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ALBERT J. PRUSS ET AL., APPELLANTS, V. JAMES PRUSS AND RODNEY L.A. PRUSS, COPERSONAL REPRESENTATIVES OF THE ESTATE OF BESSIE T. PRUSS, ET AL., APPELLEES.

514 N.W.2d 335

Filed April 8, 1994. No. S-92-266.

1. **Actions: Equity: Trusts: Accounting.** An action to impose a constructive trust and an action for an accounting are equitable actions.
2. **Equity: Appeal and Error.** In an appeal of an equity action, an appellate court reviews the record de novo, subject to the rule that where credible evidence is in conflict on material issues of fact, an appellate court will consider and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another.
3. **Trusts: Proof.** A party seeking to have a constructive trust imposed has the burden to establish by clear and convincing evidence the factual foundation required for a constructive trust.
4. **Contracts: Property: Consideration.** An agreement to devise property is, where supported by consideration, valid and enforceable.
5. **Wills: Contracts: Consideration.** A mutual will executed in connection with an agreement based on sufficient consideration is both contractual and testamentary in nature. The contract becomes irrevocable as to the surviving spouse upon the death of the other and the probate of the deceased spouse's contractual will.
6. **Decedents' Estates: Wills: Contracts: Breach of Contract.** If the surviving spouse revokes the mutual contractual will, an action may lie for breach of the contract against the estate of the survivor.
7. **Wills.** To construe a will, the court must give effect to the language of the will in light of the circumstances surrounding the making and execution of the will.
8. **Contracts: Consideration.** The fact that part of a stated consideration is insufficient does not prevent another part of the consideration from operating as sufficient valid consideration to form a contract between the parties.
9. **Wills.** The execution of a subsequent will, like the execution of any will, revokes a prior mutual or joint will.
10. **Contracts: Undue Influence: Proof.** To establish undue influence, the party asserting that theory has the burden to prove (1) that the person who executed the challenged instrument was subject to undue influence, (2) that there was an opportunity to exercise undue influence, (3) that there was an intent to exercise undue influence for an improper purpose, and (4) that the result was clearly a product of the undue influence.
11. **Equity: Undue Influence: Proof.** The burden to prove undue influence is clear and convincing evidence when the case is an equitable action, not a probate action.
12. **Undue Influence.** It is not merely the exercise of influence which invalidates the action; rather, it is the exercise of *undue* influence.
13. _____. There must be a solid factual foundation on which to rest the inference

of the existence of undue influence.

14. **Wills: Undue Influence: Evidence.** A prior will, executed when the testator's mental capacity is unchallenged and as to which the exercise of undue influence is not charged, and which conforms substantially as to the results produced by the instrument contested, may be considered as competent evidence to refute the charge of undue influence.
15. **Wills.** When the language in a will is clear and unambiguous, construction of the will is unnecessary and impermissible.
16. **Wills: Intent.** To discern the intent of the testator from the language of the will, a court must examine the will in its entirety, considering and liberally interpreting every provision. In examining the provisions of the will, the court shall employ the generally accepted literal and grammatical meaning of words used in the will and assume that the testator understood the words stated in the will.
17. **Decedents' Estates: Wills: Contracts: Gifts: Intent.** An agreement that the survivor's entire estate will be left to certain beneficiaries does not prevent a survivor from making lifetime gifts unless such gifts are made with an intent to defraud or are so unreasonable that the result defeats the purpose of the contractual wills.

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

Thomas B. Thomsen, of Sidner, Svoboda, Schilke, Thomsen, Holtorf & Boggy, for appellants.

Larry C. Johnson, of Johnson & Vaughan, P.C., for appellees.

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

WHITE, J.

This appeal arises from an order of the Dodge County District Court in favor of appellees denying appellants' request to have a constructive trust imposed on the estate of Bessie T. Pruss. Appellants contend that Bessie's estate should be distributed pursuant to the mutual and reciprocal wills executed by decedent and her husband in November 1980. We reverse the judgment of the district court and remand the cause for further proceedings.

Bessie and Albert Pruss had nine children: Albert, Francis, Richard, James, Rodney, Emil, Leonard, Theodore, and Edward. Appellants are three of the nine children: Albert,

Francis, and Richard. Appellees are James, Rodney, Emil, Leonard, and Theodore. Edward predeceased Bessie and Albert. Edward was survived by Michael and Carolyn, who are also appellees in the present action. Together, appellants and appellees are the only interested parties in the several wills executed by Bessie and Albert.

In September 1980, decedent and her then living husband, Albert, executed a single document purported to be a joint contractual will (September 1980 will). The September 1980 will was drafted and executed after consultation with their attorney, Lawrence Yost. Also present during the discussions regarding the September 1980 will was Albert, an appellant and the eldest son of Bessie and Albert. The evidence presented at trial indicates that the estate of Bessie and Albert at the time they executed the September 1980 will consisted of their residence, approximately 130 acres of farmland located in Dodge County (which Bessie held in her name only before her September 1980 transfer to Albert of an undivided one-half interest in the farmland), and an expected inheritance by Albert from his deceased uncle.

The relevant provisions of the September 1980 will provided as follows: (1) Attorney Yost would serve as the personal representative, and he would not be required to post a bond. (2) Emil, Richard, James, and Rodney were to be excluded from inheriting from Albert's estate because they had already received substantial gifts outside the will. (3) James and Rodney were to be excluded from inheriting from Bessie's estate for the same reason as stated above. (4) If Bessie predeceased Albert, he would receive a life estate in her one-half interest in the Dodge County farmland. The remainder interest was to be divided into one-seventh shares for Albert, Francis, Emil, Richard, Leonard, and Theodore. The remaining one-seventh share was to be divided into two one-fourteenth shares for Michael and Carolyn. (5) If Bessie predeceased Albert, the remainder and residue of her estate would pass to six sons and two grandchildren: Albert, Francis, Emil, Richard, Leonard, Theodore, Michael, and Carolyn. (6) If Albert predeceased Bessie, she would receive a life estate in his one-half interest in the Dodge County farmland. The remainder interest was to be

divided into one-fifth shares for Albert, Francis, Leonard, and Theodore. The remaining one-fifth share was to be divided into two one-tenth shares for Michael and Carolyn. (7) If Albert predeceased Bessie, the remainder and residue of his estate would pass to four sons and two grandchildren: Albert, Francis, Leonard, Theodore, Michael, and Carolyn.

The final relevant provision of the September 1980 will stated that simultaneously with the execution of the will, Bessie had transferred an undivided one-half interest in "certain real estate" to Albert. The provision stated that this transfer was consideration for their agreement to make the terms of the will irrevocable unless both consent and, further, that after the death of either party, the terms would become irrevocable.

Contemporaneously with the execution of the September 1980 will, two land conveyances occurred. First, Bessie conveyed by deed to Albert an undivided one-half interest in the Dodge County farmland. (We note that this deed names Bessie and Albert as grantors in this conveyance; however, the undisputed testimony establishes that Bessie was the sole owner of the Dodge County land until the September 1980 conveyance.) Second, Albert and Bessie conveyed their residence by deed to Albert and Rodney (father and son) as joint tenants.

Subsequent to the execution of the September 1980 will, Francis recommended that the wills be redrafted to correct some deficiencies he perceived in the wills. At the time, Francis was an attorney licensed to practice law in Iowa. In November 1980, Francis visited his parents and drafted new mutual and reciprocal wills; Bessie and Albert executed these wills (November 1980 wills). Although the November 1980 wills were typed by Attorney Yost's secretary and were executed by Albert and Bessie at Yost's law offices, Yost did not consult with Bessie and Albert or participate in the drafting of these wills.

The relevant provisions of Albert's November 1980 will provide as follows: (1) Francis and Richard are to serve as corepresentatives, and no bond will be required. (2) James is excluded from the provisions of the will because he has already received real property by deed during Albert's lifetime. (3) If Albert predeceases Bessie, she shall receive a life estate in his

one-half undivided interest in their residence. Rodney shall receive the remainder interest in Albert's one-half interest in the residence. (4) If Albert predeceases Bessie, she shall receive a life estate in all other real property presently owned or later acquired by Albert. The remainder interest is to be divided into one-seventh shares for sons Albert, Francis, Emil, Richard, Leonard, and Theodore. The remaining one-seventh share is to be divided into one-fourteenth shares for Michael and Carolyn. (5) If Albert predeceases Bessie, she shall receive the remainder and residue of his estate "absolutely to do with as she shall choose."

The remaining provisions of Albert's will regarding the disposition of property provide for the disposition of his property in the event that he survived Bessie or in the event that Bessie and Albert died in a common disaster.

There are two remaining provisions of Albert's November 1980 will which are relevant to the issues before this court. First, the ninth provision concerns the contractual agreement between Albert and Bessie to make the terms of their wills irrevocable. That provision states:

> My wife, BESSIE T. PRUSS, and I are making Wills at this time, on the same date, and each of our Wills contains provisions for the benefit of the survivor of us, and for the benefit of our children and two grandchildren, and I have transferred an undivided one-half interest in certain farm real estate to my wife, BESSIE T. PRUSS, and in consideration of said transfer and our mutual promises, it is our intention that our Wills be construed as mutual, reciprocal Wills, they have been executed pursuant to a prior oral agreement, one in consideration of the other, and it is our intention that under no circumstances is the Will of either of us to be changed except upon written notice to the other prior to the time of the death of either of us, and further, under no circumstances is the Will of the survivor of us to be changed after the time of the death of one of us.

