43-286(4)(f), to give a reason why she should be committed to Geneva. This contention is without merit. Section 43-286(4)(f), by its terms, applies only when a juvenile court revokes probation. The court never placed appellant on probation. The court therefore had no obligation, under § 43-286(4)(f), to provide reasons on the record for committing her to Geneva.

We next address appellant's claim as it relates to *In re Interest of A.M.H.*, 233 Neb. 610, 447 N.W.2d 40 (1989). Appellant contends that *In re Interest of A.M.H.* requires the juvenile court to provide reasons for committing a juvenile to Geneva. We disagree.

In *In re Interest of A.M.H.*, the juvenile court committed a delinquent child to Geneva. We reversed. We held that a child could not be committed to Geneva for the sole offense of driving without a license. We found no evidence in the record which would explain the commitment. Specifically, the bill of

exceptions did not establish the reasons for the commitment because all of the hearings, with the exception of the arraignment, had been held off the record. In addition to the lack of evidence, the court orders in the transcript did not establish the reasons for the commitment because the court had made no factual findings beyond classifying the child as a juvenile within the court's jurisdiction. Nowhere in *In re Interest of A.M.H.* did we require the juvenile court to articulate its reasons for committing the child to Geneva.

In committing appellant to Geneva without specifically articulating the reasons for the commitment, the juvenile court did not violate § 43-286(4)(f) and did not run afoul of *In re Interest of A.M.H.* We therefore affirm the decision of the juvenile court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LLOYD R. TRACKWELL, JR., APPELLANT.

509 N.W.2d 638

Filed January 14, 1994. No. S-93-192.

1. **Convictions: Appeal and Error.** In reviewing a criminal conviction, it is not the province of an appellate court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the trier of fact, and the verdict of the jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
2. **Trial: Prosecuting Attorneys: Evidence.** A prosecutor's argument must be based on evidence introduced rather than on matters not in evidence.
3. **Trial: Attorneys at Law: Evidence.** It is a well-established legal principle that it is improper for counsel to comment during closing argument on matters unsupported by the evidence.
4. **Trial: Juries: Appeal and Error.** 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.

5. **Motions for Mistrial.** A mistrial is properly granted when an event occurs during the course of a trial which is of such a nature that its damaging effect cannot be removed by proper admonition or instruction to the jury and thus would result in preventing a fair trial.
6. **Judgments: Motions for Mistrial: Juries: Appeal and Error.** On review, reversal of a judgment may be ordered for failure of the trial court to grant a mistrial when a proper admonition or instruction to the jury, capable of removing the damaging effect of the event, is not given.
7. **Motions for Mistrial: Appeal and Error.** The decision whether to grant a motion for mistrial is within the discretion of the trial court and will be upheld on appeal absent a showing of abuse of discretion.
8. **Trial: Words and Phrases.** A judicial abuse of discretion exists when reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.
9. **Constitutional Law: Trial: Witnesses.** U.S. Const. amend. VI and Neb. Const. art. I, § 11, guarantee an accused the right to confront witnesses. Implicit in the right of confrontation is the right to cross-examine all witnesses.
10. **Trial: Witnesses.** Cross-examination is an essential fundamental requirement of a fair trial.
11. **Convictions: Appeal and Error.** Not all trial errors, even of a constitutional magnitude, entitle an accused to reversal of an adverse trial result; it is only prejudicial error, that is, error which cannot be said to have been harmless beyond a reasonable doubt, which requires that a conviction be set aside.
12. **Trial: Prosecuting Attorneys.** Whether prosecutorial misconduct is prejudicial depends largely on the facts of each case.
13. **Prosecuting Attorneys: Juries: Motions for Mistrial.** The general rule is that remarks made by 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.
14. **Rules of Evidence: Witnesses.** Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in Neb. Rev. Stat. § 27-609 (Reissue 1989), may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness concerning his character for truthfulness or untruthfulness.
15. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction.

Appeal from the District Court for Seward County: BRYCE BARTU, Judge. Reversed and remanded for a new trial.

Vincent M. Powers for appellant.

Don Stenberg, Attorney General, and Mark D. Starr for appellee.

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

FAHRNBRUCH, J.

Lloyd Trackwell, Jr., was convicted of first degree sexual assault by a jury in the district court for Seward County. He was sentenced to not less than 10 nor more than 50 years' imprisonment.

Claiming prosecutorial misconduct, errors in evidentiary rulings, failure to give a requested jury instruction, and that the evidence is insufficient to support his conviction, Trackwell timely appealed his conviction and sentence to this court. We vacate his conviction and sentence and remand the cause to the district court for a new trial.

STANDARD OF REVIEW

In reviewing a criminal conviction, it is not the province of an appellate court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the trier of fact, and the verdict of the jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. *State v. Thompson, ante* p. 375, 507 N.W.2d 253 (1993); *State v. Russell*, 243 Neb. 106, 497 N.W.2d 393 (1993).

FACTS

The record reflects that on the evening of January 23, 1992, Trackwell; his alleged victim, an 18-year-old female; and two other individuals met at Trackwell's office in Lincoln. Trackwell and the alleged victim had not previously been acquainted. The other two individuals, a 16-year-old female and a 35-year-old male, were friends of the alleged victim and lived in an apartment across the hall from her.

The alleged victim and her two friends initially stopped at Trackwell's office so the male friend could discuss a business matter with Trackwell. The male got out of the car to talk to Trackwell while the two females waited in the vehicle. Trackwell

then joined the group, and the foursome spent the rest of the evening drinking beer and driving on Interstate 80 toward Omaha and back to Lincoln.

At some point the group returned to Lincoln, where all four parties lived. The alleged victim claims that she wanted to return to her apartment because she was tired and that the other three parties wanted to continue drinking. Upon returning to Trackwell's office, the alleged victim agreed to accompany Trackwell in his vehicle to her apartment building so she could show Trackwell where the other two parties lived.

Rather than driving eastward toward the apartment building, Trackwell drove west on O Street during the early morning hours of January 24, eventually coming to a stop on a county road in rural Seward County. The alleged victim testified that prior to stopping the vehicle, Trackwell put his hand on her leg, but removed his hand from her leg when she told him to do so. She testified that Trackwell then called her a "stupid bitch" and forced her out of the car, even though she was clad only in cutoff sweatpants and a T-shirt and it was cold outside. Trackwell drove forward, then reversed the car and allowed the alleged victim to get back into the vehicle.

The alleged victim testified that Trackwell drove into a field, forcibly removed her clothing after she refused to remove it, and sexually penetrated her twice. The alleged victim testified that Trackwell then allowed her to dress and drove her back to her apartment building in Lincoln. The alleged victim first went to her friends' apartment and told them what had occurred. She then went to her own apartment, showered, and took a nap before calling police to report the incident.

On June 2, 1992, Trackwell was charged by information with first degree sexual assault and first degree false imprisonment. The false imprisonment charge was dismissed by the court upon conclusion of the State's case.

Trackwell testified that the alleged victim agreed to go for breakfast with him. The other two members of the group returned to their apartment. He testified that he and the alleged victim then decided not to have breakfast, although nothing was said verbally. Trackwell does not deny having sexual intercourse with the alleged victim. He claims that they had sex

only once and that it was consensual. Trackwell testified that he "freaked" and forced the alleged victim out of his car and started to drive away because after they had intercourse, she told him she was only 16 years old. Trackwell testified that he did not intend to leave the alleged victim and that she later told him she was joking about her age.

At trial, the State called Waheed Malik as a witness. Malik's roommate had introduced Malik to Trackwell. Malik testified that Trackwell had dinner with Malik and his roommate on Friday evening, the day following the alleged assault. According to Malik, Trackwell bragged about his adventures of the previous evening and said that he "scared the shit out of the bitch" by making her get out of the car. Malik testified that Trackwell said he had sex with the alleged victim a couple of times after he let her back in the car, and that when Malik suggested that this was rape, Trackwell "just started laughing."

Malik testified that he called the Seward County Attorney's office the following Monday and spoke to a secretary but did not leave his name. He said he made "quite a few" calls to the county attorney's office but was unable to reach the county attorney or her deputy until May 1992.

Malik admitted on cross-examination that he was engaged in civil litigation with Trackwell during May 1992 which continued through approximately October 1992. The litigation involved repossession of Malik's Mercedes-Benz automobile by Trackwell, who operated a collection agency.

Trackwell's attorney in the civil case testified that during the course of a hearing in September or October 1992, Malik became very agitated and said, "[Y]ou'll be sorry for this Trackwell. This is really going to cost you Trackwell." The attorney also recalled that Malik then said "something about Seward County."

Malik denied making such statements or that his testimony against Trackwell in the criminal case was in any way an attempt to get even with Trackwell because of the civil litigation.

During her closing statement, the prosecutor stated in rebuttal:

> [Trackwell's] had a couple people come up and testify about Waheed Malik's testimony, why that's not believable

> because he said something that may have related to a civil [suit] in a courthouse in Lincoln. Waheed Malik had nothing to gain from testifying here. He testified *and he called my office the following Monday, and my secretary told me someone called about the Trackwell case.*

(Emphasis supplied.)

Defense counsel immediately objected that there was no evidence to support the prosecutor's statement and moved for a mistrial, both of which were overruled.

An hour after the case was submitted to the jury, the jury requested a transcript of Malik's testimony. The request was denied, and Trackwell was found guilty of first degree sexual assault.

ASSIGNMENTS OF ERROR

On appeal, Trackwell alleges that (1) the trial court erred in not sustaining his objection and motion for mistrial for prosecutorial misconduct when the prosecutor testified and corroborated the testimony of a State's witness, (2) the trial court erred in not allowing him to call the Seward County Attorney to testify to prior inconsistent statements made by the alleged victim and another witness, (3) the trial court erred in failing to give his requested jury instruction on intent, (4) the evidence is insufficient to support the conviction and is contrary to law and fact, and (5) his sentence is excessive.

ANALYSIS

PROSECUTOR'S CLOSING REMARKS

We initially turn to the issue of whether the prosecutor's closing remarks were improper. A prosecutor's argument must be based on evidence introduced rather than on matters not in evidence. *State v. Pierce*, 231 Neb. 966, 439 N.W.2d 435 (1989). It is a well-established legal principle that it is improper for counsel to comment during closing argument on matters unsupported by the evidence. *State v. Rodriguez, ante* p. 707, 509 N.W.2d 1 (1993).

When the prosecutor stated in her rebuttal remarks that "he called my office the following Monday, and my secretary told me someone called about the Trackwell case," she assumed the

role of a witness and corroborated Malik's testimony that he had reported his knowledge of Trackwell's possible criminal activity in a timely fashion. The prosecutor's comment as to what her secretary had said was a fact not in evidence. Neither the prosecutor nor her secretary was a witness in the case, and therefore they were unavailable for cross-examination by the defense. There is no question that the prosecutor's comments were improper.

Because the trial court overruled both Trackwell's objection to the prosecutor's comments and his motion for mistrial, we first determine whether the trial court properly overruled the objection. " '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. . . .' " *State v. Swillie*, 240 Neb. 740, 746, 484 N.W.2d 93, 96 (1992).

Trackwell correctly objected that there was no evidence whatsoever to support the prosecutor's statement that her secretary had told her someone had called about the Trackwell case, because the prosecutor's secretary had not testified at the trial. Therefore, Trackwell's objection should have been sustained, and the trial court's failure to do so was clearly erroneous.

Next, we determine whether the trial court properly denied Trackwell's motion for mistrial. A mistrial is properly granted when an event occurs during the course of a trial which is of such a nature that its damaging effect cannot be removed by proper admonition or instruction to the jury and thus would result in preventing a fair trial. *State v. Morrison*, 243 Neb. 469, 500 N.W.2d 547 (1993). On review, reversal of a judgment may be ordered for failure of the trial court to grant a mistrial when a proper admonition or instruction to the jury, capable of removing the damaging effect of the event, is not given. *State v. Fraser*, 230 Neb. 157, 430 N.W.2d 512 (1988). However, the decision whether to grant a motion for mistrial is within the discretion of the trial court and will be upheld on appeal absent a showing of abuse of discretion. *State v. Morrison, supra.*

"A judicial abuse of discretion exists when reasons or rulings of a trial judge are clearly untenable, unfairly depriving a

litigant of a substantial right and denying just results in matters submitted for disposition." *State v. Plant*, 236 Neb. 317, 328, 461 N.W.2d 253, 263 (1990). Accord, *State v. Riley*, 242 Neb. 887, 497 N.W.2d 23 (1993); *State v. Thomas*, 238 Neb. 4, 468 N.W.2d 607 (1991).

> U.S. Const. amend. VI and Neb. Const. art. I, § 11, guarantee an accused the right to confront witnesses. Implicit in the right of confrontation is the right to cross-examine all witnesses. *Chambers v. Mississippi*, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); *State v. Warford*, 223 Neb. 368, 389 N.W.2d 575 (1986). In holding that the confrontation clause is applicable to the states through U.S. Const. amend. XIV, the U.S. Supreme Court stated that "[t]here are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential fundamental requirement for the kind of fair trial which is this country's constitutional goal." *Pointer v. Texas*, 380 U.S. 400, 405, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965).

State v. Hartmann, 239 Neb. 300, 310, 476 N.W.2d 209, 216 (1991).

When the prosecutor became a witness in the case, corroborating the testimony of a State's witness by giving hearsay testimony, Trackwell was denied his fundamental right to confront and cross-examine witnesses against him. Because he was deprived of these substantial constitutional rights, it was an abuse of discretion for the trial court to overrule Trackwell's motion for mistrial in the absence of a proper admonition to the jury to disregard the prosecutor's remarks.

Nonetheless, not all trial errors, even of a constitutional magnitude, entitle an accused to reversal of an adverse trial result; it is only prejudicial error, that is, error which cannot be said to have been harmless beyond a reasonable doubt, which requires that a conviction be set aside. *State v. Menuey*, 239 Neb. 513, 476 N.W.2d 846 (1991).

Whether prosecutorial misconduct is prejudicial depends largely on the facts of each case. *State v. Swillie, supra*. The general rule is that remarks made by 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. *State v. Greeno*, 230 Neb. 568, 432 N.W.2d 547 (1988).

Considering the facts of this case, we are unable to conclude that the trial court's failure to grant a mistrial was harmless error. Although the evidence in this case was legally sufficient to convict Trackwell, there was also evidence which, if believed by the jury, could have resulted in his acquittal.

The importance of Malik's testimony in the conviction of Trackwell cannot be minimized. Malik was the only witness who testified for the State that Trackwell had, in effect, confessed to acts which constituted first degree sexual assault. Except for Malik's testimony, the jury's verdict hinged on whether it found the alleged victim's testimony or the defendant's testimony to be more credible.

Malik's potential bias was exposed on cross-examination when it was revealed that Malik had been engaged in difficult civil litigation with Trackwell over the repossession of Malik's vehicle. Malik's testimony that he was not trying to "get even" with Trackwell over the civil suit had been impeached by the rebuttal testimony of Trackwell's attorney in the civil action, who testified that Malik had made threats to Trackwell, which the jury could have found related to the Seward County incident.

The prosecutor's statements had the effect of enhancing Malik's credibility, which had been severely challenged. The importance to the jury of Malik's testimony is reflected by the fact that the case was submitted to the jury at 4:07 p.m., and at 5:05 p.m. the jury requested a transcribed copy of Malik's testimony. It is readily apparent that under the circumstances of this case, the prosecutor's comments did unduly influence the jury.

Accordingly, because of the extreme importance of Malik's testimony to the State's case, and because the jury obviously found his testimony to be particularly significant, we cannot say that the prosecutor's comments bolstering the credibility of this key witness constituted harmless error. It was therefore prejudicial error for the trial court to overrule Trackwell's motion for a mistrial. Trackwell is entitled to a new trial on that basis.

CALLING COUNTY ATTORNEY TO IMPEACH OTHER WITNESSES

Trackwell also complains that he was not permitted to put the county attorney on the witness stand to testify to prior inconsistent statements made by the alleged victim and her 16-year-old female companion about their conduct while sitting in the car at Trackwell's office earlier in the evening.

Both the alleged victim and the 16-year-old female had testified on cross-examination that they had talked only to members of their own party that evening. Each specifically denied talking to anyone else.

A man who worked at a business next to Trackwell's testified for the defense that he and two other people arrived in the parking lot while Trackwell was talking with another man. The witness testified that when he got out of his car he heard "some whistling and stuff like that." He testified that there were two female voices "screaming and hollering" and that somebody said, "[N]ice ass."

The witness further testified that when he discussed his testimony with the county attorney, she told him that "we've already talked to her and she's already admitted to that." After the witness was excused, Trackwell attempted to call the county attorney as a witness "to see if there is a prior inconsistent statement which would impeach either [the alleged victim] or [her companion]." The court overruled the request.

Trackwell argues in his reply brief that he was entitled to call the county attorney to impeach the alleged victim and her companion because "[i]f [the alleged victim] sexually heckles men she does not know and lies about it, the jury should have known this. If she could lie about her flirtatious conduct while waiting for Appellant and [her male companion], she could have also lied about her conduct later that evening." Reply brief for appellant at 7-8.