Second, the eleventh provision concerns inter vivos gifts by Albert to his children and grandchildren. The eleventh provision of Albert's November 1980 will states:

> It shall not constitute a violation of the agreement which I have entered into with my wife, BESSIE T. PRUSS, nor shall it constitute a violation of the terms of my Will and my wife's Will if I elect to make gifts prior to the time of my death, in equal amounts to all of my children (with one child's share to be divided equally between my grandchildren, MICHAEL PRUSS and CAROLYN PRUSS), whether or not said children are named as residuary beneficiaries under my Will.

The relevant provisions of Bessie's November 1980 will provide as follows: (1) Francis and Richard shall serve as corepresentatives of the estate, and no bond shall be required. (2) James is excluded from the provisions of the will because he has already received real property by deed during Bessie's lifetime. (3) If Albert predeceases Bessie, Rodney shall receive Bessie's one-half undivided interest in the residence. (4) If Albert predeceases Bessie, sons Albert, Francis, Emil, Richard, and Theodore shall each receive a specific money bequest in the amount of $6,000. The two grandchildren, Michael and Carolyn, shall each receive a specific bequest of $1,500. (5) If Albert predeceases Bessie, the remainder and residue of her estate shall be divided into one-seventh shares for Albert, Francis, Emil, Richard, Leonard, and Theodore. The remaining one-seventh share is to be divided into one-fourteenth shares for Michael and Carolyn.

The other provisions of Bessie's will regarding the disposition of property provide for the disposition of her property in the event that she predeceased Albert or in the event they died in a common disaster.

There are two remaining provisions of Bessie's November 1980 will which are relevant to the issues before this court. First, the ninth provision of the will concerns the contractual agreement between Albert and Bessie to make the terms of their wills irrevocable. That provision states:

> My husband, ALBERT B. PRUSS, and I are making Wills at this time, on the same date, and each of our Wills contains provisions for the benefit of the survivor of us, and for the benefit of our children and two grandchildren, and I have transferred an undivided one-half interest in

> certain farm real estate to my husband, ALBERT B. PRUSS, and in consideration of said transfer and our mutual promises, it is our intention that our Wills be construed as mutual, reciprocal Wills, they have been executed pursuant to a prior oral agreement, one in consideration of the other, and it is our intention that under no circumstances is the Will of either of us to be changed except upon written notice to the other prior to the time of the death of either of us, and further, under no circumstances is the Will of the survivor of us to be changed after the time of the death of one of us.

Second, the eleventh provision concerns inter vivos gifts by Bessie to her children and grandchildren. The eleventh provision of Bessie's November 1980 will states:

> It shall not constitute a violation of the agreement which I have entered into with my husband, ALBERT B. PRUSS, nor shall it constitute a violation of the terms of my Will and my husband's Will if I elect to make gifts prior to the time of my death, in equal amounts to all of my children (with one child's share to be divided equally between my grandchildren, MICHAEL PRUSS and CAROLYN PRUSS), whether or not said children are named as residuary beneficiaries under my Will.

Contemporaneously with the execution of both Albert's and Bessie's November 1980 wills, several land conveyances occurred. First, Albert and Rodney (joint tenants in the residence) conveyed the residence back to Albert and Bessie as tenants in common. Second, to correct descriptions in the approximately 30 acres deeded to James in May 1980, James and his wife, Marilyn, conveyed to Bessie and Albert the same 30 acres of the Dodge County farmland. Third, Bessie and Albert reconveyed the 30 acres to James and Marilyn. It is undisputed that Bessie did not convey any "certain farm real estate" to Albert and that Albert did not convey any "certain farm real estate" to Bessie in November 1980.

Albert died approximately 2 months after the November 1980 wills were executed. His November 1980 will was admitted to probate, and his estate was distributed according to its terms without objection.

In March 1983, Bessie executed a new will (1983 will) which affects appellants' proportional shares in her estate as compared to her November 1980 will. Bessie stated in her 1983 will that she was revoking the November 1980 will because that will did not accurately reflect her wishes and because Francis did not correctly represent to her what the November 1980 will purported to do.

The relevant provisions of Bessie's 1983 will provide as follows: (1) Sons James and Rodney shall serve as copersonal representatives of her estate, and no bond shall be required. (2) Rodney shall receive all of Bessie's interest in the residence. (3) All the remaining real property owned by Bessie shall be divided into one-seventh shares for Albert, Francis, Emil, Richard, Leonard, and Theodore. The remaining one-seventh share is to be divided into one-fourteenth shares for Michael and Carolyn. (4) The remainder and residue of Bessie's estate is to be divided in the following manner: to Albert, a one-ninth share less $2,500; to Francis, a one-ninth share less $6,700; and to Richard, a one-ninth share less $4,800. The remaining amount of the residue of her estate, including the $14,000 from the above shares, is to be divided into one-sixth shares for Emil, Leonard, Theodore, James, and Rodney. The remaining one-sixth share is to be divided into two one-twelfth shares for Michael and Carolyn. (5) If the residue of Bessie's estate is insufficient to make the deductions attributed to the shares of Albert, Francis, and Richard, they shall pay the amount specified into her estate as a condition precedent to their inheriting any real property discussed in provision (3) above. (6) If Albert, Francis, or Richard contest the terms of the 1983 will, such contesting party shall forfeit any inheritance under the provisions of Bessie's will, except as stated in provision (3).

According to the will, the deductions attributed to the shares for Albert, Francis, and Richard outlined in provision (4) above represent the money that Bessie believes these sons cost her in legal fees when they unsuccessfully attempted to have a guardian appointed to manage Bessie's affairs. Bessie also states in her will that she does not want these three sons to share equally with the other children in her estate and that she wants them to bear the expense of the guardianship proceedings.

When Bessie executed her 1983 will, the only interests she had in any real property were in the residence and the Dodge County farmland. With regard to the residence, Bessie held one-half undivided interest in fee and a life estate in the other one-half interest. With respect to the Dodge County farmland, she held a one-half undivided interest in fee and a life estate in the other one-half interest.

Pursuant to the terms of Bessie's 1983 will and the property interests created by the various deeds executed by Albert and Bessie, the following would occur at Bessie's death: (1) Rodney would receive the residence. (2) Albert, Francis, Emil, Richard, Leonard, and Theodore would each receive a one-seventh share of the one-half interest in the Dodge County farmland, and Michael and Carolyn would each receive a one-fourteenth share of that land (pursuant to Albert's November 1980 will). (3) Albert, Francis, Emil, Richard, Leonard, and Theodore would each receive a one-seventh share of the other one-half interest in the Dodge County farmland, and Michael and Carolyn would each receive a one-fourteenth share of that land. The shares of Albert, Francis, and Richard, however, would be subject to conditions set forth in Bessie's 1983 will discussed above. (4) Albert, Francis, Richard, Emil, Leonard, Theodore, James, and Rodney would receive equal shares of the residue of Bessie's estate. However, the shares of Albert, Francis, and Richard would be subject to the deductions discussed above. Michael and Carolyn would share equally in one share of the residue.

On the contrary, if Bessie's estate is subject to the terms of the November 1980 will, the following would occur at her death: (1) James would not inherit anything under either Bessie's or Albert's will; (2) Albert, Francis, Emil, Richard, Leonard, and Theodore would each receive a one-seventh share in the one-half interest of the Dodge County farmland, and Michael and Carolyn would each receive a one-fourteenth share in that land (pursuant to Albert's November 1980 will); (3) Albert, Francis, Emil, Richard, and Theodore would each receive $6,000, and Michael and Carolyn would each receive $1,500 (pursuant to Bessie's November 1980 will); and (4) the residue of Bessie's estate would be divided into one-seventh shares for Albert, Francis, Emil, Richard, Leonard, and Theodore, and

Michael and Carolyn would receive a one-fourteenth share of the residue.

Bessie died in 1990, and her 1983 will was offered for probate. As outlined above, the 1983 will affects the shares that appellants, Albert, Francis, and Richard, would have received pursuant to the terms of the November 1980 wills. Appellants filed suit in district court. Appellants contend that the 1980 will was irrevocable and that Bessie breached the contractual agreement embodied in the 1980 wills when she executed her 1983 will. In essence, appellants wish to have the court impose a constructive trust on Bessie's estate pursuant to the terms of the November 1980 wills and to have an accounting ordered with respect to inter vivos gifts Bessie may have made contrary to the terms of the November 1980 wills.

After a trial, the district court issued a judgment in favor of appellees. The court made several findings in support of its judgment. First, the court found that Bessie's November 1980 will was the product of undue influence exerted by Francis and that, therefore, the terms of that will could not be imposed on the estate. Second, the court found that there was a failure of consideration for the November 1980 wills and that, therefore, no binding contract was created between Bessie and Albert to make their wills irrevocable. Third, the court found that contrary to appellants' contentions, the November 1980 wills did not prohibit Bessie from changing her testamentary disposition with regard to her personal property or giving unequal inter vivos gifts from such personal property to the children after Albert's death. Finally, the court denied both appellants' and appellees' requests for attorney fees.