Neb. Evid. R. 608(2), Neb. Rev. Stat. § 27-608(2) (Reissue 1989), provides:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in section 27-609, may not be proved by extrinsic evidence. They may,

> however, in the discretion of the court, if probative of truthfulness or untruthfulness be inquired into on cross-examination of the witness (a) concerning his character for truthfulness or untruthfulness . . . .

Therefore, it was impermissible for Trackwell to attack the credibility of the alleged victim and her female companion by presenting extrinsic evidence of their behavior through the testimony of the county attorney. Trackwell had the opportunity to attack the credibility of each of these witnesses through cross-examination. The trial court correctly denied Trackwell's request to call the county attorney as a witness.

JURY INSTRUCTION ON INTENT

Next, Trackwell contends that the trial court erred in failing to instruct the jury on intent as an element of first degree sexual assault.

To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction. *State v. Lowe, ante* p. 173, 505 N.W.2d 662 (1993).

Neb. Rev. Stat. § 28-319(1) (Reissue 1989) states that "[a]ny person who subjects another person to sexual penetration and (a) overcomes the victim by force, threat of force, express or implied, coercion, or deception . . . is guilty of sexual assault in the first degree."

For the jury to find Trackwell guilty of first degree sexual assault, it was only necessary for it to find beyond a reasonable doubt that he (1) subjected the alleged victim to sexual penetration and (2) overcame the alleged victim by force, threat of force, express or implied, coercion, or deception. Intent is not an element of first degree sexual assault as defined by the statute. Trackwell's proposed jury instruction on the element of intent is not a correct statement of the law, and this assignment of error is without merit.

SUFFICIENCY OF EVIDENCE

Trackwell also maintains that the evidence is insufficient to convict him of first degree sexual assault. It is undisputed that Trackwell subjected the alleged victim to sexual penetration. He admitted to having sexual intercourse with the alleged victim.

The only controverted issue before the jury was whether Trackwell overcame the alleged victim by force, threat of force, express or implied, coercion, or deception when he had intercourse with her. Taking the view most favorable to the State, the jury could have found beyond a reasonable doubt that Trackwell overcame his alleged victim by force, and therefore the evidence against Trackwell was legally sufficient to support his conviction for first degree sexual assault.

EXCESSIVE SENTENCE

As we have already found reversible error requiring a new trial, it is not necessary for us to consider Trackwell's assigned error that his sentence is excessive.

CONCLUSION

We reverse Trackwell's judgment of conviction and remand the cause to the district court for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

HASTINGS, C.J., and WHITE, J., concur.

RICHDALE DEVELOPMENT COMPANY, A NEBRASKA PARTNERSHIP, APPELLANT, V. MCNEIL COMPANY, INC., A NEBRASKA CORPORATION, APPELLEE.

510 N.W.2d 312

Filed January 21, 1994. No. S-91-814.

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Remanded with directions.

Jeffrey A. Silver for appellant.

David D. Ernst and Lisa M. Meyer, of Gaines, Mullen, Pansing & Hogan, for appellee.

HASTINGS, C.J., BOSLAUGH, CAPORALE, FAHRNBRUCH, and LANPHIER, JJ.

PER CURIAM.

Upon motion for rehearing, the motion is overruled; however, the opinion previously adopted by this court, *Richdale Dev. Co. v. McNeil Co.*, *ante* p. 694, 508 N.W.2d 853 (1993), is hereby modified by striking therefrom all that portion of the opinion beginning "The judgment of the district court is affirmed," down to and including the end of the opinion. *Id.* at 707, 508 N.W.2d at 861. The following is substituted therefor:

The Congress having preempted forum jurisdiction as to claims involving copyright, both this court and the district court are without jurisdiction in this case. Such lack of jurisdiction may not be waived by the parties, nor need it be asserted as an affirmative defense. The cause is remanded to the district court with directions to dismiss the cause and to dissolve the existing injunction.

REMANDED WITH DIRECTIONS.

WHITE, J., participating on briefs.

SHANAHAN, J., not participating.

DONALD M. DUGAN, APPELLEE, CROSS-APPELLANT, AND CROSS-APPELLEE, V. DONALD D. JENSEN AND PATRICIA K. JENSEN, APPELLANTS AND CROSS-APPELLEES, AND SMITH CONSTRUCTION, INC., APPELLEE, CROSS-APPELLANT, AND CROSS-APPELLEE.

510 N.W.2d 313

Filed January 21, 1994. No. S-91-917.

1. **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 such party the benefit of all reasonable inferences deducible from the evidence.

2. **Summary Judgment.** Summary judgment is to be granted only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
3. **Trespass: Title.** To bring an action in trespass, the complaining party must have had title or legal possession of the land when the acts complained of were committed.
4. **Trespass: Title: Proof.** The party bringing a trespass action has the burden of establishing that he had title or possession of the property before he can proceed with his trespass action.
5. **Title.** A party seeking to declare his title must rely on the strength of his own title and not the weakness of the title of others.
6. **Adverse Possession: Proof: Time.** A party claiming title through adverse possession must prove by a preponderance of the evidence that the adverse possessor has been in actual, continuous, exclusive, notorious, and adverse possession under claim of ownership for the statutory period of 10 years.
7. **Adverse Possession: Title.** Title cannot be acquired without simultaneous and continuous existence of each element of adverse possession for the required period.
8. **Adverse Possession: Intent.** To establish adverse possession under a claim of ownership, the party claiming adverse possession must have occupied the property in the same manner as an owner would occupy the property. The party claiming adverse possession must have occupied the property with the intent and purpose to assert his ownership of the property.
9. _____: _____. Ordinarily, intent may be determined by examining the acts of the occupier and the nature of his possession; however, intent of the occupier is an essential requirement which must be established.

Appeal from the District Court for Greeley County: RONALD D. OLBERDING, Judge. Reversed and remanded for further proceedings.

Patrick A. Brock, of Cunningham, Blackburn, Francis, Brock & Cunningham, for appellants.

John A. Wolf, of Shamberg & Wolf, for appellee Dugan.

Roger G. Steele, of Luebs, Beltzer, Leininger, Smith & Busick, for appellee Smith Construction.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, FAHRNBRUCH, and LANPHIER, JJ., and RONIN, D.J., Retired.

WHITE, J.

Donald D. and Patricia K. Jensen appeal from a partial

summary judgment on the issues of ownership of real property and trespass and from a jury award of $5,000 in damages. Appellee Donald M. Dugan cross-appeals from the district court's ruling that treble damages were not recoverable. Appellee Smith Construction, Inc., also filed a cross-appeal and contends that the jury instruction on the measure of damages was an incorrect statement of the law. We reverse the partial summary judgment and remand the cause for further proceedings.

The property in dispute is a right-of-way situated across the southeast quarter of Section 36, Township 18 North, Range 11 West of the 6th P.M., in Greeley County, Nebraska (southeast quarter). Dugan contends that he owns the right-of-way and that the Jensens and Smith Construction trespassed on that property. The Jensens maintain that they are the rightful owners of the right-of-way and therefore did not trespass on Dugan's property.

Dugan's claim to the right-of-way arises from a quitclaim deed conveyed to him by the Burlington Northern Landowners Association-East (Landowners Association) on September 30, 1987. This deed was recorded on August 23, 1988. The Landowners Association allegedly acquired the right-of-way by quitclaim deed executed by the Burlington Northern Railroad (railroad) on April 1, 1987. This deed was recorded on August 7, 1987. There is no evidence in the record that the railroad ever acquired title by deed to the right-of-way. The record indicates, however, that the railroad had used this right-of-way since at least 1940.

The Jensens contend that they acquired title to the right-of-way because they purchased the entire southeast quarter, over which the right-of-way passes. On January 17, 1989, the Jensens acquired the southeast quarter from John Hancock Mutual Life Insurance Company (John Hancock) by special warranty deed. John Hancock acquired the southeast quarter from Raymond Dugan, father of appellee Donald Dugan, by warranty deed in October 1985.

The record indicates that the Jensens knew Donald Dugan claimed ownership of the right-of-way when they purchased the property from John Hancock. Wanting to level out the

right-of-way, the Jensens consulted with two attorneys regarding the validity of their title. After assurances that they owned the land, including the right-of-way, the Jensens hired Smith Construction to level it out for $652. The leveling included the removal of trees and shrubbery and prevented Dugan from using the right-of-way as he had intended.

In July 1990, Dugan filed suit against the Jensens and contended that he owned the right-of-way and that the Jensens, through their agent, Smith Construction, had trespassed on that right-of-way. Smith Construction filed a petition for indemnification against the Jensens for any liability arising out of its work.

The district court granted Dugan's motion for partial summary judgment and found that Dugan owned the right-of-way and that the Jensens had trespassed on that property. The court stated that the railroad had acquired title by adverse possession because the railroad had occupied the right-of-way "continuously, openly, and notoriously for more than 50 years."

The issue of damages was tried to a jury, and the Jensens were found liable for $5,000. The court further ordered that Smith Construction be indemnified by the Jensens. The Jensens appeal from both the summary judgment and the jury's award of damages. Appellee Smith Construction filed a cross-appeal from the jury's verdict. Appellee Dugan cross-appeals from the district court's decision that treble damages were not recoverable. The analysis that follows focuses on the partial summary judgment, and because our decision disposes of the appeal, we will not address the additional assignments of error raised by the parties.

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. *VonSeggern v. Willman, ante* p. 565, 508 N.W.2d 261 (1993). Summary judgment is to be granted only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that

the moving party is entitled to judgment as a matter of law. *Id.*; *Gould v. Orr, ante* p. 163, 506 N.W.2d 349 (1993).

To bring an action in trespass, the complaining party must have had title or legal possession of the land when the acts complained of were committed. *Flobert Industries v. Stuhr*, 216 Neb. 389, 343 N.W.2d 917 (1984); *Franz v. Nelson*, 183 Neb. 137, 158 N.W.2d 606 (1968). See *Hardt v. Eskam*, 218 Neb. 81, 352 N.W.2d 583 (1984) (holding that plaintiffs were not entitled to damages for trespass because plaintiffs failed to prove ownership by adverse possession). The party bringing a trespass action has the burden of establishing that he had title or possession of the property before he can proceed with his trespass action. *Franz, supra*. See *Flobert Industries, supra* (addressing ownership issue before considering the trespass action). A party seeking to declare his title must rely on the strength of his own title and not the weakness of the title of others. *Schaneman v. Wright*, 238 Neb. 309, 470 N.W.2d 566 (1991).

In the present case, the evidence indicates that Dugan received a quitclaim deed to the right-of-way from the Landowners Association on September 30, 1987. The Landowners Association received a quitclaim deed to the right-of-way from the railroad on April 1, 1987. The validity of Dugan's asserted ownership interest in the right-of-way therefore depends on whether his predecessors in interest, namely the railroad, had any interest in the right-of-way that they could have conveyed to Dugan. See, *Gustafson v. Gustafson*, 239 Neb. 448, 476 N.W.2d 819 (1991); *Smith v. Berberich*, 168 Neb. 142, 95 N.W.2d 325 (1959).

In support of his motion for partial summary judgment, Dugan contended that the railroad had acquired the right-of-way by adverse possession. Dugan presented an affidavit made by his father, in which his father states that he had personal knowledge that the railroad had been using the right-of-way since at least 1940. Dugan's father stated that the railroad used the right-of-way openly, exclusively, and continuously until 1987.

The trial court ruled that Dugan owned the right-of-way because the railroad had acquired the property by adverse

possession. Specifically, the court held that the railroad had operated on the right-of-way "continuously, openly, and notoriously for more than 50 years."

A party claiming title through adverse possession must prove by a preponderance of the evidence that the adverse possessor has been in actual, continuous, exclusive, notorious, and adverse possession under claim of ownership for the statutory period of 10 years. *Thornburg v. Haecker*, 243 Neb. 693, 502 N.W.2d 434 (1993); *Nennemann v. Rebuck*, 242 Neb. 604, 496 N.W.2d 467 (1993); *Schaneman, supra*; *State Nat. Bank & Trust Co. v. Jacobsen*, 218 Neb. 682, 358 N.W.2d 743 (1984). Title cannot be acquired without simultaneous and continuous existence of each element of adverse possession for the required period. *Thornburg, supra.*

Generally, if the occupier's physical actions on the land constitute visible and conspicuous evidence of the possession and use of the land, such acts will be sufficient to establish that the possession was actual and notorious. See *Wiedeman v. James E. Simon Co., Inc.*, 209 Neb. 189, 307 N.W.2d 105 (1981) (stating that the occupier's acts of posting signs, maintaining a boundary fence, and grazing livestock on the disputed tract of land were actual, open, and notorious). The possession must be exclusive, and if the occupier shared the possession with the title owner, the occupier may not obtain title by adverse possession. Roger A. Cunningham et al., The Law of Property § 11.7 (2d ed. 1993). Additionally, the occupier's use must be continuous; in other words, the possession must not be significantly interrupted. *Id.*

The affidavit presented by Dugan, which was uncontradicted, arguably supports a finding that the railroad actually, continuously, exclusively, and notoriously used the right-of-way. The affiant, Dugan's father, stated that he readily observed the railroad's exclusive use of the right-of-way since at least 1940. The fact that he observed such use of the property indicates that the railroad's actions constituted visible evidence of its possession. We therefore focus our analysis on the remaining requirement necessary to prevail on a claim of adverse possession: adverse under a claim of ownership.

To establish "adverse under a claim of ownership," the party

claiming adverse possession must have occupied the property in the same manner as an owner would occupy the property. See, *Hardt v. Eskam*, 218 Neb. 81, 352 N.W.2d 583 (1984); *Knight v. Denman*, 64 Neb. 814, 90 N.W. 863 (1902). The party claiming adverse possession must have occupied the property " 'with the intent and purpose of the occupant to assert his ownership of the property.' " *Berglund v. Sisler*, 210 Neb. 258, 263, 313 N.W.2d 679, 682 (1981) (quoting *Barnes v. Milligan*, 200 Neb. 450, 264 N.W.2d 186 (1978)). Ordinarily, intent may be determined by examining the acts of the occupier and the nature of his possession; however, intent of the occupier is an essential requirement which must be established. *Barnes, supra* (stating that intent is always an element).

After a review of the record, we find no evidence which demonstrates that the use of the right-of-way by the railroad was adverse under a claim of ownership. The only evidence regarding the railroad's possession was presented in an affidavit made by Dugan's father. In that affidavit, Dugan's father states that he has personal knowledge that the railroad openly, exclusively, and continuously used the right-of-way from at least 1940 to 1987. This does not satisfy Dugan's burden to establish that the railroad's use was adverse under a claim of ownership.

Although intent may be inferred in some cases, these observations of a third party who is neither the occupier nor the title owner do not clearly require the inference that the railroad's use was adverse to the title owner. See *Barnes v. Milligan*, 196 Neb. 50, 241 N.W.2d 508 (1976) (stating that the ultimate inferences to be drawn from the facts—whether the use was adverse or permissive—could not be conclusively established). For example, the use may have been with the permission of the title owner. If the railroad's initial use was permissive, the railroad could not have acquired title to the property by adverse possession and, thus, could not have conveyed title to the right-of-way to Dugan.

Dugan has not established that the railroad acquired the right-of-way by adverse possession because he has failed to present evidence of an essential element of the action. Therefore, Dugan was not entitled to judgment as a matter of

law, and summary judgment on the issue of ownership was improper. We reverse the jury's verdict on the issues of proximate cause and damages and remand the cause for further proceedings not inconsistent with this decision.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

SEAN THOMAS JASA, BY AND THROUGH HIS FATHER, MOTHER, AND NEXT FRIENDS, STEPHEN SCOTT JASA AND IVY JO JASA, APPELLEE, V. DOUGLAS COUNTY, A NEBRASKA POLITICAL SUBDIVISION, APPELLANT.

510 N.W.2d 281

Filed January 21, 1994. No. S-91-970.

1. **Political Subdivisions Tort Claims Act: Liability.** Under the provisions of Neb. Rev. Stat. § 13-910(2) (Reissue 1991), the performance or nonperformance of a discretionary function cannot be the basis of liability.
2. _____: _____. Whether the undisputed facts demonstrate that liability is precluded by the discretionary function exemption contained in Neb. Rev. Stat. § 13-910 (Reissue 1991) is a question of law.
3. **Appeal and Error.** Regarding a question of law, an appellate court has an obligation to reach a correct conclusion independent of that reached by the court below.
4. **Political Subdivisions Tort Claims Act: Tort Claims Act: Liability.** As the discretionary function exemption is expressed in nearly identical language in Neb. Rev. Stat. § 81-8,219(1)(a) (Reissue 1987) of the State Tort Claims Act and Neb. Rev. Stat. § 13-910(2) (Reissue 1991) of the Political Subdivisions Tort Claims Act, cases construing the state exemption apply as well to the exemption given political subdivisions.
5. **Political Subdivisions Tort Claims Act: Tort Claims Act: Liability: Words and Phrases.** That which is protected under the discretionary function exemption is the discretion of a governmental executive or administrator to act according to his or her judgment of the best course to be taken; such discretion includes more than the initiation of programs and activities; it includes determinations or judgments made in establishing plans, specifications, or schedules of operations.
6. **Political Subdivisions Tort Claims Act: Tort Claims Act: Liability.** Where policy judgment exists, there also exists discretion exempted from liability under the discretionary function exemption.