In an effort to present the assignments of error in a manner consistent with our analysis, we have summarized and reorganized the errors raised by appellants. Appellants contend that the district court erred in (1) finding that there was a failure of consideration underlying the 1980 wills, (2) finding that Bessie's November 1980 will was the product of undue influence, (3) finding that the November 1980 wills did not restrict Bessie's inter vivos gifts to her children, and (4) failing to grant appellants' request for attorney fees pursuant to Neb. Rev. Stat. § 30-2481 (Reissue 1989).

Appellants commenced an equitable action in the district court to have a constructive trust imposed on the estate of Bessie Pruss pursuant to the terms of the mutual and reciprocal wills that Bessie and Albert executed in November 1980. Appellants also request that the court order an accounting of gifts that may have been made by Bessie contrary to the terms of the November 1980 wills. An action to impose a constructive trust and an action for an accounting are equitable actions. *Central States Resources v. First Nat. Bank*, 243 Neb. 538, 501 N.W.2d 271 (1993); *Northern Bank v. Federal Dep. Ins. Corp.*, 242 Neb. 591, 496 N.W.2d 459 (1993); *Vejraska v. Pumphrey*, 241 Neb. 321, 488 N.W.2d 514 (1992); *Gottsch v. Bank of Stapleton*, 235 Neb. 816, 458 N.W.2d 443 (1990); *Smith v. Daub*, 219 Neb. 698, 365 N.W.2d 816 (1985). In an appeal of an equity action, an appellate court reviews the record de novo, subject to the rule that where credible evidence is in conflict on material issues of fact, an appellate court will consider and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another. *Miller v. Westwood*, 238 Neb. 896, 472 N.W.2d 903 (1991); *Gottsch, supra*; *Southern Lumber & Coal v. M.P. Olson Real Est.*, 229 Neb. 249, 426 N.W.2d 504 (1988).

A party seeking to have a constructive trust imposed has the burden to establish by clear and convincing evidence the factual foundation required for a constructive trust. *Gottsch, supra*; *Lone Oak Farm Corp. v. Riverside Fertilizer*, 229 Neb. 548, 428 N.W.2d 175 (1988). The factual foundation for the present action is the contractual agreement not to revoke the November 1980 wills. Appellants thus carry the initial burden of proving that the parties entered into a valid agreement not to revoke their mutual and reciprocal wills. See, *Youngblood v. American Bible Soc.*, 227 Neb. 472, 418 N.W.2d 554 (1988); *Geiger v. Geiger*, 185 Neb. 700, 178 N.W.2d 575 (1970). See, also, *Mabry v. McAfee*, 301 Ark. 268, 783 S.W.2d 356 (1990); *Hatbob v. Brown*, 394 Pa. Super. 234, 575 A.2d 607 (1990); *Matter of Estate of Fusse*, 803 S.W.2d 245 (Tenn. App. 1990).

Neb. Rev. Stat. § 30-2351 (Reissue 1989) provides:

> A contract to make a will or devise, or not to revoke a will or devise, or to die intestate, if executed after January

> 1, 1977, can be established only by (1) provisions of a will stating material provisions of the contract; (2) an express reference in a will to a contract and extrinsic evidence proving the terms of the contract; or (3) a writing signed by the decedent evidencing the contract. The execution of a joint will or mutual wills does not create a presumption of a contract not to revoke the will or wills.

Appellants contend that Albert and Bessie entered into a contract not to revoke their mutual wills and that the material provisions of that contract are embodied in the ninth clause of each of the mutual wills executed in November.

An agreement to devise property is, where supported by consideration, valid and enforceable. *Youngblood, supra*; *Blanchard v. White*, 217 Neb. 877, 351 N.W.2d 707 (1984). In essence, the contract must be supported by sufficient valid consideration. *Blanchard, supra*; *Allen v. Mayo*, 203 Neb. 602, 279 N.W.2d 617 (1979). Moreover, a mutual will executed in connection with an agreement based on sufficient consideration is both contractual and testamentary in nature. The contract becomes irrevocable as to the surviving spouse upon the death of the other and the probate of the deceased spouse's contractual will. *Geiger, supra*; *Kimmel v. Roberts*, 179 Neb. 25, 136 N.W.2d 217 (1965); *Kerper v. Kerper*, 780 P.2d 923 (Wyo. 1989). It is important to note that the contract does not make the wills irrevocable because wills, by their nature, are ambulatory and may be revoked at any time. However, if the surviving spouse revokes the mutual contractual will, an action may lie for breach of the contract against the estate of the survivor. *Youngblood, supra*; *Geiger, supra*; *Kimmel, supra*; *Kerper, supra*.

As we review the formation and enforceability of the contractual agreement between Bessie and Albert, we are guided by established principles of contract law. See *id.* In connection with our analysis of the contract, we will first address whether there was sufficient consideration to form the contract and second, if a contract was formed, whether that contract was breached.

The stated consideration which purportedly supports both Albert's and Bessie's November 1980 wills is made up of two

parts. First, they transfer from one to the other an "undivided one-half interest in certain farm real estate"; second, each provides the other with their future promise to devise their respective estates pursuant to the terms of the November 1980 wills. We will separately consider each part of the stated consideration to determine whether it was sufficient to form the contract.

To consider whether the transfer of an "undivided one-half interest in certain farm real estate" is sufficient consideration, we must determine to what property the statement refers. The cardinal rule of testamentary construction is to ascertain and effectuate the intention of the testator as expressed in the will. To construe a will, the court must give effect to the language of the will in light of the circumstances surrounding the making and execution of the will. *Gretchen Swanson Family Foundation, Inc. v. Johnson*, 193 Neb. 641, 228 N.W.2d 608 (1975); *Hays v. Hohnson*, 187 Neb. 307, 189 N.W.2d 475 (1971); *Father Flanagan's Boys' Home v. Graybill*, 178 Neb. 79, 132 N.W.2d 304 (1964); *Hahn v. Verret*, 143 Neb. 820, 11 N.W.2d 551 (1943). See, also, *Haerry v. Hoffschneider*, 202 Neb. 534, 276 N.W.2d 196 (1979) (construing intent by the language of the will together with the facts and circumstances existing at the time the will was executed).

As stated above, the undisputed evidence establishes that at the time that Bessie and Albert drafted and executed the November 1980 wills, the only farm real estate either owned was their respective interests in the Dodge County farmland. In November 1980, Albert owned a one-half interest in the Dodge County farmland which he acquired when Bessie conveyed it to him in September 1980. After that transfer in September 1980, Bessie owned the remaining one-half interest in the same Dodge County farmland. We thus find that the language "undivided one-half interest in certain real estate" contained in both Bessie's and Albert's wills, read together with the circumstances existing at the time that they executed the wills, indicates that Bessie and Albert transferred to each other an undivided one-half interest in the same Dodge County farmland.

According to the language of the wills, these transfers were part consideration for their agreement not to revoke their wills.

We find, however, that such a transfer by itself was insufficient to support the formation of a contract.

Consideration is sufficient to support a contract if there is any detriment to the promisee or any benefit to the promisor. Generally, a court will not inquire into the adequacy or value of the stated consideration so long as the performance or the promise of performance is one that the promisor considers of value. We have stated that even a "peppercorn" or nominal consideration may be sufficient consideration as long as the promisor deems it of value. The monetary value of the performance or the promise of performance is irrelevant. It is sufficient that the promisee did something he or she was not otherwise required to do or that the promisor received something he or she was not otherwise entitled to receive. *Buckingham v. Wray*, 219 Neb. 807, 366 N.W.2d 753 (1985); *Omaha Nat. Bank v. Goddard Realty, Inc.*, 210 Neb. 604, 316 N.W.2d 306 (1982); Arthur L. Corbin, Corbin on Contracts § 127 (one vol. ed. 1952); 3 Samuel Williston, A Treatise on the Law of Contracts §§ 7:3 and 7:4 (Richard A. Lord 4th ed. 1992).

However, when the inadequacy of the stated consideration is so gross or transparent, a court may find that the consideration was not a bargained-for exchange. If there is no bargain, there is no consideration. Corbin, *supra*. In such a situation, the statement of consideration reflects a mere pretense or the equivalent of a mere formality. In other words, the statement of consideration is a false recital and by itself is insufficient to support a contract. *Id.*

In the present case, we find that the stated exchange of an "undivided one-half interest in certain farm real estate" between Albert and Bessie is a mere pretense of consideration or a recital without substance. According to the language of the provision, Albert received no benefit except that which he already had, and Bessie parted with nothing except that which she was receiving from Albert. In other words, they each gave the other a one-half interest in the same Dodge County farmland. In this respect, that part of the stated consideration is analogous to an exchange of past consideration or an exchange of preexisting duties: The promisor is receiving a benefit that he

has already received or that he is already entitled to receive, and the promisee is parting with what she has already parted with or with what she is already required to part with. The inadequacy of such an exchange between Bessie and Albert is such that there could not have been a true bargain between the parties as to the stated land transfer. The part of the stated consideration regarding the exchange of certain farm real estate was insufficient to support the formation of a contract not to revoke their wills.