7. _____: _____: _____. The discretionary function or duty exemption extends only to the basic policy decisions made in governmental activity, and not to ministerial activities implementing such policy decisions.
8. **Political Subdivisions Tort Claims Act: Tort Claims Act: Negligence: Liability.** The State or political subdivision is liable for negligence of its employees at the operational level, where there is no room for policy judgment.
9. **Political Subdivisions Tort Claims Act: Tort Claims Act: Liability.** It is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exemption applies in a given case.
10. **Political Subdivisions Tort Claims Act: Tort Claims Act: Public Officers and Employees: Words and Phrases.** Where a health officer must make a judgmental decision within a regulatory framework, the decision is not a ministerial act but a discretionary function.

Appeal from the District Court for Douglas County: STEPHEN A. DAVIS, Judge. Reversed and remanded with direction.

James S. Jansen, Douglas County Attorney, and Michael W. Amdor for appellant.

William J. Elder and Michael McCormack, of McCormack, Cooney, Mooney, Hillman & Elder, for appellee.

Vard R. Johnson and Robert W. Kortus, of Broom, Johnson, Fahey & Clarkson, for amicus curiae Nebraska Association of County Officials.

J. Patrick Green and E. Terry Sibbernsen for amicus curiae Amicus Curiae Committee of the Nebraska Association of Trial Attorneys.

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

CAPORALE, J.

I. STATEMENT OF CASE

The minor appellee, Sean Thomas Jasa, by and through his parents (father Stephen Scott Jasa and mother Ivy Jo Jasa) acting as his next friends, brought this action under the provisions of the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. § 13-901 et seq. (Reissue 1991), against the appellant, Douglas County, alleging that through the failure of its department of health to take appropriate steps with respect to

the presence of bacterial meningitis, an infectious disease, in the population of West Omaha Day Care and Nursery School, Inc., a day-care facility, the county negligently caused said minor to suffer permanent and catastrophic disability. The district court entered judgment against the county. In challenging the judgment, the county assigns a number of errors, including that the district court incorrectly determined that liability is not foreclosed by the discretionary function exemption of the act. The record sustaining that assignment, we, without reaching the other claimed errors, reverse the judgment and remand the cause with the direction that it be dismissed.

II. SCOPE OF REVIEW

The essence of the minor's claim is that the county department was negligent in its admitted failure to determine that there had been a case of bacterial meningitis at West Omaha Day Care and its failure to inform his parents of the presence of the disease at that facility.

While § 13-908 makes a political subdivision such as the county liable for an action in tort "in the same manner and to the same extent as a private individual under like circumstances," § 13-910(2) exempts a political subdivision from liability on any claim "based upon the exercise or performance of or the failure to exercise or perform a discretionary function or duty on the part of the political subdivision or an employee of the political subdivision, whether or not the discretion be abused." Thus, the performance or nonperformance of a discretionary function cannot be the basis of liability under the act. *Lemke v. Metropolitan Utilities Dist.*, 243 Neb. 633, 502 N.W.2d 80 (1993).

We have held that whether the undisputed facts demonstrate that liability is precluded by the discretionary function exemption of the Political Subdivisions Tort Claims Act is a question of law. See *id.* See, also, *Blitzkie v. State*, 241 Neb. 759, 491 N.W.2d 42 (1992). Regarding a question of law, an appellate court has an obligation to reach a correct conclusion independent of that reached by the court below. *Transamerica Commercial Fin. Corp. v. Rochford, ante* p. 802, 509 N.W.2d 214 (1993); *Metropolitan Life Ins. Co. v. Kissinger Farms,*

ante p. 620, 508 N.W.2d 568 (1993); *Lemke, supra.*

III. NATURE OF DISEASE

According to Dr. David J. Itkin, a physician who specializes in infectious diseases, the minor's condition results from his having contracted bacterial meningitis as the consequence of his exposure to Haemophilus influenzae type b, a bacterium which can cause a variety of different diseases and is generally spread by respiratory secretions and other close contact with infected persons. The Haemophilus organism causes disease in children who have not developed their own immunity; thus, children between 3 to 6 months and 3 to 4 years of age are at the greatest risk of infection and subject to the greatest damage from the disease.

Itkin ranks Haemophilus as the most dangerous infectious organism among children 3 years of age and under in terms of communicability and the effect of the disease upon those infected.

IV. FACTS

1. Developments at West Omaha Day Care

A then 3-year-old girl enrolled at West Omaha Day Care, who last attended the facility on Friday, October 23, 1987, became ill with flu-like symptoms on Sunday, October 25, 1987. On Tuesday morning, October 27, the girl was examined in her pediatrician's office. Due to the girl's imbalance and weakness, her mother, a registered nurse, was concerned about the potential of a "massive ear infection or meningitis." However, the girl's mother said that at that time "we ruled out meningitis."

On Wednesday, October 28, the girl was again taken to her pediatrician's office. While being examined, she began to suffer rigidity in her neck; the pediatrician who examined her believed she probably had meningitis and sent her to a hospital.

Being familiar with the dangers of meningitis, the girl's mother was concerned about the children with whom the girl had had contact. Accordingly, the girl's mother called West Omaha Day Care on the 28th and informed the director that the girl was ill and was probably suffering from meningitis. The

girl's mother testified that she called the director so that the director "could alert the other parents."

The next morning, the director called the girl's mother and inquired specifically whether the girl had viral or bacterial meningitis. The girl's mother told the director that was not yet known. Either later that same day or the next day, the director called the girl's mother a second time to determine how the girl was doing and to inquire about visiting.

According to Lewis William White, the president of the corporation which owned and operated West Omaha Day Care, the director contacted the girl's mother and "asked her when she found out or heard anything more to please let us know." When the girl's mother did not call back in the next couple of days, White asked the staff to call her again. According to White, the girl's father was reached by a staff member at the hospital on Friday, October 30. He said meningitis was still suspected but that the tests were not yet conclusive. The staff then asked the father to let them "know as soon as possible," but received no further notification of the girl's condition. The girl's father, however, denies receiving the call White described.

The county department had informed day-care facilities of the vaccines obtainable from various sources and made available a Haemophilus factsheet to be sent to parents. The county department also provided day-care facility operators with an informational packet prepared by the Centers for Disease Control of the U.S. Public Health Service entitled "What You Should Know About Contagious Diseases in the Day Care Setting." It informs day-care facility operators how to respond to bacterial meningitis as follows:

> **What to Do**
>
> If one case of bacterial meningitis has occurred in your [facility]:
>
> Temporarily exclude the sick child from the [facility].
>
> Contact the child's physician[.]
>
> Ask what germ caused the meningitis.
>
> Contact your Health Department.
>
> Tell them about the case of meningitis and the germ that caused it.
>
> Ask what actions they recommend to prevent spread

of infection.

Parents of all children in the [facility] should be informed that:

They should know that their child may have been exposed to a serious contagious disease.

Their child should see a physician IMMEDIATELY if he develops fever, headache, rashes, spots, unusual behavior or other symptoms of concern.

They should know any other preventive measures the Health Department recommends.

To STOP others from getting the disease:

A child's doctor or your Health Department may recommend certain antibiotics for exposed children and adults to reduce their risk of getting bacterial meningitis.

White acknowledged he had a copy of the publication in his possession at the time of the onset of the girl's disease and admitted he did not consult it until after the minor became ill.

2. Minor's Illness

The minor, who, having been born on September 24, 1986, was then just over a year old, started attending West Omaha Day Care on October 26, 1987, spending about 40 hours a week at the facility, Monday through Friday.

On Saturday morning of Thanksgiving week of that year, the minor's father noticed that the minor was a bit warm and mentioned the fact to the minor's mother. By late afternoon, the minor's temperature had risen to approximately 102.5 degrees.

The mother gave the minor some Tylenol and called his pediatrician. One of the pediatrician's partners returned the call and advised that the minor, who had a history of ear infections, might be having another ear or viral infection. The partner stated he could not prescribe any medication without an examination and advised that, if desired, the minor could be taken to an emergency care facility or the condition could be left to "run its course." The minor's parents decided to keep him at home and try to hold the temperature down with Tylenol and fluids as the partner had instructed.

Between 4 and 4:30 a.m. of the following morning, the mother checked the minor's temperature; it was steady at 102.5

degrees. However, she noticed that several areas of his body were discolored. Because of the discoloration and the minor's lethargic behavior and discomfort, the minor's parents decided to take him to the hospital for treatment. By the time they arrived at the hospital at approximately 6 a.m., the areas of discoloration had turned dark purple, and the minor also began discharging blood through his nose and mouth. After testing, he was diagnosed as having bacterial meningitis.

Dr. John Moore, the pediatrician whose office the minor's mother first contacted, explained that there is no specific symptom which in the early stages signals the presence of bacterial meningitis. However, if one suspects its presence, a lumbar puncture permits a diagnosis. He testified that if he had been informed that the minor had been exposed to bacterial meningitis, he would have treated the minor with antibiotics. When asked whether in his opinion

> to a reasonable degree of medical probability in [the minor's] situation if he would have been treated when [the mother] called [Moore's office] that there is a possibility that his injuries would have been less or he would have been better off than he was when he [was] presented to [the hospital] early the next morning?

Moore replied that he had an opinion and felt that if the minor "had gotten antibiotics at that moment, I think it could have altered the course in his favor, yes."

Itkin testified that in small populations such as at a day-care facility, there is an increased frequency of secondary cases by colonization, a process by which one exposed to the organism, although not ill, carries the organism and passes it on to another. Antibiotics may be given that "are effective in eradicating the carrier or colonization state" to interrupt the spread of Haemophilus. The key to treatment is the timeliness of diagnosis and treatment with antibiotics.

In Itkin's view, although the girl and the minor were not at West Omaha Day Care at the same time, the minor's infection was directly related to the girl's because of the colonization of the other enrollees, who eventually colonized the minor, producing his infection.

3. COUNTY'S ROLE

The record contains opinion evidence to the effect that the county department was negligent in failing to determine that the girl had attended West Omaha Day Care and in failing to inform the minor's parents of that fact. However, whether the undisputed facts, even if establishing negligence, demonstrate that liability is foreclosed by the discretionary function exemption is, as noted in part II above, a question of law. We thus focus upon the undisputed facts relating to the county department's conduct.

John M. Weston has been the chief of the division of clinical services for the county department since early 1987 and has been employed by the county department and its predecessor, the Omaha-Douglas County Health Department, an organization serving both the city of Omaha and the county, since 1972. Weston worked as an epidemiologist prior to assuming his present duties. According to Weston, epidemiology is "the study of the distribution of disease and other physiological conditions in human populations and [the] factors that influence that distribution." Disease control consists of the implementation of "activities that will allow for the reduction or elimination of a disease."

Since 1987, Weston has supervised and directed the county department's epidemiology and sexually transmitted disease control sections, each of which performs surveillance activities for communicable diseases in the community. He reports directly to the director of the county department, who, as the chief executive officer, reports directly to the county's board of health.

Based on similar forms used by the state Department of Health and by California, Weston, in 1981, designed a postcard reporting form. The card lists a number of reportable diseases, including bacterial meningitis, and asks for the name of the disease reported, the patient's name and address, the dates of the report and onset of the disease, the laboratory results, and the name and address of the reporting health care provider. Although the regulations of the state department did not require the reporting of bacterial meningitis, Weston included the illness to comply with an Omaha ordinance which made it

reportable.

According to Weston, the purpose of the card was to provide a means of collecting data furnishing a basis for formulating sound public health policy and good disease control measures. The card was not intended to itself trigger disease control measures, nor was it designed to collect all the information the county department needed about a particular disease. The thought was that the card would provide the information needed to enable the county department to contact people to gather such additional information as the county department might find useful.

The postcard reports of infectious diseases were also used by the county department to fill out more detailed reports on forms of the national center, which the county department then forwarded to the state department.

In answer to an interrogatory which inquired whether, as of October 1987, there was in effect "any policy or contingency plans for disseminating information regarding a reported case of bacterial meningitis to day care facilities or the parents of day care attendees," the county department replied that if it had been notified "of a case of bacterial meningitis in a day care center or in a day care attendee," then as a matter of policy some employee "would have contacted the day care center and/or the parents of the attendee, made recommendations and suggestions to them, and offered the expertise of the Department as a resource." The answer continued that no employee had "the authority to order the day care operators or the parents of attendees to do anything. The decision as to the type of response rested with the day care operators and the parents of attendees." The trial testimony explained further that it was the county department's policy to educate day-care facility operators about bacterial meningitis, to provide informational literature, to offer to assist day-care facilities in which the disease had occurred, to urge day-care operators to notify the parents of its enrollees that there had been an incident of the disease, and to offer to talk with parents who had questions. The county department had not in any instance notified the enrollees' parents of an incident of the disease at a day-care facility.

After Weston attended the first symposium on infectious diseases in the day-care setting sponsored by the national center in 1984, the county department distributed to day-care facilities the informational packet described in section 1 of this part of the opinion.

The county department received a card report dated November 2, 1987, from the hospital to which the girl had been admitted, advising that she had bacterial meningitis. The hospital reported the date of onset of the disease to be October 25, 1987, and reported that laboratory tests revealed the presence of Haemophilus. Receipt of that card caused the county department to report the incident on February 12, 1988, to the national center on a national center form with a revision date of "4-77." That revision did not inquire about day-care attendance by the infected person. However, the national center had revised the bacterial meningitis report form with forms carrying revision dates of "7-81," "10-85," and "10-86." The 1986 revision, for the first time, inquired as to whether the infected person was less than 6 years old and attended a day-care facility.

A former employee of the state department testified that if the county department wanted revisions of the national center forms, it was not to contact the national center directly but was to obtain them from the state department. However, the state department did not have a program or policy of sending the new revisions of the national center forms to the county department. Neither did the national center's weekly morbidity and mortality report make mention of the existence of revised reporting forms.

While it was the county department's policy to use the most current national center forms, it had not received the updated forms from the state, had not been told about the new forms by the state, did not have the new forms in the fall of 1987, and did not learn of the "10-86" revision until a discussion between one of the county department's employees and a state department employee in early 1988, at which time the county department began using the "10-86" revision of the form.

Indeed, in 1987, the state department itself forwarded 16 reports to the national center on the same 1977 revision used by

the county department, 5 on the 1981 revision, 7 on the 1985 revision, and 8 on the 1986 revision. Furthermore, even in 1988, the state department forwarded to the national center 1 report on the 1977 revision, 2 on the 1981 revision, 6 on the 1985 revision, and 33 on the 1986 revision.

4. STATE OF MEDICAL KNOWLEDGE

According to Itkin, Haemophilus has been around for a long time; the new issue is that in the day-care environment, infectious diseases have a propensity for spreading due to the close contact and intensity of exposure. When Itkin came to Omaha in 1986, physicians regarded the risk of infectious diseases in day-care facilities "with a lot of anxiety" and "recognized that [they] posed a risk and yet they recognized the controversy in establishing how much of a risk that was."

In 1987, the antibiotic rifampin was effective in eradicating Haemophilus in the carrier state in 95 percent of the cases and could be used for children under 2 years of age. However, the primary authority on which pediatricians then relied in treating infectious diseases, including Haemophilus, stated: "The risk of secondary disease occurring in [facilities] with a single case is uncertain. Moreover, the efficacy of Rifampin in preventing secondary disease in day-care groups is not well established, and the difficulties in delivering prophylaxis are considerable." This authority left permissive the administration of rifampin after a single occurrence in a day-care facility, and there was a controversy among reasonable physicians as to the efficacy of the drug at that time.

It was during that same year that the state department first began to follow up on reports of Haemophilus occurrences in day-care settings, the first such occasion occurring in October of that year. That constituted a change in the state department's practices. The change occurred because a vaccine had been licensed to protect children against the organism. Information was becoming available concerning the seriousness of the disease and the impact of day-care facilities in the spread of the disease, and health authorities were beginning to take into account the effect of the disease on public health resources.

According to the minor's pediatrician, in 1987 the

Haemophilus vaccine was not customarily given to children less than 2 years of age, but it is now given to infants as young as 2 months old.

V. ANALYSIS

We begin our analysis by noting that the discretionary function exemption is expressed in nearly identical language in Neb. Rev. Stat. § 81-8,219(1)(a) (Reissue 1987) of the State Tort Claims Act and § 13-910(2); thus, cases construing the state exemption apply as well to the exemption given political subdivisions by § 13-910(2). See *Lemke v. Metropolitan Utilities Dist.*, 243 Neb. 633, 502 N.W.2d 80 (1993).

1. Nature of Discretionary Function Exemption

In considering the discretionary function exemption under the State Tort Claims Act and holding that summary judgment should not have been granted the State, we, in *Wickersham v. State*, 218 Neb. 175, 180, 354 N.W.2d 134, 138-39 (1984), stated:

> Performance of or failure to perform a discretionary function or duty cannot be the basis for liability under the State Tort Claims Act. See *Fletcher v. State*, 216 Neb. 342, 344 N.W.2d 899 (1984); cf. *Dalehite v. United States*, 346 U.S. 15, 73 S. Ct. 956, 97 L. Ed. 1427 (1953) (Federal Tort Claims Act, 28 U.S.C. § 1346(b) and §§ 2671 et seq. (1948)).
>
> That which is protected under the State Tort Claims Act, § 81-8,219(1)(a), is the discretion of a governmental executive or administrator to act according to one's judgment of the best course to be taken. Such discretion includes more than the initiation of programs and activities. Discretion includes determinations or judgments made in establishing plans, specifications, or schedules of operations. Where policy judgment exists, there also exists discretion exempted from liability under the State Tort Claims Act. Cf. *Dalehite v. United States, supra.*
>
> However, the discretionary function or duty exemption in the State Tort Claims Act extends only to the basic policy decisions made in governmental activity, and not to

> ministerial activities implementing such policy decisions. See *Koepf v. County of York*, 198 Neb. 67, 251 N.W.2d 866 (1977); cf. *Indian Towing Co. v. United States*, 350 U.S. 61, 76 S. Ct. 122, 100 L. Ed. 48 (1955) (Federal Tort Claims Act). In other words, the State is liable for negligence of its employees at the operational level, where there is no room for policy judgment. See *Eastern Air Lines v. Union Trust Company*, 221 F.2d 62 (D.C. Cir. 1955).

In *Wickersham*, the State, through its Department of Agriculture, had under statutory direction adopted regulations in conformance with regulations of the U.S. Department of Agriculture, which required that the State both test for brucellosis and directly notify, among others, purchasers of cattle which came from an infected herd. We reasoned that the State was rendered liable by its failure to comply with its own regulations by failing to timely test cattle which Wickersham had purchased and by failing to timely notify him of its subsequent discovery that the cattle he had purchased came from an infected herd.

However, in *Blitzkie v. State*, 241 Neb. 759, 491 N.W.2d 42 (1992), we affirmed the judgment in favor of the State against Blitzkie's claims that he, as an owner of hogs near an outbreak of pseudorabies, should have been notified personally and that the notice given to local veterinarians was inadequate. There, we wrote:

> The very letter of § 54-701 implies that the Department of Agriculture has the discretion of "employing the most efficient and practical means" in the control and prevention of livestock disease. The evidence is uncontroverted that the Department of Agriculture did quarantine the affected animals, in compliance with the statute, and in its discretion, notified the state's veterinarians by way of newsletter. The method of notice and to whom the notice would be sent were completely discretionary functions, and plaintiff's claims that these activities were ministerial, rather than discretionary, are without merit.

Blitzkie, 241 Neb. at 763, 491 N.W.2d at 45.

In *Security Inv. Co. v. State*, 231 Neb. 536, 437 N.W.2d 439 (1989), we, in affirming the sustainment of the State's demurrer, held that the alleged general failure of the state Department of Banking and Finance to enforce the banking laws, take remedial steps with respect to a failing financial institution, remove certain officers of the institution, inform other financial institutions of the failing institution's condition, and put the failing institution into receivership all fell within the discretionary function. Quoting extensively from *Berkovitz v. United States*, 486 U.S. 531, 108 S. Ct. 1954, 100 L. Ed. 2d 531 (1988), we wrote:

> " '[I]t is the nature of the conduct, rather than the status of the actor that governs whether the discretionary function exception applies in a given case.' " 108 S. Ct. at 1958 (quoting *United States v. Varig Airlines*, 467 U.S. 797, 104 S. Ct. 2755, 81 L. Ed. 2d 660 (1984)). The Court then described the conduct which is within the discretionary function exception: "In examining the nature of the challenged conduct, a court must first consider whether the action is a matter of choice for the acting employee. This inquiry is mandated by the language of the exception; conduct cannot be discretionary unless it involves an element of judgment or choice. See *Dalehite v. United States*, 346 U.S. 15, 34, 73 S.Ct. 956, 967, 97 L.Ed. 1427 (1953) (stating that the exception protects 'the discretion of the executive or the administrator to act according to one's judgment of the best course'). Thus, the discretionary function exception will not apply when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow. In this event, the employee has no rightful option but to adhere to the directive. And if the employee's conduct cannot appropriately be the product of judgment or choice, then there is no discretion in the conduct for the discretionary function exception to protect. Cf. *Westfall v. Erwin*, 484 U.S. [292], 108 S.Ct. 580, [585], 98 L.Ed.2d 619 (1988) (recognizing that conduct cannot be discretionary if prescribed by law).
>
> "Moreover, assuming the challenged conduct involves

> an element of judgment, a court must determine whether that judgment is of the kind that the discretionary function exception was designed to shield. The basis for the discretionary function exception was Congress' desire to 'prevent judicial "second-guessing" of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort.' *United States v. Varig Airlines, supra*, [467 U.S.] at 814, 104 S.Ct., at 2764-2765. The exception, properly construed, therefore protects only governmental actions and decisions based on considerations of public policy. See *Dalehite v. United States, supra*, [346 U.S.] at 36, 73 S.Ct., at 968 ('Where there is room for policy judgment and decision there is discretion'). In sum, the discretionary function exception insulates the Government from liability if the action challenged in the case involves the permissible exercise of policy judgment."

Security Inv. Co., 231 Neb. at 544-45, 437 N.W.2d at 445.

Most recently, in *Lemke v. Metropolitan Utilities Dist.*, 243 Neb. 633, 502 N.W.2d 80 (1993), a political subdivision which retailed odorized natural gas had received information that certain flexible connectors deteriorated with age and could leak. Although it had not installed all such connectors in the area, the subdivision had emplaced several thousand of them and had been on the plaintiffs' premises to make adjustments to their gas appliances. The subdivision had in place a program which informed, through literature, its customers and, through advertisements, the general public concerning the benefits and risks involved in using natural gas. Nonetheless, the political subdivision did not undertake to inform its customers about the connector problem; instead, it merely filed the information in its library without even telling its service personnel about the defect. The plaintiffs sustained damages when, because of a deteriorated connector, an explosion occurred while one of them attempted to relight a pilot light. In affirming the judgment rendered against the political subdivision, we wrote:

> [W]hen (1) a governmental entity has actual or constructive notice of a dangerous condition or hazard caused by or under the control of the governmental entity

> and (2) the dangerous condition or hazard is not readily apparent to persons who are likely to be injured by the dangerous condition or hazard, the governmental entity has a nondiscretionary duty to warn of the danger or take other protective measures that may prevent injury as the result of the dangerous condition or hazard. In such a situation, a governmental entity's failure to warn or take other protective measures is not a planning-level decision involving a social, economic, or political policy judgment and, therefore, does not come within the discretionary function exemption of the Political Subdivisions Tort Claims Act.

Id. at 647, 502 N.W.2d at 89.

We have previously distinguished ministerial acts from discretionary functions. In *Allen v. County of Lancaster*, 218 Neb. 163, 352 N.W.2d 883 (1984), the plaintiffs alleged that the county had improperly approved the construction of a sewer which did not comply with a certain county resolution and had improperly inspected the sewer. More specifically, the plaintiffs claimed that the sewer violated seven of the various criteria set forth in five pages of the resolution, which provided that all sewers would be constructed " 'in conformance with the requirements of the health Officer who shall be guided by' " the specified criteria. *Id.* at 164, 352 N.W.2d at 884. In affirming the sustainment of the county's demurrer, we held that where a health officer must make a judgmental decision within a regulatory framework, such decision is distinguishable from a ministerial act:

> In this case the health officer had a great deal of "room for policy judgment and decision," and as stated in *Dalehite* at 36, where there is such room "there is discretion." The health officer is clearly required to exercise his discretion. He is not given standards that he must follow, but instead he and the public are informed that individual sewage systems must be installed "in conformance with [his] requirements" and that, in connection with those requirements, he is to be guided by certain criteria, many of which require the exercise of further discretion.

> Consideration of the second of Allens' statements set out above—that the acts complained of were ministerial—reinforces our holding herein. In *State of Nebraska ex rel. Line v. Kuhlman*, 167 Neb. 674, 682-83, 94 N.W.2d 373, 380 (1959), we stated: " 'A ministerial act has been defined as one performed in response to a duty which has been positively imposed by law and its performance required at a time and in a manner or upon conditions which are specifically designated, the duty to perform under the conditions specified not being dependent upon the officer's judgment or discretion.' "
>
> "In Mekota v. State Board of Equalization & Assessment, 146 Neb. 370, 19 N.W.2d 633, we quoted with approval this definition: ' "A ministerial act may * * * be defined to be one which a person performs in a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to, or the exercise of, his own judgment upon the propriety of the act being done." ' "
>
> Examination of the regulation herein, delegating authority to the health officer of Lancaster County, shows clearly that that officer is to exercise a great deal of his own judgment and that his acts are clearly not ministerial.

Allen, 218 Neb. at 168-69, 352 N.W.2d at 886-87.

2. Statutes Regulating Actions of County Department

With the nature of the discretionary function exemption in mind, we turn our attention to the statutes which regulate the county department.

Neb. Rev. Stat. § 71-501 (Reissue 1990) declares:

> The county boards . . . shall make and enforce regulations to prevent the introduction and spread of . . . infectious . . . diseases in their respective counties. . . . Should the board of health fail to enact rules and regulations as herein provided, it shall enforce the rules and regulations promulgated by the [state] Department of Health.

Neb. Rev. Stat. § 71-503 (Reissue 1990) reads in part:

> All attending physicians shall report to the official local health department or the [state] Department of Health

promptly, upon the discovery thereof, the existence of any contagious or infectious diseases and such other disease, illness, or poisoning as the [state] Department of Health may from time to time specify.

Neb. Rev. Stat. § 71-503.01 (Reissue 1986) announces:

> Whenever any statute of the state, *any ordinance or resolution of a municipal corporation or political subdivision* enacted pursuant to statute . . . requires medical practitioners or other persons to report cases of communicable diseases . . . such reports or notifications shall be confidential. . . . The appropriate board, health department, agency, or official *may*: (1) Publish analyses of such reports and information for scientific and public health purposes in such a manner as to assure that the identity of any individual concerned cannot be ascertained; (2) discuss the report or notification with the attending physician; and (3) make such investigation as deemed necessary.

(Emphasis supplied.)

Neb. Rev. Stat. § 71-505 (Reissue 1986) provides:

> It shall be the duty of the [state] Department of Health, in addition to other duties provided by law, to secure and maintain in all parts of the state an official record and notification of reportable diseases, illnesses, or poisonings . . . and in all other effective ways to prevent the origin and spread of disease and promote the general public health.

Neb. Rev. Stat. § 71-1631 (Reissue 1990) states:

> The board of health of each county . . . shall have the *power* herein set forth. . . . It shall, with the approval of the board of county commissioners . . . (7) enact rules and regulations . . . and enforce the same for the protection of public health and the prevention of communicable diseases within its jurisdiction, subject to the review and approval of such rules and regulations by the State Board of Health . . . (10) investigate the existence of any contagious or infectious disease and adopt measures, with the approval of the [state] Department of Health, to arrest the progress of the same . . . .

(Emphasis supplied.)

3. APPLICATION OF DISCRETIONARY FUNCTION EXEMPTION

Accordingly, under the relevant statutes, the county board of health, and through it the county department, had the power to make bacterial meningitis a reportable disease (§ 71-503.01); had the power and duty to make and enforce regulations to prevent the spread of any infectious disease (or to enforce the rules and regulations of the state department) (§§ 71-501 and 71-1631); and had the obligation of keeping the identity of the person having the disease confidential (§ 71-503.01).

A reading of the relevant statutes makes obvious that the duty of the county department to make and enforce regulations is painted in broad strokes and does not specify the manner in which investigations are to be conducted or the specific use to be made of the data collected. It is equally obvious that the significance of making a particular infectious disease reportable is so that data can be collected for the study of the disease and its distribution in order that proper regulations may be adopted to prevent its spread, in accordance with the requirement of § 71-501.

Thus, the situation now before us differs markedly from that presented in *Wickersham v. State*, 218 Neb. 175, 354 N.W.2d 134 (1984). While in *Wickersham* there was a specific regulation requiring testing and notification of persons in the position of the plaintiff therein, here there is not. Nor is the situation presented here like that in *Lemke v. Metropolitan Utilities Dist.*, 243 Neb. 633, 502 N.W.2d 80 (1993). Whereas in *Lemke* it was the subdivision that brought the injury-causing agent (the odorized gas) to its customers, the county department did not bring the injury-causing agent (the Haemophilus bacterium) to the population of which the girl and the minor were a part. In other words, while the subdivision in *Lemke* had dominion, and in that sense control, over the injury-causing agent, the county department did not.

Rather, the situation at hand is analogous to those presented in *Security Inv. Co. v. State*, 231 Neb. 536, 437 N.W.2d 439 (1989), and *Allen v. County of Lancaster*, 218 Neb. 163, 352 N.W.2d 883 (1984). As in *Security Inv. Co.*, how the State was to discharge its duties in supervising financial institutions was a

matter of judgment, so, here, how the disease was to be contained was a matter of judgment. As noted in *Allen*, where a health officer must make a judgmental decision within a regulatory framework, the decision is not a ministerial act but a discretionary function.

We have not been cited to, nor have we found, any statute which required that the county department ascertain that the girl attended West Omaha Day Care, that the county department contact West Omaha Day Care, or that the county department notify the parents of West Omaha Day Care's enrollees. Neither have we been cited to any such regulation. How the county department discharged its duty and how it allocated its resources in doing so was a matter of judgment based on considerations of public policy, including the allocation of resources. Thus, the county department's determination to discharge whatever duty it had through a program of educating day-care operators and offering such assistance as might be requested by such facilities was within the discretionary function exemption.

However one may view the efficacy of the county department's policy and reaction to the onset of bacterial meningitis in the girl, the courts are not at liberty to second-guess the county department's policy decisions.

VI. JUDGMENT

Accordingly, we reverse the judgment of the district court and remand the cause with the direction that it be dismissed.

REVERSED AND REMANDED WITH DIRECTION.

WHITE, J., dissenting.

The majority holds that responsibility for the negligence of Douglas County is excused by reason of the discretionary function exemption of the Political Subdivisions Tort Claims Act. I respectfully dissent from the majority opinion, since I submit that the county had a nondiscretionary responsibility to inquire whether a day-care center was involved and to warn the day-care center and the parents of the day-care center's attendees of the incidence of bacterial meningitis.

Bacterial meningitis is an extremely dangerous disease which if not immediately treated can cause extensive and permanent

physical disabilities and, in some cases, death. The debilitating extent of this disease is particularly apparent from a consideration of Sean Thomas Jasa. As a result of the bacterial meningitis, Sean permanently suffers from seizures, severe brain damage, loss of sight and hearing, and a loss of bodily functions. Additionally, the doctors had to amputate several of Sean's fingers and his left foot.

The county collected information regarding particular cases of bacterial meningitis. This information was not readily available to persons who would be injured by the disease. Once the county had knowledge of an actual case of bacterial meningitis, it had a nondiscretionary duty to act with reasonable care. Cf. *Lemke v. Metropolitan Utilities Dist.*, 243 Neb. 633, 502 N.W.2d 80 (1993). I submit that under the circumstances of this case, reasonable care required the county at least to inquire whether the afflicted child had been in a day-care setting and to provide meaningful notice to those persons whose children had been exposed to the disease. The reasonableness of these acts is especially apparent in light of the county's extensive knowledge regarding the extremely debilitating injuries that this disease can cause, particularly to young children, and the near certainty that this disease would spread rapidly in a day-care setting.

The distinction between discretionary and ministerial acts is not as clear-cut as the majority suggests. Although the discretionary function exemption protects social, economic, and political judgments from judicial "second-guessing," the fact that a particular act involved an element of decisionmaking by the actor does not necessarily indicate that the act is within the exemption. See, *Berkovitz v. United States*, 486 U.S. 531, 108 S. Ct. 1954, 100 L. Ed. 2d 531 (1988); *Lemke, supra*. In fact, almost all acts involve some element of decisionmaking. For example, whether a state would maintain a lighthouse is a policy decision, and the entity would not be liable because of the fact that the state decided to operate the lighthouse. However, while maintaining the lighthouse a state actor may be making decisions, but these are decisions involved in implementing the state's policy and are ministerial, therefore, not subject to the discretionary function exemption. See *Indian Towing Co. v.*

United States, 350 U.S. 61, 76 S. Ct. 122, 100 L. Ed. 48 (1955).

The above example indicates that although decisions are being made while implementing a policy, those decisions are ministerial and must be executed with reasonable care. I recognize that the county's response to a specific case of bacterial meningitis involves decisionmaking. However, I believe that the response does not constitute the policy itself and thus must be executed with reasonable care. Once the county undertook to collect information regarding bacterial meningitis, the county should have been required to respond to that information reasonably.

From a review of the record in this case, I believe that the county's inaction despite its wealth of information cannot be attributed to a policy judgment of the type intended to be protected from judicial second-guessing. The record indicates that the county health board had a statutory duty to enact rules and regulations to prevent the spread of infectious diseases. The county board permitted these decisions to be made by various employees of the county health department. There was no written evidence presented which reflected any rules and regulations adopted by the county board regarding this delegation of authority. One member of the board testified that he believed these decisions were made by the health department's "top-staff" people. It is extremely disturbing that even the county board cannot elucidate exactly what decisionmaking authority has been granted to whom by the county board. It appears that alleged policy decisions are being made on an ad hoc basis by persons whose authority is not verifiable.