The fact that part of the stated consideration is insufficient, however, does not prevent another part of the consideration from operating as sufficient valid consideration to form a contract between the parties. John D. Calamari & Joseph M. Perillo, The Law of Contracts § 4-14 (3d ed. 1987); Corbin, *supra*, § 126. See, *Shea v. Begley*, 94 Or. App. 554, 766 P.2d 418 (1988); *Jim Murphy & Associates, Inc. v. LeBleu*, 511 So. 2d 886 (Miss. 1987).

In the present case, the fact that part of the consideration is invalid—the exchange of certain farm real estate—does not prevent the other part of the consideration—the mutual promises between Albert and Bessie to devise their property according to the terms of the will—from operating as sufficient valid consideration. See, Calamari & Perillo, *supra*; Corbin, *supra*; 3 Williston, *supra*, § 7:48. Mutual promises between spouses regarding the disposition of their property are sufficient valid consideration to form the contract. *Geiger v. Geiger*, 185 Neb. 700, 178 N.W.2d 575 (1970); *Shea, supra*. Therefore, we hold that the November 1980 wills executed by Albert and Bessie are supported by sufficient valid consideration to form a contractual agreement not to revoke their wills.

Bessie and Albert thus entered into a valid and enforceable contract which became irrevocable after Albert's death. The execution of a subsequent will, like the execution of any will, revokes a prior mutual or joint will. *Geiger, supra*; *Kimmel v. Roberts*, 179 Neb. 25, 136 N.W.2d 217 (1965). When Bessie executed her 1983 will which revoked her November 1980 will, she breached the contract she made with Albert.

We now address appellees' contention that Bessie's

November 1980 will was the product of undue influence exerted by Francis and that it should not be used to impose a constructive trust on her estate.

To establish undue influence, the party asserting that theory has the burden to prove (1) that the person who executed the challenged instrument was subject to undue influence, (2) that there was an opportunity to exercise undue influence, (3) that there was an intent to exercise undue influence for an improper purpose, and (4) that the result was clearly a product of the undue influence. *Miller v. Westwood*, 238 Neb. 896, 472 N.W.2d 903 (1991); *Craig v. Kile*, 213 Neb. 340, 329 N.W.2d 340 (1983); *In re Estate of Saathoff*, 206 Neb. 793, 295 N.W.2d 290 (1980). The burden to prove undue influence is clear and convincing evidence because the present case is an equitable action, not a probate action. See *In re Estate of Price*, 223 Neb. 12, 388 N.W.2d 72 (1986) (explaining that the burden of proof on a particular issue is controlled by the nature of the cause of action, not by the instrument involved).

In evaluating the evidence in the present case we are mindful that it is not merely the exercise of influence which invalidates the action; rather, it is the exercise of *undue* influence. *Miller, supra*; *In re Estate of Price, supra*. Undue influence is unlawful or fraudulent influence which controls the will of the actor. *Miller, supra*. Moreover, mere suspicion, surmise, or conjecture is not enough to warrant a finding of undue influence. There must be a solid factual foundation on which to rest the inference of the existence of undue influence. *Craig, supra*; *Andersen v. Andersen*, 177 Neb. 374, 128 N.W.2d 843 (1964). See *McDonald v. McDonald*, 207 Neb. 217, 298 N.W.2d 136 (1980).

This court has stated on numerous occasions that undue influence is generally surrounded by all possible secrecy. It is nearly impossible to prove with direct evidence. It is usually shown through inferences drawn from the facts and circumstances surrounding the testator; his life, character, and mental condition, as shown by the evidence; and the opportunity afforded designing persons for the exercise of improper control. *In re Estate of Villwok*, 226 Neb. 693, 413 N.W.2d 921 (1987).

We recognize that in undue influence cases, the burden of proof is onerous. Nonetheless, we have stated:

> The fact that the exercise of undue influence is difficult to prove, however, does not mean that the party seeking to establish such influence has met his or her burden by proving circumstances from which it may be inferred equally that such took place or that such did not take place. Certainly, a party seeking to prove the exercise of undue influence is entitled to an evaluation of all the circumstances proved, together with all the reasonable inferences to be drawn therefrom . . . but if all the evidence is circumstantial and the inferences to be drawn therefrom are as equally consistent with the hypothesis that undue influence was not exercised as they are with the hypothesis that such influence was exercised, the burden of proving the exercise of undue influence by [clear and convincing evidence] has not been met.

In re Estate of Price, 223 Neb. at 20-21, 388 N.W.2d at 78-79. The party bearing the burden must put forth evidence that convincingly establishes the necessary elements of undue influence. Anything less is not enough to support a finding of undue influence.

Appellees rely on our prior cases in which we discussed the burden of going forward on the issue of undue influence. This reliance is misplaced in the present case because although the burden of going forward on the issue of undue influence may shift to the proponent of the instrument, the ultimate burden of proof remains at all times on the party asserting the issue. See *In re Estate of Novak*, 235 Neb. 939, 458 N.W.2d 221 (1990).

After reviewing the evidence in the present case, we find that appellees have not proven by clear and convincing evidence that the November 1980 will was the product of undue influence. The evidence conclusively establishes that Francis had the opportunity to exercise undue influence over Bessie. Francis was the only person with his parents when the wills were redrafted; indeed, Bessie and Albert requested that Francis return home and help them with the wills. Francis stated that he was the only person who stayed with his parents during the time the November wills were drafted, and there is no evidence that

Bessie and Albert sought or obtained independent legal advice regarding the November 1980 wills. However, the mere opportunity for a party to exert undue influence on the actor is not sufficient to establish an inference that such influence was exercised. *Andersen, supra.*

Appellees point to the various letters that Francis sent Bessie after Albert died and argue that the letters demonstrate that he had a desire to control what Bessie did with her property. Even accepting that Francis had an intent to exert undue influence over Bessie in November 1980, appellees cannot prove that the result was clearly the product of the alleged undue influence or that Bessie was subject to such influence.

The crucial evidence with regard to these remaining two issues is the September 1980 will. A prior will, executed when the testator's mental capacity is unchallenged and as to which the exercise of undue influence is not charged, and which conforms substantially as to the results produced by the instrument contested, may be considered as competent evidence to refute the charge of undue influence. *In re Estate of Flider*, 213 Neb. 153, 328 N.W.2d 197 (1982); *In re Estate of Bose*, 136 Neb. 156, 285 N.W. 319 (1939).

There has been no allegation that the September 1980 will executed by Bessie and Albert was the product of undue influence. Moreover, Francis, whom appellees contend is the person who exercised the alleged undue influence in the execution of the November 1980 will, was not present during the drafting and execution of the September will, nor did Francis participate, directly or indirectly, in the making of the September will. The testamentary plan embodied in the September will is substantially similar to that embodied in the November wills. Both sets of wills evidence an intent by Bessie and Albert to distribute their respective estates equally among their children and two grandchildren, with the exception of children to whom they planned to give substantial inter vivos gifts.

Of particular significance in our consideration of whether Francis exerted his influence over the November 1980 wills is the difference between Francis' share under the September 1980 will compared to the November will. Francis' share under the

September will would have been larger than that under the November will. Additionally, pursuant to the terms of the September will, a lesser number of children shared in the distribution of the estate, and thus, Francis was to receive a larger proportional share than that provided for in the November will.

The only advantage that appellees contend that Francis gained by influencing the November 1980 will is the fact that the will named him as corepresentative of the estate and that the bond requirement was waived. We are not persuaded that such evidence proves that the November will was the product of undue influence. As to the waiver of a bond, all of the wills executed by Bessie and Albert waived the bond requirement for whoever was named as representative.

Finally, appellees suggest that Bessie was mentally and physically infirm when she executed the November 1980 will. Appellees did not present any evidence on this issue and merely rely on the testimony offered by appellants at trial. That testimony does not persuade us that Bessie lacked the ability to understand the wills or express her wishes. The fact that appellants attempted to have a conservator appointed to manage Bessie's affairs a year after the will was executed does not prove that she lacked testamentary capacity at the time the wills were executed.

After a review of the evidence, we find that appellees have failed to establish by clear and convincing evidence each of the required elements of undue influence and that the district court erred in holding that the November 1980 will was the product of undue influence.

To summarize, we find that Bessie and Albert formed a contractual agreement to make the terms of their November 1980 wills irrevocable. The material terms of that agreement are embodied in the November 1980 wills. Second, we find that Bessie breached that contract when she executed the 1983 will. Third, we hold that appellees failed to prove that Bessie's November 1980 will was the product of undue influence.

Appellees make an argument that we must address before we may find that the terms of the November 1980 will must be imposed on Bessie's estate. Appellees contend that because

Albert's November 1980 will devises to Bessie all of his personal property "to do with as she shall choose," Bessie could change her will with regard to such property without violating the terms of the November 1980 will.