This untraceable hierarchy of decisionmaking authority effectively insulates the county from liability for its actions. A reviewing court cannot accurately determine what acts are discretionary or policy-making and what acts are ministerial or policy-implementing. The difficulty in distinguishing these is apparent from the record in this case.

According to the record, the chief of the division of clinical services for the county health department, John M. Weston, had the untethered authority to decide when and what disease control actions the county would take. However, Weston

himself provides conflicting evidence on the issue of whether the county had a policy regarding an actual case of bacterial meningitis in a day-care center.

In a response to interrogatories, Weston answered that if the county had knowledge, in 1987, that there was

> a case of bacterial meningitis in a day care center or in a day care attendee, then as a matter of policy John Weston or another employee of the department would have contacted the day care center and/or the parents of the attendee, made recommendations and suggestions to them, and offered the expertise of the Department as a resource. Weston and similar employees did not have the authority to order the day care operators or the parents of attendees to do anything. The decision as to the type of response rested with the day care operators and the parents of attendees.

At trial, Weston testified that the county health department never had a policy regarding whether the county would notify parents of day-care attendees. Weston further testified that the county health department did not have a policy regarding whether the county would notify the day-care center itself.

An epidemiology nurse employed by the county health department testified that her duties included visiting day-care centers in which the county had received notice that a communicable disease may have occurred. According to the nurse, she was to visit the day-care center to determine whether there was a chance that other children had been infected, and would make recommendations to prevent the spread of the disease. The nurse stated that she was not sent to West Omaha Day Care after the first report of bacterial meningitis or after the report of Jasa's case of bacterial meningitis.

If the county had a policy to address cases of bacterial meningitis in a day-care center, then the actions necessary to implement that policy—inquiring whether a day-care center is involved and providing meaningful notification—are nondiscretionary. On the other hand, if the county collected information of actual cases of bacterial meningitis but did not have a specific policy regarding its response to the information, then the actual response should be deemed nondiscretionary. I

do not subscribe to the theory that the county's inaction itself constitutes a protected policy decision by default. The discretionary function exemption protects policy judgments and should not shield the county from its failure to act. I am not convinced that the county has demonstrated it made a policy-type decision not to act; therefore, I respectfully dissent.

LANPHIER, J., joins in this dissent.

JOHN ROSSE AND THERESE ROSSE, APPELLEES, V. VALERIE ANN ROSSE, APPELLANT, AND JOHN EDMOND ROSSE, APPELLEE.

510 N.W.2d 73

Filed January 21, 1994. No. S-92-252.

1. **Divorce: Visitation: Appeal and Error.** In a dissolution of marriage action, determinations concerning visitation with a minor are initially entrusted to the discretion of the trial judge, whose determinations, on appeal, will be reviewed de novo on the record and affirmed in the absence of abuse of the trial judge's discretion. The same standard of review is to be applied to a judicial determination of grandparent visitation rights.
2. **Collateral Estoppel.** There are four conditions that must exist for the doctrine of collateral estoppel to apply: (1) The identical issue was decided in a prior action, (2) there was a judgment on the merits which was final, (3) the party against whom the rule is applied was a party or in privity with a party to the prior action, and (4) there was an opportunity to fully and fairly litigate the issue in the prior action.
3. **Divorce: Visitation.** A grandparent may seek visitation with his or her minor grandchild if the marriage of the child's parents has been dissolved or a petition for the dissolution of such marriage has been filed and is still pending, but no decree has been entered.
4. **Divorce: Visitation: Pleadings.** If the marriage of the parents of a minor child has been dissolved or a petition for the dissolution of such marriage has been filed, is still pending, but no decree has been entered, a grandparent seeking visitation shall file a petition for visitation in the district court in the county in which the dissolution was had or the proceedings are taking place.
5. **Statutes.** In the absence of anything indicating to the contrary, statutory language is to be given its plain and ordinary meaning; when the words of a statute are plain, direct, and unambiguous, no interpretation is necessary or will be indulged to ascertain their meaning.
6. **Trial: Evidence: Appeal and Error.** In a civil case, to constitute reversible error, admission or exclusion of evidence must unfairly prejudice a substantial right of

a litigant complaining about the evidence admitted or excluded.

7. **Visitation.** Reasonable rights of visitation may be granted when the court determines by clear and convincing evidence that there is or has been a significant beneficial relationship between the grandparent and the child, that it is in the best interests of the child that such relationship continue, and that such visitation will not adversely interfere with the parent-child relationship.
8. **Attorney Fees.** The general rule in Nebraska is that an attorney fee may be recovered only when authorized by statute, or when a recognized and accepted uniform course of procedure allows recovery of an attorney fee.

Appeal from the District Court for Douglas County: J. PATRICK MULLEN, Judge. Affirmed.

Daniel W. Ryberg for appellant.

Michael F. Pistillo, of Steier, Rogers & Pistillo, P.C., for appellees John Rosse and Therese Rosse.

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

PER CURIAM.

Valerie Ann Rosse appeals an order of the district court for Douglas County awarding grandparent visitation rights to her daughter's paternal grandparents, Therese Rosse and John Rosse. We affirm the order of the district court.

FACTS

Valerie Ann and John Edmond (Eddie) Rosse were married on June 18, 1988, in Omaha. A daughter, Isabella, was born to the couple on April 30, 1989. Subsequently, Valerie instituted dissolution of marriage proceedings against Eddie. A decree of dissolution was entered on March 19, 1991, in which Valerie was awarded sole custody of Isabella and Eddie was granted reasonable visitation with Isabella subject to "reasonable non-intrusive supervision by [Valerie] or her designate."

At the time the present case was tried, Eddie was permitted four separate 5-hour visitation periods per month. Eddie, who is employed by an airline, lives in the State of Washington and travels to Omaha twice monthly to exercise his visitation rights with Isabella. During the visitations, Eddie stays with his mother and takes Isabella either to his mother's home or to another family member's home.

On April 5, 1991, Therese Rosse and John Rosse filed a petition in the district court, naming Valerie and Eddie as respondents and requesting grandparent visitation rights with Isabella pursuant to statute. Therese and John were divorced in 1980, but their relationship is amicable, and they agreed to share any visitation rights with their granddaughter that the court would grant them.

The district court granted Therese and John visitation rights with Isabella the first Saturday of every even-numbered month from 10 a.m. to 5 p.m. The court further ordered that Eddie's visitation rights were paramount and would supersede any visitation rights of the grandparents.

Valerie's motion for new trial was overruled, and she timely appealed to this court. Eddie did not appear and was in default in the proceedings.

ASSIGNMENTS OF ERROR

Summarized, Valerie alleges that the trial court erred in (1) failing to find that the petitioners were estopped from bringing a separate action for visitation because of their participation in, or opportunity to participate in, the prior dissolution proceedings; (2) failing to find that the admission into evidence of affidavits as provided by Neb. Rev. Stat. § 43-1802(2) (Reissue 1988) constitutes hearsay and is a violation of her due process rights; (3) determining that the petitioners were entitled to grandparent visitation rights pursuant to Neb. Rev. Stat. § 43-1801 et seq. (Reissue 1988); and (4) failing to award her attorney fees.

STANDARD OF REVIEW

This case is one of first impression for this court regarding grandparent visitation rights. However, we have consistently held that, in a dissolution of marriage action, determinations concerning visitation with a minor are initially entrusted to the discretion of the trial judge, whose determinations, on appeal, will be reviewed de novo on the record and affirmed in the absence of abuse of the trial judge's discretion. *Hickenbottom v. Hickenbottom*, 239 Neb. 579, 477 N.W.2d 8 (1991). We hold that the same standard of review is to be applied to a judicial determination of grandparent visitation rights.

ANALYSIS

ESTOPPEL

Valerie first contends that the trial court erred in failing to find that Therese and John are estopped from bringing an action for grandparents' visitation rights. In her answer to Therese and John's petition, Valerie affirmatively alleges that the best interests of the minor child were in issue and were determined in the dissolution proceedings; that the grandparents were privies of Eddie because they had full knowledge of the issues in the dissolution proceedings, controlled the proceedings on his behalf, and paid for and directed the actions of his counsel; and that the grandparents were entitled to become parties in the dissolution proceedings, waived their rights, and are now estopped from litigating the issue of the child's best interests as it relates to visitation.

This is a somewhat novel and rather confusing legal argument. Valerie alleges on one hand that the grandparents were so involved in the dissolution proceeding that they were in privity with Eddie and are now collaterally estopped from pursuing visitation rights, while on the other hand alleging that the grandparents failed to become parties to the action and have thus waived their rights to visitation.

Initially, we consider whether Therese and John are collaterally estopped from bringing a grandparent visitation action at this time. There are four conditions that must exist for the doctrine of collateral estoppel to apply: (1) The identical issue was decided in a prior action, (2) there was a judgment on the merits which was final, (3) the party against whom the rule is applied was a party or in privity with a party to the prior action, and (4) there was an opportunity to fully and fairly litigate the issue in the prior action. *McCook Nat. Bank v. Myers*, 243 Neb. 853, 503 N.W.2d 200 (1993); *State on behalf of J.R. v. Mendoza*, 240 Neb. 149, 481 N.W.2d 165 (1992).

We need look no further than the first condition to determine that Therese and John are not collaterally estopped from bringing a grandparent visitation action. Although an informal meeting was held with Valerie and Eddie and their respective counsel to attempt to arrange visitation rights for Therese

during the pendency of the dissolution proceeding, Valerie refused to allow such visitation at that time. The dissolution decree awards Eddie reasonable visitation, but makes no mention of grandparent visitation. Visitation by a father and visitation by grandparents are not identical issues. Thus, the first condition for collateral estoppel has not been met, and therefore, the collateral estoppel doctrine does not apply to the facts of this case.

The issue of whether petitioners have waived their rights by failing to intervene in Valerie and Eddie's dissolution proceeding is controlled by the applicable statutes. Section 43-1802(1) provides that "[a] grandparent may seek visitation with his or her minor grandchild if . . . (b) [t]he marriage of the child's parents *has been dissolved or a petition for the dissolution of such marriage has been filed*, [and] is still pending, but no decree has been entered." (Emphasis supplied.)

Section 43-1803(1) provides in relevant part:

> If the marriage of the parents of a minor child *has been dissolved or a petition for the dissolution of such marriage has been filed*, is still pending, but no decree has been entered, a grandparent seeking visitation shall file a petition for visitation in the district court in the county *in which the dissolution was had or the proceedings are taking place*.

(Emphasis supplied.)

In the absence of anything indicating to the contrary, statutory language is to be given its plain and ordinary meaning; when the words of a statute are plain, direct, and unambiguous, no interpretation is necessary or will be indulged to ascertain their meaning. *Malzahn v. Transit Authority, ante* p. 425, 507 N.W.2d 289 (1993); *In re Application of City of Lexington, ante* p. 62, 504 N.W.2d 532 (1993).

Sections 43-1802 and 43-1803 are both written in the disjunctive and permit a grandparent visitation action to be initiated *either* during the dissolution proceeding *or* after the marriage of the parents has been dissolved. Although Valerie strenuously argues that the statutes intend that a grandparent seeking visitation join in the dissolution action and that no reasonable person could construe the statutes to require

defending two separate suits, such an interpretation simply cannot be reconciled with the plain language of the statutes. If the grandparent visitation statutes as written impose an unreasonable burden upon litigants, that matter must be addressed by the Legislature, rather than by this court. In connection with this assignment of error, Valerie also contends that the trial court erred in sustaining an objection to her offer of proof on the extent to which Therese had participated in the dissolution proceeding. Valerie sought to have Therese testify that Therese had assisted Eddie in obtaining the services of an attorney, that Therese had participated as a member of Eddie's "divorce team," and that grandparent visitation rights had been discussed as part of the dissolution proceeding. Counsel for Valerie stated that the testimony was offered for the purpose of showing that Therese and John should be estopped from bringing their grandparent visitation action.

In a civil case, to constitute reversible error, admission or exclusion of evidence must unfairly prejudice a substantial right of a litigant complaining about the evidence admitted or excluded. *Maresh v. State*, 241 Neb. 496, 489 N.W.2d 298 (1992). Since we have already determined that Therese and John are not collaterally estopped from bringing their grandparent visitation action on the basis that the identical issue before the court had not been determined in a prior action, any error in excluding evidence of Therese's participation in the dissolution proceeding would not unfairly prejudice any substantial right of Valerie's and, thus, would be harmless. This assignment of error is without merit.

Admission of Affidavits

Next, Valerie argues that the trial court erred in admitting an affidavit into evidence in violation of her due process rights. Over Valerie's objection, the court received into evidence the affidavit, with the exception of one paragraph which the court omitted for lack of foundation, of a physician from Oregon expressing the opinion that a relationship between Therese and Isabella would be a positive one for Isabella.

Valerie concedes in her brief that another witness "testified to the same point of fact that [the affidavit] sought to address."

Brief for appellant at 33. That being true, the admission of the affidavit, if constitutionally impermissible, was cumulative to properly admitted evidence and was not prejudicial. See *Behm v. Northwestern Bell Tel. Co.*, 241 Neb. 838, 491 N.W.2d 334 (1992). This assignment of error is without merit.

ENTITLEMENT TO GRANDPARENT VISITATION RIGHTS

We now turn to the issue of whether the trial court properly granted visitation rights to the petitioner grandparents. Section 43-1802(2) provides in part:

> Reasonable rights of visitation may be granted when the court determines by clear and convincing evidence that there is, or has been, a significant beneficial relationship between the grandparent and the child, that it is in the best interests of the child that such relationship continue, and that such visitation will not adversely interfere with the parent-child relationship.

Turning to the first requirement, we note that because this is a case of first impression involving the grandparent visitation statutes, this court has not expounded on what constitutes a "significant beneficial relationship" between a grandparent and a grandchild. However, it is obvious that such a relationship is fact-dependent, and thus we proceed to examine this requirement based on the facts of the present case.

Therese, a teacher and educational consultant who was working on a Ph.D. at the time of the hearing, testified that she saw her role as a grandmother as "loving Isabella and having her love me." When Eddie brings Isabella to her house during his scheduled visits, Therese reads to Isabella and does other things with her. In fact, Isabella will not let anyone except Therese read to her.

Therese testified that Isabella trusts her and has fallen asleep in her arms. Therese is able to meet Isabella's physical needs and is able to comfort her when she cries. Isabella calls Therese "Nana Therese," which Therese considers a term of endearment. Isabella hugs and kisses Therese and has told her, "I love you, Nana."

John testified that he and Eddie have taken Isabella to places such as the park and to the zoo. He feels that he has a good

relationship with Isabella. John plays with Isabella, and they have good times together when they go places. He testified that he is willing and able to care for Isabella's physical needs such as feeding and toileting while she would be in his care. Isabella calls John "Grandpa Jack" and gives him kisses, which he considers a sign of affection. John testified that he loves Isabella very much, just as he does all his grandchildren.

Based upon the above facts, there is clear and convincing evidence to support the trial court's finding that the petitioners have a significant beneficial relationship with Isabella. We take into consideration the fact that Isabella was only 2 1/2 years old at the time this case was tried and that a child of that young age is limited by virtue of her life circumstances in establishing any relationships whatsoever.

Next, we turn to the requirement that grandparent visitation not adversely interfere with the parent-child relationship. At trial, Valerie testified that both grandparents are two-faced to her. She further testified that Therese was a liar and could not be trusted to care for Isabella in the way Valerie preferred. These accusations were mostly general. Valerie did testify that she does not allow Isabella to have candy and that Isabella had reported to her that Therese had given her a piece of candy on one occasion. In the absence of any evidence that one piece of candy was nutritionally or medically inadvisable for Isabella, Valerie's complaint that Therese gave Isabella candy on one occasion is not sufficient reason to deny visitation rights to the grandparents.

Therese testified that in her house there is a rule against making derogatory remarks against the family of any child present in the home. Both Therese and John testified that they have no animosity toward Valerie.

The trial court did not abuse its discretion in finding by clear and convincing evidence that visitation by the grandparents would not adversely interfere with the parent-child relationship between Valerie and Isabella. Although it is clear from the record that the relationship between Valerie and Therese and John is strained, there is no evidence that either Therese or John interferes in the relationship between Valerie and Isabella.

Finally, in view of these findings, it cannot be said that the

trial court abused its discretion in finding by clear and convincing evidence that it is in the best interests of Isabella for her relationship with Therese and John to continue. The trial court's award of one 7-hour visitation every other month is appropriate in view of the age of the child and the fact that Eddie also exercises visitation rights with Isabella for 5 hours on each of 2 days every other weekend.

Valerie also contends that the trial court erred in failing to require that the grandparents' visitation be done in conjunction with the father's visitation. This assignment of error is not discussed in Valerie's brief. An assignment of error not discussed in an appellant's brief will not be considered by this court. See, *Marple v. Sears, Roebuck & Co., ante* p. 274, 505 N.W.2d 715 (1993); *Swedlund v. City of Hastings*, 243 Neb. 607, 501 N.W.2d 302 (1993).

ATTORNEY FEES

Finally, Valerie asserts that the trial court erred in failing to award her attorney fees, and she also requests attorney fees in this court. The general rule in Nebraska is that an attorney fee may be recovered only when authorized by statute, or when a recognized and accepted uniform course of procedure allows recovery of an attorney fee. *State ex rel. Reitz v. Ringer, post* p. 976, 510 N.W.2d 294 (1993); *Dunning v. Tallman, ante* p. 1, 504 N.W.2d 85 (1993). The grandparent visitation statutes do not provide for an award of fees, nor is there a uniform course of procedure in these cases which would allow recovery of attorney fees. The trial court did not abuse its discretion in failing to award attorney fees in that court. For the same reasons, we decline to award Valerie an attorney fee for the services of her attorney in this court.

CONCLUSION

We have fully considered Valerie's remaining assignments of error and find they have no merit. The order of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. ZACKORY HAROLD REITZ, APPELLEE, AND KELLY MARIE REITZ, APPELLANT, V. MITCHELL RINGER, APPELLEE.

510 N.W.2d 294

Filed January 21, 1994. No. S-92-382.

1. **Child Custody: Appeal and Error.** Child custody determinations are initially entrusted to the discretion of the trial judge and will be affirmed unless they constitute an abuse of that discretion. An appellate court reviews such cases de novo on the record. Where credible evidence is in conflict on a material issue of fact, an 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.
2. **Contempt: Final Orders: Appeal and Error.** A final judgment or order in a contempt proceeding is reviewed in the same manner as in a criminal case.
3. _____: _____: _____. An appellate court, examining a final judgment or order in a contempt proceeding, reviews for errors appearing on the record.
4. **Jurisdiction: Appeal and Error.** An appellate court is without jurisdiction to entertain appeals from nonfinal orders.
5. **Child Custody.** Custody determinations, which are controlled by Neb. Rev. Stat. § 42-364 (Cum. Supp. 1992), are considered special proceedings.
6. _____. Ordinarily, custody of a minor child will not be modified unless there has been a material change of circumstances showing that the custodial parent is unfit or that the best interests of the child require such action.
7. _____. An award of custody should not be interpreted as a sentence to immobilization.
8. _____. Before a custodial parent can remove a child from the state, permission of the court is required, whether or not there is a travel restriction placed on the custodial parent.
9. **Child Custody: Proof.** Generally, a custodial parent seeking removal of a child from the jurisdiction must establish that removal is in the best interests of the child and must demonstrate that departure from the jurisdiction is the reasonably necessary result of the custodial parent's occupation, a factually supported and reasonable expectation of improvement in the career or occupation of the custodial parent, or required by the custodial parent's remarriage.
10. **Contempt.** The character, nature, or purpose of a contempt proceeding is determined by the procedure used in a trial to determine whether there is contempt and the sanction imposed.
11. **Criminal Law: Contempt: Indictments and Informations.** In criminal contempt proceedings where the act charged was not committed in the presence of the court, the prosecution should be in the name of the State and by information.
12. **Attorney Fees.** An attorney fee may be recovered only when authorized by statute, or when a recognized and accepted uniform course of procedure allows recovery of an attorney fee.

13. **Appeal and Error.** In de novo review, when the evidence is in conflict, an 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. Under this standard, an appellate court is not required to give any weight to the trial court's findings, much less great weight.

Petition for further review from the Nebraska Court of Appeals, HANNON, IRWIN, and MILLER-LERMAN, Judges, on appeal thereto from the District Court for Keith County, DONALD E. ROWLANDS II, Judge. Judgment of Court of Appeals affirmed in part, and in part reversed and remanded for further proceedings.

Firmin Q. Feltz for appellant.

Kelly Michael Hogan, of Neil E. Williams & Associates, P.C., for appellee Ringer.

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

LANPHIER, J.

This action for contempt and modification of custody was initiated by the appellee father, Mitchell Ringer, against the appellant mother, Kelly Marie Reitz, after she moved with their child to Arizona without obtaining permission from the court. The district court found the mother in contempt and sentenced her to 30 days in jail. The district court, also finding that a material change in circumstances had occurred, assumed legal custody of the child and placed physical custody with the child's paternal grandparents. After a motion for new trial was filed by Reitz, the court modified the decree so that Reitz could purge herself from contempt upon paying Ringer's attorney fees of $720. On appeal, the Nebraska Court of Appeals reversed the judgment of the district court, returning custody of the parties' child to his mother, Reitz. *State ex rel. Reitz v. Ringer*, 2 NCA 688 (1993).

The Court of Appeals also determined that a trial court must find both parents unfit before acquiring temporary legal custody of a child and that when a custody decree is silent on the matter, a custodial parent is not required to obtain permission from the courts before removing a child from this jurisdiction.

We affirm in part, reverse in part, and remand for further proceedings.

BACKGROUND

The parents of this 6-year-old child were never married. However, after a filiation proceeding, Ringer was determined to be the father and ordered to pay $100 per month in child support. Although Reitz was named the custodial parent, the trial court's decree ordered that Ringer was to be allowed reasonable visitation rights.

The current dispute arose in June 1991, when Reitz' position with the Keith County Zoning Administration was terminated. Unable to find another job in the area, Reitz asked Ringer to sign a document which would allow her to move with their son to Arizona. Ringer refused. Without informing Ringer, Reitz moved in November to Arizona, where she enrolled in college and obtained a job. On January 10, 1992, Ringer filed a motion for contempt and an application for modification of the original custody decree.

In March 1992, Reitz returned to Nebraska for the custody and contempt hearing. At the hearing, a psychotherapist who had treated the child testified that the child was exhibiting a lot of anger toward his father. The psychotherapist further testified that the child told him he hated his father, his father used bad words, and his father would sometimes touch the child's "wee." The psychotherapist believed the child should not be placed in the custody of the father.

The district court determined that Reitz "did willfully violate the laws of the state . . . in that she did remove the child from the state . . . without the written permission of this Court." Reitz was sentenced to 30 days in the Keith County Jail for contempt of court. The court also found a "material change in circumstances has taken place and it would be in the best interests of the minor child that neither party have legal custody and that the Court take legal custody of the child at this time until further order." The court took legal custody of the child, but placed physical custody with the child's paternal grandparents.

After Reitz moved for a new trial, the court modified its

decree so she could purge herself of the sentence by paying Ringer's attorney fees in the amount of $720.

ASSIGNMENTS OF ERROR

Ringer alleges that the Court of Appeals erred in (1) taking jurisdiction of the appeal of custody because the trial court's custody order was interlocutory and not appealable; (2) requiring the trial court to find that both parents were unfit before placing custody of the minor child with the trial court; (3) finding that the record did not support the trial court's conclusion that extraordinary circumstances justified ordering transfer of legal custody of the minor child to the trial court; (4) finding that Reitz was not required to seek the trial court's permission before removing the child from the jurisdiction; (5) finding that the trial court's order granted "custody" of the minor child to a more distant relative; (6) determining that the record did not show a material change in circumstances; (7) determining that the trial court clearly abused its discretion by taking custody of the minor child and that such decision was clearly against the weight of the evidence; (8) failing to apply and adhere to Neb. Rev. Stat. § 42-364 (Cum. Supp. 1992), which grants the trial court the authority to take legal custody of a minor child when the court deems it in the best interests of the minor child or the court lacks adequate information concerning the best interests of the minor child; (9) failing to give great weight to the fact that the trial court had the opportunity to see and hear the witnesses and accepted one version of the facts over another; (10) finding that Ringer failed to carry his burden of proof as to changed circumstances which adversely affected the child; and (11) failing to remand this cause for further proceedings to determine what was in the best interests of the child regarding his custody. Ringer's numerous assignments of error will be consolidated into two main areas of contention for discussion below.

STANDARD OF REVIEW

Child custody determinations are initially entrusted to the discretion of the trial judge and will be affirmed unless they constitute an abuse of that discretion. An appellate court reviews such cases de novo on the record. Where credible

evidence is in conflict on a material issue of fact, an 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. *Hansen v. Hansen*, 240 Neb. 31, 480 N.W.2d 204 (1992).

A final judgment or order in a contempt proceeding is reviewed in the same manner as in a criminal case. *Dunning v. Tallman, ante* p. 1, 504 N.W.2d 85 (1993). An appellant court, examining a final judgment or order in a contempt proceeding, reviews for errors appearing on the record. *Id.*

JURISDICTION

Ringer first contends that the Court of Appeals erred in hearing the appeal because the trial court's custody order was interlocutory and, therefore, not appealable. Ringer correctly points out that an appellate court is without jurisdiction to entertain appeals from nonfinal orders. *In re Interest of R.G.*, 238 Neb. 405, 470 N.W.2d 780 (1991). Thus, we are confronted with the threshold question of whether the order from which this appeal was taken was final within the meaning of Neb. Rev. Stat. § 25-1911 (Cum. Supp. 1992). Section 25-1911 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." Neb. Rev. Stat. § 25-1902 (Reissue 1989) provides that an "order affecting a substantial right made in a special proceeding . . . is a final order which may be vacated, modified or reversed, as provided in this chapter."

"Although 'special proceeding' has no statutory definition, this court has . . . construed the phrase to mean every civil statutory remedy which is not encompassed in what is now chapter 25." *In re Interest of R.G.*, 238 Neb. at 413, 470 N.W.2d at 787. Under this definition, custody determinations, which are controlled by § 42-364, are considered special proceedings. Accordingly, if the district court's order affected a substantial right of Reitz', it would be considered a final order. We have stated that a parent "has a liberty interest in raising her or his child, a concept which encompasses the child's custody, care, and control." *In re Interest of R.G.*, 238 Neb. at 416, 470 N.W.2d at 789. "[T]he relationship between parent and child is

constitutionally protected." *Quilloin v. Walcott*, 434 U.S. 246, 255, 98 S. Ct. 549, 54 L. Ed. 2d 511 (1978). It is thus clear that the district court's order affected a substantial right of Reitz' and is a final order. The Court of Appeals was correct in so ruling.

CUSTODY

The Court of Appeals correctly recognized that ordinarily, custody of a minor child will not be modified unless there has been a material change of circumstances showing that the custodial parent is unfit or that the best interests of the child require such action. *Hibbard v. Hibbard*, 230 Neb. 364, 431 N.W.2d 637 (1988). The party seeking the modification has the burden of showing such a change of circumstances. *Peterson v. Peterson*, 239 Neb. 113, 474 N.W.2d 862 (1991). Although the trial court found that Ringer had made such a showing, thus warranting a change in custody, the Court of Appeals held that he "clearly failed to carry his burden of proof." *State ex rel. Reitz v. Ringer*, 2 NCA 688, 698 (1993).

The Court of Appeals, citing *Haake v. Haake*, 215 Neb. 889, 341 N.W.2d 911 (1983), noted that this court has previously held that removal of a child from the state, without more, does not amount to a change of circumstances warranting a change of custody.

In *Hibbard v. Hibbard, supra*, we found that a father's denial of a mother's visitation rights, together with his removal of their children from the United States without the court's permission, constituted a material change of circumstances justifying transfer of custody. We have often held that visitation is a key ingredient of raising children, and it is in their best interests to be with their respective parents to the utmost. *Id.*; *Clark v. Clark*, 228 Neb. 440, 422 N.W.2d 793 (1988); *Heyne v. Kucirek*, 203 Neb. 59, 277 N.W.2d 439 (1979).

Here, Reitz' move resulted in a denial of Ringer's court-ordered visitation rights. The trial court properly determined that modification was warranted.

We must review, however, whether the modification made was appropriate. The trial court entered the following order modifying its previous custody determination:

> A material change in circumstances has taken place and it would be in the best interests of the minor child that neither party have legal custody and that the Court take legal custody of the child until further Order. Physical possession shall be placed with the paternal grandparents until Petitioner serves her jail sentence and establishes a permanent residence within the 13th Judicial District in the State of Nebraska. Petitioner shall be responsible for scheduling a hearing and giving notice to the Respondent of the date and time of the scheduled hearing. . . .

The Court of Appeals held: "A review of the record does not support a conclusion of extraordinary circumstances such as would support the court's acquiring legal custody of the child." *State ex rel. Reitz v. Ringer*, 2 NCA at 697-98. The Court of Appeals faulted the trial court for failing to make specific findings concerning Reitz' or Ringer's fitness before taking custody of the child. The Court of Appeals applied the following rule from *Ensrud v. Ensrud*, 230 Neb. 720, 725, 433 N.W.2d 192, 196 (1988):

> [I]f a parent is fit to have custody of a child involved in a dissolution proceeding, a court's acquired and retained legal custody of such child should be a rare disposition warranted only in the extraordinary situation where the court lacks adequate information concerning the best interests of the child in relation to the custody question.

In *Ensrud*, there was absolutely no issue of parental fitness; the trial court was deciding which of the two parents would be the custodial parent. The issue facing the trial court was what was in the best interests of the child. Although in *Ensrud* we suggested that a court must always, prior to acquiring custody of a minor, make a preliminary determination as to parental fitness, there can be no such requirement when the court wishes to take custody so that it can acquire further information on parental fitness. Here, the trial court acknowledged that it needed more information in order to make an informed decision regarding parental fitness. Requiring the trial court to rule on parental fitness before that information is obtained would put the "cart before the horse." *Ensrud* is, therefore,

inapplicable.

Bartlett v. Bartlett, 193 Neb. 76, 225 N.W.2d 413 (1975), is instructive on the issue of parental fitness in this context. In *Bartlett*, we stated:

> It is evident that when a court finds it necessary to place custody of minor children in the court, it does so because it is doubtful that it is cognizant of the full story relating to the best interests of the children and of the propriety of awarding custody to one of the parties. Such an order is ordinarily temporary and probationary in nature and reserves in the court the power to make further summary disposition of minor children when it becomes apparent that their best interests require it.

193 Neb. at 79, 225 N.W.2d at 415-16.

The Court of Appeals' reliance on *Uhing v. Uhing*, 241 Neb. 368, 488 N.W.2d 366 (1992), and *Nielsen v. Nielsen*, 207 Neb. 141, 296 N.W.2d 483 (1980), is misplaced. Both of those cases addressed grants of permanent custody to third parties. Here the issue is temporary custody. The trial court acquired custody temporarily so it could further investigate the issue of permanent custody.

In light of the foregoing, we find that the Court of Appeals was in error in deciding that the trial court was required to determine that both parents were unfit before taking custody of the child. The requirements of *Nielsen* and its progeny do not apply when a court is merely taking custody of a child temporarily, pending a determination of permanent custody. The trial court properly took temporary custody of the child when it was unsure either parent was fit. Moreover, at the time the court took custody, the child's psychotherapist believed the child should not be placed in the custody of the father, and the court knew the mother was going to be put in jail for contempt. Assuming custody until the situation changed and further information was obtained appeared to be the court's only viable option.

However, requiring that Reitz establish a permanent residence within the 13th judicial district before seeking to regain custody was unwarranted. An award of custody should not be interpreted as a sentence to immobilization. *Vanderzee v.*

Vanderzee, 221 Neb. 738, 380 N.W.2d 310 (1986); *Korf v. Korf*, 221 Neb. 484, 378 N.W.2d 173 (1985); *Boll v. Boll*, 219 Neb. 486, 363 N.W.2d 542 (1985); *Gottschall v. Gottschall*, 210 Neb. 679, 316 N.W.2d 610 (1982). When we say it is the best policy to keep minor children within the "jurisdiction," we are referring to the jurisdiction of the state. See *id.* It was an abuse of discretion by the trial court to require that Reitz live within the confines of the 13th judicial district. Where the father can only contribute $100 per month and the mother, having lost her job, can obtain gainful employment out of the state, it would seem that the best interests of the child would necessitate allowing the mother to leave the jurisdiction of the state if gainful employment can be found elsewhere.

Ringer next assigns as error the Court of Appeals' finding that Reitz was not required to seek the trial court's permission before removing the child from the jurisdiction. In regard to this issue, the Court of Appeals stated: "[N]o case law could be found requiring a custodial parent to receive written permission prior to leaving the jurisdiction, where the original decree did not place a travel restriction on the custodial parent." *State ex rel. Reitz v. Ringer*, 2 NCA 688, 695 (1993). However, this court has held that whenever removal from the jurisdiction is contemplated, application should be made to the court and a full disclosure made of the advantage to the child if consent is given for such change of residence. *Osborn v. Osborn*, 143 Neb. 1, 8 N.W.2d 444 (1943). Although we may not have had occasion to state this rule under the precise circumstances of this case, it is nonetheless the law in Nebraska that before a custodial parent can remove a child from the state, permission of the court is required, whether or not there is a travel restriction placed on the custodial parent. *Id.* See, also, *Gerber v. Gerber*, 225 Neb. 611, 407 N.W.2d 497 (1987) (generally, a custodial parent seeking removal of a child from the jurisdiction must establish that removal is in the best interests of the child and must demonstrate that departure from the jurisdiction is the reasonably necessary result of the custodial parent's occupation, a factually supported and reasonable expectation of improvement in the career or occupation of the custodial parent, or required by the custodial parent's

remarriage); *Parsons v. Parsons*, 219 Neb. 736, 365 N.W.2d 841 (1985) (trial court did not abuse its discretion in denying a mother's application to leave the state, where the mother admitted she moved with her children to another state without the consent of the court); *Prell v. Prell*, 181 Neb. 504, 149 N.W.2d 104 (1967) (custodial parent's removal of children from the state without the consent of the parent with visitation rights or the court was a sufficient change of circumstances justifying the court in reducing the amount of child support payments).