This argument is without merit. Spouses enter into a specific and irrevocable testamentary plan to express a specific agreement on the *method* of devising of their respective estates. It is the plan itself that the parties are contracting to create. In other words, Albert and Bessie bargained for and received each other's promise that upon either's death their estate would be distributed in a particular manner. To permit the surviving spouse to alter the plan is a breach of that agreement. With respect to the personal property Bessie may have held at her death, Albert believed that she would distribute it according to the November 1980 plan. It is irrelevant that her interest in such property was absolute. Moreover, although Bessie may have been entitled to use and dispose of that property during her lifetime, that right does not include the right to alter the testamentary plan. Significantly, appellees failed to present or discuss any cases to support their argument, nor have we found any. See *Knolle v. Hunt*, 551 S.W.2d 755 (Tex. Civ. App. 1977) (explaining that although a joint will devises to the survivor an absolute interest in property and allows the survivor to reasonably use such property during his lifetime, the survivor may not make a subsequent will disposing of that property in a different manner than that set forth in the joint will).

A constructive trust shall be imposed on Bessie's estate pursuant to the terms of the November 1980 contractual will, notwithstanding the probate of her 1983 will. We must now determine whether the terms of the November 1980 will restricted Bessie from making gifts during her lifetime.

The eleventh provision of Bessie's November 1980 will provides:

> It shall not constitute a violation of the agreement which I have entered into with my husband, ALBERT B. PRUSS, nor shall it constitute a violation of the terms of my Will and my husband's Will if I elect to make gifts prior to the time of my death, in equal amounts to all of my children (with one child's share to be divided equally between my

> grandchildren, MICHAEL PRUSS and CAROLYN PRUSS), whether or not said children are named as residuary beneficiaries under my Will.

Appellants contend that this provision prevents Bessie from making any gifts unless she makes gifts of equal value to each of the children.

Appellants argue that Bessie made unequal gifts during her lifetime and seek to have an accounting ordered to determine the extent such gifts were made by Bessie. We find that this provision did not restrict Bessie from giving gifts to her children with the property she acquired from the residue of Albert's estate.

Appellants' argument rests upon Francis' testimony regarding the meaning of this provision. Although a court may consider extrinsic evidence to construe the testator's intent from the language of a will, a court may only do so when the language of the will is ambiguous. We have consistently held that

> "[w]hen language in a will is clear and unambiguous, construction of a will is unnecessary and impermissible. [Citations omitted.] As a corollary of the immediately preceding rule, when ambiguity exists in a testamentary provision, construction of a will is necessary. Ambiguity exists in an instrument, including a will, when a word, phrase, or provision in the instrument has, or is susceptible of, at least two reasonable interpretations or meanings."

In re Estate of Ritter, 227 Neb. 641, 645, 419 N.W.2d 521, 524 (1988) (quoting *In re Estate of Walker*, 224 Neb. 812, 402 N.W.2d 251 (1987)). Moreover, to discern the intent of the testator from the language of the will, a court must examine the will in its entirety, considering and liberally interpreting every provision. In examining the provisions of the will, the court shall employ the generally accepted literal and grammatical meaning of words used in the will and assume that the testator understood the words stated in the will. *In re Estate of Ritter, supra*; *In re Estate of Walker, supra*.

The intent of Bessie and Albert, as expressed in their November 1980 wills, is discernable from the clear and

unambiguous language of those wills. It is unnecessary, therefore, for us to consider and evaluate any extrinsic evidence concerning an alternative interpretation not reasonably inferred from the language itself. The fifth provision of Albert's November 1980 will devises to Bessie an absolute interest in the residue of his estate "to do with as she shall choose." The eleventh provision states that Bessie or Albert may make equal gifts to their children during their lifetimes without violating the terms of their mutual agreements. This provision does not prohibit Bessie from making gifts in any other manner to their children and grandchildren. We hold that the eleventh provision is not a specific restriction on Bessie's use and disposition of the property she received pursuant to the terms of Albert's November 1980 will.

We note that appellants do not argue that any gifts Bessie may have made were with the intent to defeat the general purpose of the mutual contractual wills or that such gifts were unreasonable and thus destroyed the purpose of the contractual wills. See, 79 Am. Jur. 2d *Wills* § 339 (1975); 94 C.J.S. *Wills* § 119 (1956); *Blackmon v. Estate of Battcock*, 78 N.W.2d 735, 741, 587 N.E.2d 280, 283, 579 N.Y.S.2d 642, 645 (1991) (stating that "an agreement that the survivor's entire estate will be left to certain beneficiaries does not necessarily prevent a survivor from making a lifetime gift, since such a gift would not necessarily defeat the purpose of the agreement"); *In re Estate of Lenders*, 247 Iowa 1205, 78 N.W.2d 536 (1956). See, also, *Allen v. Mayo*, 203 Neb. 602, 279 N.W.2d 617 (1979) (implicitly recognizing that a complete divestment of the survivor's estate would be a breach of the contract to devise). The record does not provide us with a basis from which to determine whether Bessie made gifts of such an unreasonable amount that she defeated the purpose of the mutual contractual agreement. We therefore remand this issue for consideration by the district court.

The final issue remaining concerns the various requests made by appellants and appellees for attorney fees and costs. Because of our holdings on the issues in this case, we affirm the denial by the district court of appellees' request for attorney fees and costs pursuant to Neb. Rev. Stat. § 25-1336 (Reissue 1989).

Appellants seek to receive from the estate the necessary costs incurred for prosecuting this action. See § 30-2481. We remand that issue for consideration by the district court.

In summary, we find that (1) a mutual contractual will was created by Bessie and Albert and the terms of that agreement are embodied in the November 1980 wills, (2) Bessie breached that agreement when she executed her 1983 will, (3) Bessie's November 1980 will was not the product of undue influence, and (4) the eleventh provision of the November 1980 wills was not an express restriction on the survivor's lifetime use of estate property. We order that a constructive trust be imposed on Bessie's estate pursuant to the terms of the November 1980 will. We further order that the issue of whether the gifts Bessie may have made during her lifetime defeated the purpose of the contractual wills be remanded for further consideration. Finally, we remand for consideration whether appellants are entitled to fees and costs pursuant to § 30-2481.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

GRANT, J., Retired, dissenting.

I respectfully dissent from that portion of the majority opinion which determines that the November 1980 will of Bessie Pruss was not the product of undue influence and that portion which denies appellees' requests for fees and costs and remands the cause for consideration whether appellants are entitled to fees and costs under Neb. Rev. Stat. § 30-2481 (Reissue 1989).

As I view the evidence, it appears to me that the trial court was correct in determining that the November 1980 will was the product of undue influence exerted by Francis Pruss, a son of Albert and Bessie, and a graduate of Michigan Law School.

It appears that Albert and Bessie executed a valid will, drawn by their family attorney, Lawrence Yost, in September 1980. Francis received a copy of this will from his brother Albert. Francis believed there were deficiencies in the will, including the fact that Yost was named as personal representative. Francis called his parents about his concerns and told them that new wills should be drawn. Francis traveled to Fremont, Nebraska, from Cedar Rapids, Iowa. He arrived late in the evening before

Thanksgiving Day in 1980, with his typewriter, and with portions of a will already drafted to his satisfaction. He testified that he spent the next 24 hours working with his parents on the terms of the new wills.

I agree completely with the majority opinion that "[t]he evidence conclusively establishes that Francis had the opportunity to exercise undue influence over Bessie." I cannot agree that "appellees cannot prove that the result was clearly the product of the alleged undue influence . . . ." I think the evidence is sufficient to establish undue influence, without giving any weight to the fact that Francis is a lawyer and a person affected by the new and old wills.

The majority opinion states that the crucial evidence was the September 1980 will, which, the majority states, "conforms substantially as to the results produced by the instrument contested." In the most general terms, it can possibly be said that the November 1980 will conforms generally with the September will. It is unnecessary to dissect, analyze, and compare the two wills. In the first place, if the wills are basically the same, what is all the excitement about? Why is Francis touring the countryside to rectify the situation? Second, the November will restores Francis to control of the estate as the personal representative, together with whatever funds flow from that job.

I also do not think it is of much significance that Francis' share under the September will would have been larger than under the November will. As personal representative, Francis could have requested whatever fee arrangements were necessary to make him whole. In addition, man lives not by bread alone. There are apparently great personal rewards for Francis if he can impose his desires on Bessie and on his siblings.

I would affirm the decision of the trial court, including the trial court's ruling on requested fees. During his mother's life, after the execution of the November wills, Francis tried to put her under conservatorship. He failed, both in the county court and on his appeal to the district court. Francis then tried to enjoin his mother from making gifts during her life. He failed. I would not give Francis another bite of this apple. An end should be put to this effort to emulate the legendary Jarndyce

case in Charles Dickens' "Bleak House," referred to in *Rosnick v. Dinsmore*, 235 Neb. 738, 457 N.W.2d 793 (1990), and *Bert Cattle Co. v. Warren*, 238 Neb. 638, 471 N.W.2d 764 (1991) (Shanahan, J., dissenting).

SHAKUR ABDULLAH, APPELLANT, V. NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES ET AL., APPELLEES.

513 N.W.2d 877

Filed April 8, 1994. No. S-92-325.

1. **Administrative Law: Pleadings: Time: Appeal and Error.** When the petition instituting proceedings for review under the Administrative Procedure Act is filed in the district court on or after July 1, 1989, the review shall be conducted by the district court de novo on the record.
2. **Administrative Law: Judgments: Appeal and Error.** On an appeal under the Administrative Procedure Act, an appellate court reviews the judgment of the district court for errors appearing on the record and will not substitute its factual findings for those of the district court where competent evidence supports those findings.
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 conclusion irrespective of the determination made by the court below.
4. **Administrative Law: Prisoners: Appeal and Error.** The language of Neb. Rev. Stat. § 83-4,123 (Cum. Supp. 1992) is clear that judicial review of disciplinary proceedings is permitted only when the disciplinary action imposed on the inmate involves the imposition of disciplinary isolation; the loss of good time credit; or a change in work, education, or other program assignment in accordance with the Administrative Procedure Act.
5. **Constitutional Law: States.** A state creates a protected liberty interest through the use of explicitly mandatory language in connection with the establishment of specified substantive predicates to limit discretion.
6. **Judgments: Records: Time: Appeal and Error.** The proceedings in error statutes, Neb. Rev. Stat. § 25-1901 et seq. (Reissue 1989 & Cum. Supp. 1992), require that within 30 days after the rendition of the final judgment or order sought to be reversed, vacated, or modified, a petitioner in error must file a petition and an appropriate transcript containing the final judgment or order.
7. **Judgments: Records: Time: Jurisdiction: Appeal and Error.** Timely filing of both the petition in error and the certified transcript is mandatory to confer jurisdiction on an appellate court reviewing the final judgment.

8. **Actions: Time.** Failure to institute the proceeding within the stated time limitation bars the action.
9. **Statutes.** Where a right has been given and specific remedy has been provided by statute, the right can be secured in no other way than that provided by the statute.

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

Shakur Abdullah, pro se.

Don Stenberg, Attorney General, and Alfonza Whitaker for appellees.

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

LANPHIER, J.

A Nebraska State Penitentiary disciplinary committee found that appellant, Shakur Abdullah, violated a prison rule by storing contraband. The Nebraska Department of Correctional Services (DCS) Appeals Board affirmed the decision, and appellant filed an appeal to the district court for Douglas County. The district court dismissed his petition for review because appellant was not entitled to a judicial review of his disciplinary case for the reason that the action imposed did not involve disciplinary isolation; loss of good time credit; or a change in work, education, or other program assignment. Appellant then filed a motion for rehearing and requested that the court allow him to amend his petition to conform to the statute. The district court denied the motion because it was untimely filed. We affirm.

FACTS

Appellant is an inmate of the DCS. On March 27, 1991, the disciplinary committee found appellant guilty of possessing or receiving unauthorized articles; in this case, a radio with an altered cord. As a penalty, the committee imposed a reprimand and a warning. On April 18, the appeals board affirmed the decision of the disciplinary committee.

On April 29, appellant filed a petition for review pursuant to Neb. Rev. Stat. § 84-917 (Cum. Supp. 1992) in the district court for Lancaster County and, on June 10, amended this petition.

A hearing was held on November 12, and on March 31, 1992, the court found that the penalties imposed involved only a reprimand, a warning, and instructions to send the radio out of the institution or to destroy the radio. The district court dismissed appellant's petition, holding that appellant was not entitled to judicial review under Neb. Rev. Stat. § 83-4,123 (Cum. Supp. 1992) because the disciplinary case did not involve the " 'imposition of disciplinary isolation, the loss of good-time credit, or a change in work, education or other program assignment.' "

On April 9, 1992, appellant filed a motion to reconsider his action under the petition in error statute, Neb. Rev. Stat. § 25-1901 (Reissue 1989). In the alternative, he requested leave to amend his petition to conform to the statutory requirements of the petition in error statute. A hearing was held on April 14 on appellant's motion to reconsider. The court denied the motion because the petition in error was not filed within 30 days of the final order of the appeals board. Appellant filed an appeal to this court on April 16.

Appellant claims the district court erred (1) in determining that he was not entitled to judicial review under § 83-4,123 and (2) in refusing to allow him to amend his petition for review.

STANDARD OF REVIEW

When the petition instituting proceedings for review under the Administrative Procedure Act is filed in the district court on or after July 1, 1989, the review shall be conducted by the district court de novo on the record. *Bell Fed. Credit Union v. Christianson*, 244 Neb. 267, 505 N.W.2d 710 (1993). On an appeal under the Administrative Procedure Act, the appellate court reviews the judgment of the district court for errors appearing on the record and will not substitute its factual findings for those of the district court where competent evidence supports those findings. *Id.*

We note that 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. *Rigel Corp. v. Cutchall, ante* p. 118, 511 N.W.2d 519 (1994).

JUDICIAL REVIEW

Appellant contends that the district court erred in dismissing his appeal because it was not cognizable under § 83-4,123. That section states in part:

> Nothing in sections 83-4,109 to 83-4,123 shall be construed as to restrict or impair an inmate's free access to the courts and necessary legal assistance in any cause of action arising under sections 83-4,109 to 83-4,123 or to judicial review for disciplinary cases *which involve* the imposition of disciplinary isolation, the loss of good-time credit, or a change in work, education, or other program assignment in accordance with the Administrative Procedure Act.

(Emphasis supplied.)

Appellant's punishment for violating the prison regulations resulted in the loss of his radio and a verbal reprimand. It did not involve the imposition of the penalties enumerated in the foregoing statute. The language of § 83-4,123 is clear. Judicial review is limited to cases "which involve" the imposition of the penalties so listed.

SECTION 83-4,122

Appellant argues that Neb. Rev. Stat. § 83-4,122 (Cum. Supp. 1992) expands the types of cases for which judicial review of disciplinary actions may be sought under § 83-4,123. Section 83-4,122 sets forth procedural safeguards for disciplinary actions which "may involve" the imposition of the same penalties enumerated in § 83-4,123. Appellant argues that since under § 83-4,122 procedural safeguards are required in cases other than those which result in the enumerated penalties, judicial review must also be extended to disciplinary actions other than those which may involve the imposition of the enumerated penalties.

Appellant's assertions are inconsistent with the plain language of the statute. In the absence of anything indicating to the contrary, statutory language is to be given its plain and ordinary meaning, and 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*

Jantzen, ante p. 81, 511 N.W.2d 504 (1994). Unlike § 83-4,122, the language of § 83-4,123 is clear in its mandate that judicial review is permitted only when the disciplinary action imposed on the inmate involves the imposition of the enumerated penalties. Since the disciplinary action imposed on appellant did not involve the imposition of any of the enumerated penalties, appellant was not entitled to judicial review.

LIBERTY INTEREST

Appellant also contends that his liberty interests are affected because of a change in his program assignment. He claims that because his opportunity to have his security classification lowered from medium to minimum and his opportunity to have his sentence commuted by the Nebraska Board of Pardons are diminished, the disciplinary action affects his liberty interest. Assuming without deciding that such opportunities may be diminished, appellant would still not be entitled to relief. A liberty interest protected by the 14th Amendment may arise from two sources, the Due Process Clause and the laws of a state. *Hewitt v. Helms*, 459 U.S. 460, 103 S. Ct. 864, 74 L. Ed. 2d 675 (1983). "[A] state creates a protected liberty interest through the use of ' " 'explicitly mandatory language' " ' in connection with the establishment of ' " 'specified substantive predicates' " ' to limit discretion." *Otey v. State*, 240 Neb. 813, 828, 485 N.W.2d 153, 165 (1992) (quoting *Kentucky Dept. of Corrections v. Thompson*, 490 U.S. 454, 109 S. Ct. 1904, 104 L. Ed. 2d 506 (1989)). In *Otey*, we found that there were no provisions in Nebraska's Constitution or in its statutes which created a liberty interest in commutation hearings. In addition, although administrative rules and regulations may create a liberty interest, inmates have no inherent due process right to have their security level downgraded. *Howard v. Grinage*, 6 F.3d 410 (6th Cir. 1993). See, also, *Gomez v. Coughlin*, 685 F. Supp. 1291 (1988). Appellant has not cited, nor have we identified, any statute or prison regulation which would indicate that the State had created a liberty interest in his security classification. Thus, appellant's argument fails.

We do not address appellant's remaining claims regarding judicial review, as he merely makes assertions without setting

forth any arguments to support them. See *In re Interest of T.F.P.*, 237 Neb. 922, 468 N.W.2d 116 (1991).

PROCEEDINGS IN ERROR

Appellant claims he should have been allowed to amend his petition pursuant to Neb. Rev. Stat. § 25-852 (Reissue 1989), to conform to the standards of the petition in error statute, § 25-1901.