Therefore, the trial court's finding that Reitz "beyond a reasonable doubt" did "willfully violate the laws of the state of Nebraska in that she did remove the child from the state of Nebraska without the written permission of this Court" was correct. However, that is not to say that its judgment of contempt was proper.

At the conclusion of the contempt proceedings, the trial court addressed Reitz and stated:

> I do believe that you intentionally moved to the state of Arizona without notifying the respondent for the sole and only purpose of prohibiting him from exercising those visitation rights and attempting to alienate the minor child from his father.
>
> For that reason, it would be the judgment of this Court that you be sentenced to the Keith County Jail for a period of 30 days and that jail sentence will commence at the conclusion of this hearing.

This statement suggests that the nature of the imposed sanction was punitive. The trial court was not trying to exact compliance with its order; rather, it was punishing Reitz for her completed act of disobedience. That the sanction was punitive does not establish the nature of the contempt proceedings for the purposes of review. The character, nature, or purpose of a contempt proceeding is determined by the procedure used in a trial to determine whether there is contempt and the sanction imposed. *Dunning v. Tallman, ante* p. 1, 504 N.W.2d 85 (1993).

In this case, the procedures used are of little help in determining the nature of these contempt proceedings. It was not the State, but, rather, Ringer who initiated these contempt proceedings. In criminal contempt proceedings where the act

charged was not committed in the presence of the court, the prosecution should be in the name of the State and by information. *McFarland v. State*, 172 Neb. 251, 109 N.W.2d 397 (1961). Reitz was then instructed by the court that she could claim her Fifth Amendment privilege against self-incrimination, as in criminal contempt proceedings. The procedures used were thus partly indicative of criminal contempt and partly indicative of civil contempt.

We have previously encountered a case in which civil contempt procedures were used, and the sanction imposed was punitive, *In re Contempt of Sileven*, 219 Neb. 34, 361 N.W.2d 189 (1985). The proceedings in that case were noticed as civil, and the contemner was not advised of his rights against self-incrimination, but was sentenced punitively. There we determined that the contempt proceedings were civil in nature. We held the criminal sanction invalid, since imposed in a proceeding that was instituted and tried as civil contempt. The same result is appropriate here.

That the trial court later amended Reitz' sentence so that she could purge herself of the jail time is of no consequence. Allowing her release upon the payment of $720 to Ringer's attorney did not change the punitive sanction into a coercive one. The trial court made clear that the purpose of the sentence was to punish Reitz for removing her child from the jurisdiction. Reitz was not being sanctioned for the failure to pay Ringer's attorney. Here, even after the court amended the sentence, there was no way for Reitz to avoid paying the $720. The fine was absolute and not subject to mitigation.

> In the coercive sanction . . . the contemner holds the keys to his jail cell, in that the sentence is conditioned upon his continued noncompliance. The punitive sanction is much like the sentence in a criminal case, in that it is absolute and not subject to mitigation if the contemner alters his future conduct toward the court . . . .

In re Contempt of Liles, 216 Neb. 531, 534, 344 N.W.2d 626, 628-29 (1984). The fine only served to increase an already excessive sentence.

We note that the usual procedure on appeal in such a case is to reverse the citation for contempt and remand the cause to the

trial court in order that a proper civil penalty can be imposed or in order that a criminal proceeding can be conducted. *In re Contempt of Sileven, supra.* Here, however, given that Reitz has already spent 30 days in jail, we decline to follow the usual procedure. Instead, we affirm those parts of the Court of Appeals' judgment in which Reitz' conviction for criminal contempt was set aside; the award of $720 in attorney fees to Ringer was reversed; and Reitz' remaining sentence, if any, was vacated.

The Court of Appeals awarded Reitz reasonable attorney fees for representation at the trial, and Reitz has requested that this court award her attorney fees for representation before this court and the Court of Appeals.

In Nebraska, the general rule is that an attorney fee may be recovered only when authorized by statute, or when a recognized and accepted uniform course of procedure allows recovery of an attorney fee. *Dunning v. Tallman, ante* p. 1, 504 N.W.2d 85 (1993).

Attorney fees were authorized by Neb. Rev. Stat. § 42-351 (Supp. 1991) for proceedings to modify custody which arise out of dissolution of marriage cases. See *Nimmer v. Nimmer*, 203 Neb. 503, 279 N.W.2d 156 (1979). See, also, *Lainson v. Lainson*, 219 Neb. 170, 362 N.W.2d 53 (1985). However, this custody dispute arose out of a filiation proceeding, and no statute authorizes an award of attorney fees in such a proceeding. No uniform course of procedure allows recovery, either. The Court of Appeals, therefore, erred in awarding Reitz attorney fees for representation at the trial. For the same reason, we deny the motion for attorney fees Reitz filed in this court.

Ringer lastly contends that the Court of Appeals failed to give "great weight" to the fact that the trial court had the opportunity to see and hear the witnesses and accepted one version of the facts over another, and that this case should have been remanded for further proceedings to determine what was in the best interests of the child.

In de novo review, " ' "when the evidence is in conflict, [an 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." ' " (Emphasis supplied.) *Schulze v. Schulze*, 238 Neb. 81, 84, 469 N.W.2d 139, 141-42 (1991). Under this standard, an appellate court is not required to give any weight to the trial court's findings, much less great weight. Accordingly, this argument is without merit.

CONCLUSION

Although the trial court's order was final so that the Court of Appeals had jurisdiction of the case, the Court of Appeals erroneously held that a trial court must find both parents unfit before acquiring temporary legal custody of a child. The Court of Appeals also erroneously determined that when a divorce decree is silent on the matter, a custodial parent is not required to obtain permission from the courts before removing a child from this jurisdiction.

The Court of Appeals properly set aside Reitz' conviction for criminal contempt and the trial court's award of $720 in attorney fees to Ringer. However, with regard to the rest of the Court of Appeals' judgment: The Court of Appeals is directed to remand this cause to the district court, which shall make a determination of permanent custody; pursuant to its award of custody, the trial court shall require that child support payments be in accordance with the Nebraska Child Support Guidelines; and the Court of Appeals' award of reasonable attorney fees to Reitz for the trial below is reversed, and Reitz' motion for attorney fees for representation before this court and the Court of Appeals is denied.

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

SHANAHAN, J., not participating in the decision.

WHITE, J., dissenting.

The majority concludes, in part, that the district court properly took legal custody of the minor child. I respectfully dissent.

The majority finds that there has been a material change in circumstances warranting modification of the decree. The majority then addresses whether the ordered modification was proper, that is, whether the court properly obtained legal custody of the child. In this context, the majority confronts our

opinion in *Ensrud v. Ensrud*, 230 Neb. 720, 433 N.W.2d 192 (1988).

In *Ensrud*, we held that a court may take legal custody of a child in a dissolution proceeding only if both parents are unfit or if the court lacks adequate information regarding the best interests of the child. Although the majority states that *Ensrud* does not apply, the majority in fact expands the *Ensrud* rule and holds that a court may also take legal custody of a child if the court lacks adequate information regarding the parents' fitness. In applying the expanded rule, the majority assumes that the trial court in the present case lacked information regarding the parents' fitness and concludes that the court was therefore justified in taking legal custody.

I disagree with the majority's assumption and conclusion. In the present case, the trial court did not lack information regarding the fitness of *both* parents.

The father's fitness was called into question by the mother. In her answer, the mother alleged that the father was an unfit parent. The mother testified to support this allegation. The mother also presented an expert who testified that it would not be in the child's best interests to grant custody to the father. The trial court stated that it viewed the mother's testimony with some skepticism. Nevertheless, the trial court respected the expert as a witness with an unbiased opinion. Arguably, then, the trial court may have concluded that the father's fitness required further investigation.

The mother's fitness, however, was never called into question. There were neither allegations nor evidence to suggest that the mother was unfit. The mother's only failings as a parent were (1) that she would be in jail on contempt charges for 30 days and (2) that she had previously taken the child out of the state without the court's permission. Even if these failings raised a question of the mother's fitness—which I do not purport to decide—both of these failings were fully known to the court at the time of the hearing; neither of these failings required further investigation.

In fact, the trial court never explicitly addressed the parents' fitness. Instead, the trial court stated that "it would be in the best interests of the minor child that neither party have legal

custody and that the Court take legal custody of the child at this time until further order." The trial court's custody order does not mention fitness, but instead echoes the "best interests" language.

I would find that the trial court did not lack information regarding the mother's fitness. The trial court was not entitled to take legal custody of the minor child under the expanded *Ensrud* rule.

I would also find that the trial court was not entitled to take legal custody of the minor child under the old *Ensrud* rule. The trial court did not find that either the mother or the father was unfit. As a general rule, unfitness must be affirmatively established. See *Peterson v. Peterson*, 224 Neb. 557, 399 N.W.2d 792 (1987). The trial court also did not find that this was one of the extraordinary situations in which the court lacked information as to the best interests of the child. See *Ensrud, supra*.

The record reflects that the trial court had no need to investigate fitness, that the parents were not affirmatively adjudicated to be unfit, and that the court did not lack information as to the best interests of the child. Therefore, the trial court could not properly retain legal custody of the child.

CAPORALE, J., joins in this dissent.

STATE OF NEBRASKA, APPELLEE AND CROSS-APPELLANT, V. JESSE L. PERRIGO, APPELLANT AND CROSS-APPELLEE.

510 N.W.2d 990

Filed January 21, 1994. No. S-92-1050.

1. **Rules of Evidence: Other Acts.** Neb. Evid. R. 404(2) (Neb. Rev. Stat. § 27-404(2) (Reissue 1989)) is an inclusionary rule permitting the use of relevant, specific acts for all purposes except to prove character of a person in order to show that such person acted in conformity with character.
2. _____: _____. Neb. Evid. R. 404(2) (Neb. Rev. Stat. § 27-404(2) (Reissue 1989)) is subject to the overriding protection of Neb. Evid. R. 403 (Neb. Rev. Stat. § 27-403 (Reissue 1989)).
3. _____: _____. The purposes set forth in Neb. Evid. R. 404(2) (Neb. Rev. Stat.

§ 27-404(2) (Reissue 1989)) are illustrative only and not intended to be exhaustive or mutually exclusive.

4. **Criminal Law: Trial: Evidence: Stipulations.** Refusal of a trial court to accept an offer by a defendant to stipulate to an essential element of the alleged offense ordinarily constitutes no ground for a new trial.
5. **Prior Convictions: Evidence: Proof.** If evidence of a prior conviction is relevant to establish elements of another crime, and if the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice, the State may prove a prior conviction in any permissible manner.

Appeal from the District Court for Douglas County: LAWRENCE J. CORRIGAN, Judge. Affirmed.

Thomas M. Kenney, Douglas County Public Defender, and Janine F. Ucchino for appellant.

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

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, FAHRNBRUCH, and LANPHIER, JJ., and MORAN, D.J., Retired.

MORAN, D.J., Retired.

Jesse L. Perrigo appeals his convictions of first degree murder, see Neb. Rev. Stat. § 28-303 (Reissue 1989), a Class I felony; use of a firearm to commit a felony, see Neb. Rev. Stat. § 28-1205 (Reissue 1989), a Class III felony; and possession of a firearm by a felon, see Neb. Rev. Stat. § 28-1206 (Reissue 1989), a Class IV felony. Perrigo was sentenced to life in prison for conviction of first degree murder, 10 years' imprisonment for conviction of use of a firearm to commit a felony, and 5 years' imprisonment for conviction of possession of a firearm by a felon, all sentences to be served consecutively. The State cross-appeals the district court's refusal to give one of the State's proposed jury instructions.

FACTUAL BACKGROUND

Around 1 a.m. on November 29, 1991, the morning after Thanksgiving, the body of Jerry Lee Linkenhoker was found in the street by a passing motorist near 144th Street and Military Avenue in Douglas County. Linkenhoker, a cabdriver for Happy Cab, had been last dispatched around 12:21 a.m. to pick up a fare at 72d and Blondo Streets in Omaha at the request of a

caller who gave the name "Schaefer." An autopsy of Linkenhoker revealed that he died of multiple .32-caliber gunshot wounds.

Later the night of November 29, the Douglas County sheriff's investigation led deputies to the home of Jesse L. Perrigo. At the deputies' request, and after being apprised of the investigation, Perrigo and his father, in whose basement Perrigo lived, consented to a search of the home.

During the consensual search of the basement, a brown, leather-type briefcase was found. Inside the briefcase was a .32-caliber six-shot Colt revolver and some of Linkenhoker's personal effects. Perrigo was then arrested for being a felon in possession of a firearm and was read his *Miranda* rights. In response to the deputies' questions, Perrigo stated that Brian Schaefer had given him the gun and the briefcase earlier that day.

Deputy Pamela Giangrosso testified about her questioning Perrigo at the Douglas County sheriff's road patrol office. After being advised of his *Miranda* rights, Perrigo told her that Schaefer gave Perrigo the briefcase containing the gun and the cabdriver's effects to hide. Perrigo initially told Giangrosso that he had spent the evening of November 28 by himself at Robert J's Pub, staying there until the bar closed. However, Perrigo later changed his story, telling Giangrosso that he and Schaefer planned to go to a party at 144th and Military and that Schaefer called for a cab to pick them up at the Burger King near 72d and Blondo.

Perrigo told Giangrosso that while Schaefer and he were in the cab, Schaefer told Perrigo they should jump out of the cab and not pay the fare once the cab reached the destination given to the driver. According to Perrigo, once the cab reached the designated point, he jumped from it and ran into a field, hearing gunshots being fired from the area of the cab as he ran. Perrigo said that he ran through the nearby fields to a barn or outbuilding and fell asleep for "a couple of hours." On awakening, he walked home, not returning to the area where he had jumped from the cab. Perrigo told Giangrosso that he did not know where Schaefer went after the shooting or how Schaefer got home.

Giangrosso testified without objection that Perrigo admitted he had stolen a .32-caliber gun and some money from Danny's Bar earlier in the week, in contradiction to what Perrigo had previously told Giangrosso. However, Perrigo denied being in possession of the gun. At that point, the interrogation was interrupted briefly, and Giangrosso was informed outside the interview room that Perrigo had become the suspect in the homicide investigation. Giangrosso then confronted Perrigo with articles of clothing, believed to be bloodstained, found during the search of his home, and with pictures of Linkenhoker at the crime scene and at the morgue prior to autopsy, including a picture showing Linkenhoker's watch pulled down onto his hand. Perrigo insisted that while he had been in Linkenhoker's cab with Schaefer, he was not in the cab when the shooting occurred. The interview then ended, and Perrigo was booked on the charge of criminal homicide and transported to the county's corrections facility.

Shortly after Perrigo was taken to the corrections facility, he insisted on seeing Giangrosso. Giangrosso went to meet with Perrigo, and advised him again of his *Miranda* rights.

Perrigo then changed his account and admitted to Giangrosso that he had taken Linkenhoker's cab from 144th and Military after the shooting. He told Giangrosso that after the shooting, he returned to the cab and found the driver slumped over the steering wheel. He then pulled Linkenhoker out of the cab and drove the cab home. Perrigo said that the reason Linkenhoker's watch was pulled down over his hand was not because Perrigo had attempted to take the watch, but because it got pulled down as Perrigo dragged the driver's body out of the cab. Perrigo admitted that the jeans Giangrosso had shown him earlier were his, and told her that the jeans were probably stained with Linkenhoker's blood, since Perrigo sat in the driver's seat, where Linkenhoker had been shot, as Perrigo drove the cab away from the scene. Further changing his version of the facts, Perrigo admitted that he had suggested to Schaefer that they go out on Thanksgiving evening and do a robbery. However, Perrigo later changed his mind. Perrigo continued to claim he was not in the cab at the time of the shooting. However, Perrigo admitted that he, not Schaefer, had

called for the cab that night. Throughout questioning, Perrigo denied shooting Linkenhoker, maintaining instead that Schaefer did the killing.

Schaefer testified that he saw Perrigo on Tuesday, November 26, 1991. That day, Perrigo showed Schaefer a bank bag with money in it and a .32-caliber gun. Schaefer identified the gun found during the search of Perrigo's home as the same gun he had seen on November 26. Over Perrigo's objection, Schaefer testified that Perrigo told him that Perrigo had stolen the gun, money, and a bank bag from Danny's Bar. Schaefer testified that Perrigo called him several times on Thanksgiving Day, November 28. Schaefer said that around 8 o'clock Thanksgiving evening, Perrigo called and asked Schaefer if he wanted to "go out and make some money." Schaefer told Perrigo that he would think about it. Schaefer testified that he called Perrigo around 9 o'clock Thanksgiving evening and told Perrigo he would not go out with him. Schaefer said he last talked to Perrigo that night sometime after 11:15 and again told Perrigo that he would not go out with him. Schaefer testified that he slept that night in the apartment living room of his grandmother's with whom he stayed. Schaefer's cousin slept on the couch, while Schaefer's great-uncle and Schaefer slept on the floor.

Schaefer testified that during the day of November 29, 1991, Perrigo called him. Perrigo told Schaefer that Perrigo had gone out the night before and "did something very bad last night, and, phew, I almost got caught." In conversations later that day, Perrigo told Schaefer nothing about what had happened the night before. Late on November 29, Schaefer called Perrigo from a bar. Perrigo told Schaefer in that conversation that "the cops were at [Perrigo's] house questioning him about a cab driver."