The district court did not err in refusing to allow appellant to amend his petition, since his attempt to seek review under § 25-1901 was untimely filed. The proceedings in error statutes, Neb. Rev. Stat. § 25-1901 et seq. (Reissue 1989 & Cum. Supp. 1992), require that within 30 days after the rendition of the final judgment or order sought to be reversed, vacated, or modified, a petitioner in error must file a petition and an appropriate transcript containing the final judgment or order. See, *Scott v. Hall*, 241 Neb. 420, 488 N.W.2d 549 (1992); *Glup v. City of Omaha*, 222 Neb. 355, 383 N.W.2d 773 (1986). Timely filing of both the petition in error and the certified transcript is mandatory to confer jurisdiction on an appellate court reviewing the final judgment. *Id.* See, also, *Marcotte v. City of Omaha*, 196 Neb. 217, 241 N.W.2d 838 (1976); *Lemburg v. Nielsen*, 182 Neb. 747, 157 N.W.2d 381 (1968). "Failure to institute the proceeding within the stated time limitation bars the action." *Scott v. Hall*, 241 Neb. at 423, 488 N.W.2d at 551. Appellant's attempt to seek review under the petition in error statute was untimely because the appeals board made its final order on April 18, 1991, finding that appellant was in violation of the prison regulations. Appellant was required to file his petition, in addition to the transcript, within 30 days after the final order of the appeals board. The petition was not filed until April 9, 1992. Where a right has been given and specific remedy has been provided by statute, the right can be secured in no other way than that provided by the statute. *Peterson v. Minden Beef Co.*, 231 Neb. 18, 434 N.W.2d 681 (1989). The district court acquired no jurisdiction to review the petition in error.

CONCLUSION

The district court properly dismissed appellant's petition for

review after finding that appellant was not entitled to judicial review under § 83-4,123, since the penalty imposed on appellant did not involve the imposition of disciplinary isolation; the loss of good time credit; or a change in work, education, or other program assignments. The district court also correctly denied appellant's motion to amend, since such amendment would have permitted appellant to untimely file a petition in error.

AFFIRMED.

WRIGHT, J., participating on briefs.

ROMAINE POWELL, PERSONAL REPRESENTATIVE OF THE ESTATE OF MARY BENGSTON, DECEASED, APPELLEE, V. AMERICAN CHARTER FEDERAL SAVINGS AND LOAN ASSOCIATION AND PIPER, JAFFRAY & HOPWOOD, INCORPORATED, APPELLEES, AND DAVID MICHEL ET AL., APPELLANTS.

514 N.W.2d 326

Filed April 8, 1994. No. S-92-441.

1. **Appeal and Error.** Regarding questions of law, an appellate court is obligated to reach conclusions independent of those reached by the trial court.
2. **Decedents' Estates: Property: Joint Tenancy: States.** The determination of whether a decedent's spouse had the capacity to devise to decedent an interest in jointly held property is governed by the law of the state where the real property is situated.
3. **Decedents' Estates: Property: States.** The determination of the extent of a spouse's capacity to devise personal property is governed by the law of the state in which he or she was domiciled at the time of his or her death.
4. **Contracts: Parties: States.** The rights and duties of contracting parties are governed by the law of the state with the most significant relationship to the transaction and the parties. The relevant principles a court should consider are the place of the contracting, the place of any negotiations which occurred, the place of performance, the location of the subject matter, and the domicil or residence of the parties.
5. **Wills: Contracts: Parties.** Although a joint will is a testamentary instrument, it

may also be a contract or evidence of a contract between the two parties. The contract may be an agreement to devise, and it may include an agreement not to revoke the wills.

6. **Decedents' Estates: Wills: Contracts: Words and Phrases.** A contract and a will, although one document, are distinct and separate and are governed by different legal principles. A will is revocable because it is ambulatory in nature and does not become effective until the death of the testator. The surviving testator therefore may revoke the will, but the survivor or the survivor's estate may be subject to an action for breach of the contract.
7. **Wills: Property: Joint Tenancy.** The fact that joint tenancy property passes to the survivor by title does not prevent the property from being designated as subject to the terms of the will.
8. **Decedents' Estates: Property: Joint Tenancy.** Real property held in joint tenancy cannot be devised; rather, it passes by operation of law to the surviving tenant.
9. **Decedents' Estates: Wills.** Although a joint will does not contain any express restrictions on the survivor's use and disposition of estate property, the survivor implicitly agrees that she or he will carry out the testamentary intent of the joint will.
10. **Decedents' Estates: Wills: Contracts: Property: Gifts.** The contractual duty of the survivor to carry out the testamentary intent of a joint will does not prohibit the survivor from using his or her property for the necessities and comforts of life. The survivor is not prohibited from changing the form of the property and is not prohibited from making reasonable gifts of estate property to third parties.
11. **Decedents' Estates: Gifts.** Reasonableness of a gift would depend upon the proportion that the value of the gift bears to the value of the estate.

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

Alan L. Plessman for appellants.

Con M. Keating, of Bruckner, O'Gara, Keating, Hendry, Davis & Nedved, P.C., for appellee Powell.

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

WHITE, J.

David Michel, Robert Michel, and James Michel appeal from a district court order declaring that property held jointly by themselves and decedent, Mary Bengston, was property of her estate and imposing a restraining order against disposing of the property. We reverse the decision of the district court and remand the cause for further proceedings.

This dispute concerns various money accounts and shares, each of which decedent, at the time of her death, owned jointly with one or more of appellants, her brothers.

On April 26, 1983, decedent and her husband executed a single-instrument joint and mutual will. The will was executed in Minnesota, their place of residence. The will provided that "[w]e give, devise and bequeath unto the survivor of us all and any real and personal property owned by us, either jointly or severally, for his or her own use." The will further provided that upon the death of the survivor, "we give, devise and bequeath all of the rest, residue and remainder of our estate of every kind and nature wheresoever situated whether or not owned by us or hereinafter acquired by us including any lapsed legacy" in the following percentages: Thomas Michel, 10 percent; David Michel, 25 percent; Robert Michel, 7 1/2 percent; James Michel, 7 1/2 percent; Eric Schatz, 10 percent; Romaine Powell, 15 percent; Stephen Neighbors, 10 percent; and Leone and Marvin Neighbors, 15 percent. At the time decedent and her husband executed the will, they were joint tenants in certain real property located in Minnesota. Decedent and her husband also shared joint tenant ownership in stocks and certificates of deposit.

On October 15, 1989, decedent's husband died, and the joint will was probated in Minnesota. The only property listed in the inventory of his estate was several stock certificates. The total estimated value of those stocks was $20,190.73. Although appellants stipulated that these stocks were held jointly with decedent, there is no evidence in the record of the actual ownership interests of either decedent or her husband in the stock certificates. The inventory of her husband's estate did not include any real estate property.

After her husband's death, decedent conveyed the Minnesota real property to appellants and herself as joint tenants. Sometime thereafter, the Minnesota real property was sold and the proceeds of the sale were used to purchase the accounts and shares which are the subject of the present litigation. The following constitutes an itemized list of the disputed property, the form of title in which it was held, and the value or extent of such property:

(1) Time access account	M. Bengston for David and Robert Michel	$10,000
(2) Time access account	M. Bengston or David Michel	36,500
(3) Time access account	M. Bengston for David Michel	33,000
(4) Time access account	M. Bengston for James Michel	33,000
(5) Time access account	M. Bengston or James Michel	36,500
(6) Time access account	M. Bengston for Robert Michel	33,000
(7) Time access account	M. Bengston or Robert Michel	36,500
(8) Various shares	M. Bengston and David and Robert-joint tenants	5,697

Appellants stipulate that a portion of the money used to purchase these accounts and shares came from the proceeds of the sale of the Minnesota real property. Appellants also stipulate that a portion of the money used to purchase these accounts and shares came from stocks and certificates of deposit which decedent held jointly with her husband. Appellants state that they do not know if money or property decedent inherited through her husband's estate was used to purchase the accounts and shares listed above. Appellants concede that they did not contribute any money to the purchase of the above-listed property.

After her husband's death, decedent moved to Nebraska, where she resided until her death on February 9, 1991. Appellee Romaine Powell was appointed personal representative of decedent's estate.

On June 3, 1991, Powell commenced an action for declaratory judgment in Lancaster County District Court pursuant to Neb. Rev. Stat. § 25-21,152 (Reissue 1989). Powell contends that the joint and mutual will restricted decedent's

right to dispose of property she acquired when her husband died, that such property is traceable to the property decedent held jointly with appellants, and that the accounts and shares should be made a part of decedent's estate.

After a stipulated trial, the district court entered an order declaring that the property held by appellants is property of decedent's estate. In issuing its order, the district court made several findings: (1) that by the terms of the joint will, decedent and her husband entered a binding, irrevocable contract to devise which is recognized by both Minnesota and Nebraska law; (2) that Minnesota law applied to the interpretation and enforcement of the contract; (3) that under either Minnesota or Nebraska law, the jointly held real property was subject to the terms of the contract set forth in the joint will; (4) that such property which passed to decedent is traceable to the accounts and shares held by appellants, and therefore (5) that the accounts and shares are subject to the terms of decedent's will regardless of the fact that they were held jointly by decedent and appellants.

Appellants filed a motion for new trial, which was overruled. Appellants timely appealed to the Nebraska Court of Appeals. We granted Powell's motion to bypass the Court of Appeals pursuant to Neb. Ct. R. of Prac. 2B (rev. 1992).

Appellants contend that the district court erred in (1) finding that Minnesota law controlled the validity and construction of the will, (2) finding that the accounts and shares are property of the estate and are controlled by the will, and (3) overruling appellants' motion for new trial.

The issues before us involve only questions of law. Regarding questions of law, an appellate court is obligated to reach conclusions independent of those reached by the trial court. *First Nat. Bank v. Daggett*, 242 Neb. 734, 497 N.W.2d 358 (1993); *Dowd v. First Omaha Sec. Corp.*, 242 Neb. 347, 495 N.W.2d 36 (1993).