Over Perrigo's objection, Danny Arcuri, the owner of Danny's Bar, testified that his bar had been burglarized on November 26, 1991. During the burglary, a .32-caliber Colt revolver was stolen. Arcuri identified the gun found during the search of Perrigo's home as the gun taken during the burglary of his bar. At Perrigo's request, the trial court gave a limiting instruction concerning Arcuri's testimony, telling the jury that

Arcuri's testimony about the burglary of Danny's Bar was to be used only in determining the voluntariness and truthfulness of Perrigo's statement to Giangrosso and whether Perrigo's admission was corroborated.

Mark Bohaty, a firearms and tool-mark examiner for the Nebraska State Patrol Criminalistics Laboratory, testified that marks on the test-fired bullets and on bullets found in Linkenhoker's body were consistent with the general characteristics of marks made on bullets fired by Colts of the .32-caliber weapon's design. However, Bohaty further testified that the gun found in Perrigo's home lacked the "unique peculiarities needed for absolute positive identification." In other words, the gun failed to leave its "fingerprints" on test-fired bullets. Therefore, Bohaty was unable to positively determine whether the bullets found in Linkenhoker's body were or were not fired from the gun found in Perrigo's possession.

Before trial, Perrigo moved in limine to prevent introducing into evidence the nature of Perrigo's prior felony conviction and the burglary of Danny's Bar. Both motions in limine were overruled. Perrigo preserved those issues on appeal by objections at trial. The State rejected Perrigo's offer to stipulate that he was a convicted felon for the purpose of the felon in possession of a firearm charge. Instead, the State offered, over Perrigo's objection, a certified copy of the judgment and sentence for Perrigo's prior conviction for attempted burglary. In instructing the jury, the court gave a limiting instruction that the prior felony conviction was to be considered to establish one of the elements of the crime of possession of a firearm by a felon, and repeated its limiting instruction concerning the burglary of Danny's Bar. Perrigo was convicted of first degree murder, use of a firearm to commit a felony, and possession of a firearm by a felon.

ASSIGNMENTS OF ERROR

Perrigo assigns as error the district court's admission of evidence concerning the nature of his prior felony conviction and prior bad acts, specifically, the burglary of Danny's Bar.

STANDARD OF REVIEW

"[I]n all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by the Nebraska Evidence Rules, not judicial discretion, except in those instances under the Nebraska Evidence Rules when judicial discretion is a factor involved in admissibility of evidence . . . ." *State v. Messersmith*, 238 Neb. 924, 936, 473 N.W.2d 83, 92 (1991). Accord, *State v. Toney*, 243 Neb. 237, 498 N.W.2d 544 (1993); *State v. Jacob*, 242 Neb. 176, 494 N.W.2d 109 (1993); *State v. Thomas*, 240 Neb. 545, 483 N.W.2d 527 (1992). "Although the word 'discretion,' in one form or another, does not appear in either Rule 401 or Rule 403, nevertheless, judicial discretion, as a factor in admissibility, is implicit in Rule 401, concerning the admission of relevant evidence, and Rule 403, regarding exclusion of relevant evidence." *State v. Messersmith*, 238 Neb. at 936, 473 N.W.2d at 92.

"OTHER ACTS" EVIDENCE

To be admissible, evidence must be relevant and not subject to exclusion under the U.S. or Nebraska Constitutions, federal or state statutes, or rules adopted by the Nebraska Supreme Court. See Neb. Evid. R. 402 (Neb. Rev. Stat. § 27-402 (Reissue 1989)). Evidence not relevant is inadmissible. *Id.* "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. 404(2) (Neb. Rev. Stat. § 27-404(2) (Reissue 1989)) is a rule of relevance. See *State v. Coca*, 216 Neb. 76, 341 N.W.2d 606 (1983).

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

Rule 404(2).

> "Rule 404(2) of the Nebraska Evidence Rules is an inclusionary rule permitting the use of relevant, specific

> acts for all purposes except to prove character of a person in order to show that such person acted in conformity with character. Thus, Rule 404(2) permits evidence of other acts if such acts are relevant for any purpose other than to show a defendant's propensity or disposition to commit the crime charged."

State v. Clancy, 224 Neb. 492, 497, 398 N.W.2d 710, 714-15 (1987), *disapproved on other grounds, State v. Culver*, 233 Neb. 228, 444 N.W.2d 662 (1989). Accord, *State v. Phelps*, 241 Neb. 707, 490 N.W.2d 676 (1992); *State v. Timmerman*, 240 Neb. 74, 480 N.W.2d 411 (1992); *State v. Craig*, 219 Neb. 70, 361 N.W.2d 206 (1985).

"However, Rule 404(2) is subject to the overriding protection of Rule 403 of the Nebraska Evidence Rules . . . ." *State v. Craig*, 219 Neb. at 77, 361 N.W.2d at 213. See, *State v. Phelps, supra*; *State v. Jacobs*, 226 Neb. 184, 410 N.W.2d 468 (1987). "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)). While most, if not all, evidence offered by a party is "calculated to be prejudicial to the opposing party," only evidence tending to suggest a decision on an improper basis is "unfairly prejudicial" and a concern under rule 403. *State v. Phelps*, 241 Neb. at 722-23, 490 N.W.2d at 688. See, *State v. Messersmith*, 238 Neb. 924, 473 N.W.2d 83 (1991); *State v. Lonnecker*, 237 Neb. 207, 465 N.W.2d 737 (1991). In summary, rule 404(2) requires a two-step inquiry. See *United States v. Beechum*, 582 F.2d 898 (5th Cir. 1978), *cert. denied* 440 U.S. 920, 99 S. Ct. 1244, 59 L. Ed. 2d 472 (1979). First, relevance of the evidence at issue is determined. Rule 404(2) permits admission of other acts evidence if it is relevant to prove some fact of consequence other than the defendant's bad character. See, *State v. Phelps, supra*; *State v. Timmerman, supra*; *State v. Clancy, supra*; *State v. Craig, supra*. Second, rule 403 requires a determination of whether the probative value of the other acts evidence is substantially outweighed by the danger of unfair prejudice.

The principal issue at trial was the identity of the person who killed Linkenhoker. Perrigo asserted in his statements to Giangrosso that Schaefer, not himself, shot and killed Linkenhoker. Perrigo also asserted that Schaefer had given him the briefcase containing the .32-caliber gun and Linkenhoker's personal effects.

On appeal, Perrigo argues that the State offered evidence of the bar burglary and the gun's origin "merely to show Perrigo was a common thief and was acting in conformity therewith." Brief for appellant at 9. Perrigo further argues that the evidence of the burglary could not withstand a rule 403 balance. We disagree.

The identity of the crime's perpetrator was put in issue by Perrigo's statements to Giangrosso. Therefore, who shot Linkenhoker was a fact of consequence at trial. Perrigo admitted taking the .32-caliber gun in the burglary of Danny's Bar a few days before the shooting. His possession of the gun after the shooting, coupled with Schaefer's alibi, discredited Perrigo's story blaming Schaefer for Linkenhoker's death and naming Schaefer as the source of the gun found in Perrigo's possession. Evidence concerning the gun's origin in the bar burglary established that Perrigo possessed the gun before Linkenhoker was killed. When we link the evidence of Schaefer's alibi and the gun that was found in Perrigo's possession after the shooting, we find it more likely that the gun was in Perrigo's possession at the time Linkenhoker was killed. Therefore, the evidence of the burglary of Danny's Bar was relevant under rule 404(2).

The evidence of the bar burglary was also relevant to show Perrigo's opportunity to commit the crime charged. While Wright and Graham note that the meaning of "opportunity" in rule 404 is somewhat mysterious, they conclude that "opportunity" likely means what Wigmore termed "capacity," that is, a "person's physical or mental ability to perform the act in question." 22 Charles A. Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure: Evidence § 5241 at 485 (1978). According to Wright and Graham, no inference concerning a defendant's character is necessary with regard to opportunity, since "the definition of 'character' does not include physical or

mental ability." *Id.* Noting that this opportunity or capacity evidence would often be used to identify the defendant as the one who did the crime, Wright and Graham state that "the ability shown must not be one shared by the entire populace." *Id.* at 486.

Other state and federal courts have recognized the relevance of other acts evidence regarding opportunity or capacity. In *State v. Brooks*, 57 Or. App. 98, 643 P.2d 1324 (1982), the state argued that evidence concerning the theft and resale of certain weapons was necessary to account for the never-found murder weapon's origin and the later discovery of the holster for the missing gun in the defendant's house. The Court of Appeals of Oregon determined that the evidence was admissible because evidence of the theft of the weapons and their resale corroborated an accomplice's testimony and "went far toward showing defendant's opportunity to commit the crime." *Id.* at 107, 643 P.2d at 1330.

In *People v Billington*, 116 Mich. App. 220, 323 N.W.2d 343 (1982), the prosecution introduced other acts evidence that the defendant and three others had stolen the murder weapon, a .270-caliber rifle, during a burglary. In upholding the admission of the other acts evidence, the Court of Appeals of Michigan stated: "[T]he prior breaking and entering was clearly relevant to establish defendant's access to the murder weapon, which fact tends to refute his claimed defense that he did not participate in the shooting and thus had no intent to commit the charged crime." *Id.* at 231, 323 N.W.2d at 348.

The U.S. Court of Appeals for the Tenth Circuit in *United States v. Waldron*, 568 F.2d 185 (10th Cir. 1977), *cert. denied* 434 U.S. 1080, 98 S. Ct. 1276, 55 L. Ed. 2d 788 (1978), upheld the admissibility of other acts evidence under Fed. R. Evid. 404(b). At trial, evidence of a prior burglary was admitted by the defendant and an accomplice, in which burglary guns were stolen which were later used in the charged bank robbery. An accomplice testified that the defendant retained possession of the guns. The 10th Circuit concluded that evidence of the defendant's possession of the weapons was "highly probative" of the issue of identity. *United States v. Waldron*, 568 F.2d at 187. See, also, *United States v. Covelli*, 738 F.2d 847 (7th Cir.

1984), *cert. denied* 469 U.S. 867, 105 S. Ct. 211, 83 L. Ed. 2d 141.

The evidence concerning the bar burglary established Perrigo's possession of a particular .32-caliber gun before Linkenhoker's murder. While no doubt many .32-caliber guns are possessed among the general public, the possession of this particular gun, taken from Danny's Bar, was unique to Perrigo because, unlike other guns, this particular weapon failed to leave distinctive marks on the .32-caliber bullets found lodged in Linkenhoker's body or on bullets test-fired from the weapon by a firearms expert. Possession of this gun before the murder provided Perrigo the opportunity or capacity to use this gun in the crime charged, thereby identifying Perrigo as the one who shot and killed Linkenhoker. Thus, evidence of the bar burglary in which the gun was stolen was relevant under rule 404(2).

Because the admissibility of other acts evidence under rule 404(2) is subject to rule 403, we must consider whether the probative value of the gun's origin in the bar burglary is substantially outweighed by the danger of unfair prejudice or other factors listed in rule 403, such as misleading the jury, confusing the issues, or undue delay. See rule 403.

" 'Probative value is a relative concept; the probative value of a piece of evidence involves a measurement of the degree to which the evidence persuades the trier of fact that the particular fact exists and the distance of the particular fact from the ultimate issues of the case.' " *State v. Bostwick*, 222 Neb. 631, 639, 385 N.W.2d 906, 912 (1986) (quoting Andrew K. Dolan, *Rule 403: The Prejudice Rule in Evidence*, 49 S. Cal. L. Rev. 220 (1976)). Accord, *State v. Messersmith*, 238 Neb. 924, 473 N.W.2d 83 (1991); *State v. Baltimore*, 236 Neb. 736, 463 N.W.2d 808 (1990). "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, 741 (1991). Accord *State v. Messersmith, supra*.

Evidence of the bar burglary placed this particular gun in Perrigo's possession before the crime, thereby linking him to the shooting of Linkenhoker. Evidence of the bar burglary corroborates Schaefer's testimony. Furthermore, Perrigo's

obtaining the gun in the burglary before the murder provided him an opportunity to use the gun to shoot Linkenhoker, which situation also links Perrigo to the shooting.

The probative value of the burglary evidence was not outweighed by the danger of unfair prejudice or any other factor listed in rule 403. The district court's limiting instruction restricted the jury's use of the evidence and minimized the tendency to suggest a decision on an improper basis. See Neb. Evid. R. 105 (Neb. Rev. Stat. § 27-105 (Reissue 1989)) (restrictive instruction on the proper use of evidence admissible for one purpose but inadmissible for another). Consequently, the court's instruction reduced possible prejudice due to admission of the bar burglary evidence.

Since the evidence concerning the burglary of Danny's Bar was relevant under rule 404(2), and since its probative value was not outweighed by the danger of unfair prejudice under rule 403, evidence of the burglary was properly admitted.

EVIDENCE OF PRIOR FELONY CONVICTION

Perrigo argues that evidence of his prior felony conviction for attempted burglary was offered by the State "solely to show that Perrigo was a thief and acted in conformity with this bad character." Brief for appellant at 8. He further argues that the probative value of his prior felony conviction was substantially outweighed by the danger of unfair prejudice. We disagree.

It should be noted that rule 404(2)'s list of permissible purposes is not exhaustive. "The 'purposes' set forth in Rule 404(2) are illustrative only and not intended to be exhaustive or mutually exclusive." *State v. Craig*, 219 Neb. 70, 77, 361 N.W.2d 206, 213 (1985). See, *State v. Phelps*, 241 Neb. 707, 490 N.W.2d 676 (1992); *State v. Timmerman*, 240 Neb. 74, 480 N.W.2d 411 (1992). Therefore, if evidence of the prior felony conviction was offered for a purpose other than to show Perrigo's propensity to commit the crime charged, it would be relevant under rule 404(2), and its admissibility would be subject to rule 403.

First, evidence of the prior conviction was offered to establish one of the elements of possession of a firearm by a felon. Therefore, evidence of the prior conviction was relevant

for a reason other than to show Perrigo's propensity to commit the crime charged. Second, the probative value of the prior conviction evidence is not substantially outweighed by the danger of unfair prejudice, since the district court limited the jury's use of the evidence to establish the elements of possession of a firearm by a felon. In light of the court's instruction, we cannot say that the evidence tended to suggest a decision on an improper basis or that Perrigo was unfairly prejudiced. Evidence of Perrigo's prior felony conviction was properly admitted.

Perrigo asserts that the State should not have been permitted to prove the charge of possession of a firearm by a felon by using a copy of the prior judgment, which Perrigo termed "the most prejudicial and inflamatory [sic] evidence available." Brief for appellant at 11. Instead, Perrigo argues that the State should have been required to accept Perrigo's offer to stipulate that he was a felon.

Perrigo further argues that we should by analogy apply our reasoning in *State v. Olsan*, 231 Neb. 214, 436 N.W.2d 128 (1989), which prescribed the parameters for proper impeachment under Neb. Evid. R. 609 (Neb. Rev. Stat. § 27-609 (Reissue 1989)) (impeachment by evidence of conviction of crime). In *Olsan*, we held that a prosecutor's cross-examination of a defendant concerning how many times the defendant had been convicted of felonious escape violated the boundaries established for impeachment by rule 609 and prejudiced Olsan's right to a fair trial. We recognized in *Olsan* that a prosecutor's delving into the nature of a defendant's prior convictions "ravished the rationale of Rule 404, which is equally applicable to Neb. Evid. R. 609 . . . ." 231 Neb. at 225, 436 N.W.2d at 135-36.

We know that rules 404 and 609 have similar rationales. Nevertheless, we decline to fashion a per se rule requiring the State to stipulate to prior convictions. We note that in *State v. Narcisse*, 187 Neb. 209, 188 N.W.2d 715 (1971), we said that refusal of a trial court to accept an offer by the defendant to stipulate to an essential element of the alleged offense ordinarily constitutes no ground for a new trial.

If evidence of a prior conviction is relevant to establish

elements of another crime, and if the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice, the State may prove a prior conviction in any permissible manner. See rules 404(2) and 403. As we said in *State v. Ondrak*, 212 Neb. 840, 842, 326 N.W.2d 188, 189-90 (1982):

> Where conviction of a previous crime is an essential element of the crime charged, proof of prior convictions is properly made by offering in evidence the complaint or information, judgment rendered on the verdict or plea of guilty, evidence that the judgment has become final, and that the defendant in an earlier conviction is the same person presently before the court.

In the present case, the State offered a certified copy of the judgment and sentence from Perrigo's prior conviction of attempted burglary. The trial court limited the jury's use of evidence of the prior felony, reducing the risk the jury would use the evidence improperly. The court's limiting instruction diminished the risk of unfair prejudice, and evidence of Perrigo's prior conviction was properly admitted. Perrigo's assignment of error is without merit. Accordingly, we affirm Perrigo's convictions.

Since we have determined the controversy between the State and Perrigo, we need not address the State's cross-appeal. "It is not our function to render advisory opinions." *State v. Hochstetler*, 214 Neb. 482, 486, 334 N.W.2d 455, 458 (1983). See, also, *Mullendore v. Nuernberger*, 230 Neb. 921, 434 N.W.2d 511 (1989) (existence of case or controversy required for exercise of judicial power in Nebraska).

AFFIRMED.

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