Before we may address the merits of the present action, we must determine which state law governs the issues, Minnesota or Nebraska.

The determination of whether Minnesota or Nebraska law governs the issues raised in the present case is affected by the

theories underlying Powell's action. That action concerns both the testamentary and the contractual aspects of the joint will. We find that Minnesota law governs the resolution of both the testamentary and contractual issues raised in this action.

A joint will represents the testator's plan for devising the property that he owns at the time of his death. The determination of whether decedent's husband had the capacity to devise to decedent an interest in the jointly held property is governed by the law of the state where the real property is situated. See, Restatement (Second) of Conflict of Laws §§ 239 and 240 (1971); 94 C.J.S. *Wills* § 77 (1956). The determination of the extent of the husband's capacity to devise personal property is governed by the law of the state in which he was domiciled at the time of his death. See *id.*

The real property at issue was located in Minnesota, and decedent's husband was domiciled in Minnesota at the time of his death. Minnesota law therefore applies to determine whether and to what extent decedent's husband had the capacity to devise any interest in real and personal property in which he had an interest.

Joint wills also have a contractual aspect, and contract principles may apply to support Powell's claim that decedent breached her agreement with her husband when she used assets which may have been subject to the terms of the joint will.

Recently we have stated that the validity and interpretation of a contract are governed by the law of the state where the contract was made absent an express statute or public policy which prevents application of such a state's law. See *Jaramillo v. Mercury Ins. Co.*, 242 Neb. 223, 494 N.W.2d 335 (1993) (paralleling the Restatement of Conflict of Laws § 595 (1934)). We recognize, however, that we have also applied the approach set forth in the Restatement (Second) of Conflict of Laws § 188 (1971) to contract actions. See *Shull v. Dain, Kalman & Quail, Inc.*, 201 Neb. 260, 267 N.W.2d 517 (1978).

According to the Restatement (Second), *supra*, § 188 analysis, the rights and duties of the contracting parties are governed by the law of the state with the most significant relationship to the transaction and the parties. The relevant principles a court should consider are the place of the

contracting, the place of any negotiations which occurred, the place of performance, the location of the subject matter, and the domicil or residence of the parties. See *Shull, supra* (also applying the Restatement (Second) of Conflict of Laws § 203 (1971) regarding usury charges).

Although we recognize that in *Jaramillo* we applied the law of the state where the contract was made, it is apparent that if we had applied the Restatement (Second), *supra*, § 188 analysis to the facts in *Jaramillo*, the result would have been the same—California law would have governed the validity of the insurance contract. In an effort to present a consistent rule for future cases involving conflicts of law, we hereby adopt the approach set forth in the Restatement (Second), *supra*, § 188.

Applying these principles to the facts and circumstances of the present case, we find that Minnesota is the state with the most significant relationship to the transaction and the parties. At the time decedent and her husband entered into their agreement, they both resided in Minnesota, they executed the joint will in Minnesota, a significant portion of the property they owned consisted of real property which was located in Minnesota, and decedent's husband performed his promise in Minnesota when he died and the will was probated. The only relationship Nebraska has to the contract is that decedent was a resident of Nebraska when she died. We recognize that if her actions constituted a breach of the agreement, some of those actions may have occurred in Nebraska. However, we find that Minnesota has the most significant relationship to the formation of the contract. Therefore, Minnesota law governs the determination of the rights and obligations of the parties to that contract.

In the present case, we are concerned with the effect of a joint will on property and the various interests a party may have in such property. A joint will is a single instrument which is executed by two parties and which represents their respective wills. Although the joint will is a testamentary instrument, it may also be a contract or evidence of a contract between the two parties. The contract may be an agreement to devise, and it may include an agreement not to revoke the wills. See, Thomas E. Atkinson, Handbook of the Law of Wills § 49 (2d ed. 1953);

William M. McGovern, Jr., et al., Wills, Trusts and Estates § 9.5 (1988). Minnesota law recognizes and enforces joint contractual wills. Minn. Stat. Ann. § 524.2-701 (West 1975) provides:

> A contract to make a will or devise, or not to revoke a will or devise, or to die intestate, if executed after the effective date of this act, can be established only by (1) provisions of a will stating material provisions of the contract; (2) an express reference in a will to a contract and extrinsic evidence proving the terms of the contract; or (3) a writing signed by the decedent evidencing the contract. The execution of a joint will or mutual wills does not create a presumption of a contract not to revoke the will or wills.

The contract and the will, although one document, are distinct and separate and are governed by different legal principles. Accordingly, a will is revocable because it is ambulatory in nature and does not become effective until the death of the testator. The surviving testator therefore may revoke the will, but the survivor or the survivor's estate may be subject to an action for breach of the contract if the survivor had agreed not to revoke the terms of the will. Atkinson, *supra*; McGovern, *supra*; *Concordia College v. Salvation Army*, 470 N.W.2d 542 (Minn. App. 1991); *Pruss v. Pruss, ante* p. 521, 514 N.W.2d 335 (1994).

When executing a joint contractual will, the parties specifically agree to devise their respective estates according to the terms of the will and may also agree not to revoke or modify that will. When the parties agree that the survivor of them shall not revoke or modify the will, the parties implicitly agree that the survivor of them will abide by the testamentary intent embodied in the joint will and not dispose of estate property in a manner which is contrary to that intent. *Robison v. Graham*, 799 P.2d 610 (Okla. 1990).

In the present case, the joint will executed by decedent and her husband includes the material provisions of a contract to devise and a contract not to revoke. Specifically, the will provides that decedent and her husband understand and agree that the provisions of the will are binding upon each and upon

the survivor. The consideration supporting the contract is the agreement of each to devise his or her respective estate according to the terms of the will. See *Concordia College, supra* (holding that exchange of mutual promises to devise is sufficient valid consideration).

The controversy raised by the parties concerns the extent of the survivor's power over the property which is subject to the terms of the joint will. We must first determine what property is subject to the terms of the joint will. We will then discuss what power the survivor has over that property.

Estate property is property which is subject to the terms of the joint will. The parties are free to designate what property will be estate property. As long as their agreement is not contrary to law, the designated property will be subject to the terms of the will. The fact that joint tenancy property passes to the survivor by title does not prevent the property from being designated as subject to the terms of the will. *Robison, supra.* See, *Moline Nat'l Bk. v. Flemming*, 91 Ill. App. 3d 398, 414 N.E.2d 936 (1980); *First United Pres. Church v. Christenson*, 64 Ill. 2d 491, 356 N.E.2d 532 (1976).

We emphasize that there is a distinction between property that is subject to the terms of a joint will and property that passes to the survivor pursuant to the terms of the will. For example, real property held in joint tenancy cannot be devised; rather, it passes by operation of law to the surviving tenant. Therefore the property does not pass to the survivor pursuant to the terms of the will. As stated above, however, the parties may designate in their will that their joint property be subject to the terms of the joint will. *Robison, supra*; *First United Pres. Church, supra.* After a review of our own cases, we recognize that we have contributed to the confusion between property which is subject to the terms of a will and property which is devised pursuant to the will. See, *Youngblood v. American Bible Soc.*, 227 Neb. 472, 418 N.W.2d 554 (1988); *Sheldon v. Watkins*, 188 Neb. 599, 198 N.W.2d 455 (1972). To the extent that these cases imply that a testator may change the method of transferring property held in joint tenancy by the language in his will, the cases are incorrect.

Powell appears to suggest that the real property that

decedent and her husband held as joint tenants passed to decedent pursuant to the terms of the will and, further, that her husband devised to decedent only a life estate interest in such property. This is incorrect. When decedent's husband died, he had no interest in the real property which he could devise because title automatically vested in the surviving tenant. See, *Sabot v. Fox*, 272 N.W.2d 280 (N.D. 1978); *Cranston v. Winters*, 238 N.W.2d 647 (N.D. 1976). (Powell's reliance on *Concordia College v. Salvation Army*, 470 N.W.2d 542 (Minn. App. 1991), for the argument is misplaced. There is nothing in the *Concordia College* opinion which suggests that the court ever considered such an issue.)

Decedent's husband could have devised an interest in the Minnesota real property to decedent only if the joint tenants had severed the joint tenancy before decedent's husband died. We find that the joint will did not sever the joint tenancy. See *First United Pres. Church, supra.* Minn. Stat. Ann. § 500.19, subd. 5 (West 1990), sets forth the only methods by which a joint tenancy in real property may be severed and legally effective. Section 500.19, subd. 5, provides:

> A severance of a joint tenancy interest in real estate by a joint tenant shall be legally effective only if (1) the instrument of severance is recorded in the office of the county recorder or the registrar of titles in the county where the real estate is situated; or (2) the instrument of severance is executed by all of the joint tenants; or (3) the severance is ordered by a court of competent jurisdiction; or (4) a severance is effected pursuant to bankruptcy of a joint tenant.

See *Wendt v. Hane*, 401 N.W.2d 457 (Minn. App. 1987). Real estate held in joint tenancy cannot be severed unless one of the conditions of § 500.19, subd. 5, has been satisfied. *Wendt, supra.*

Although Minnesota courts have not addressed whether a will constitutes an "instrument of severance," the Minnesota Court of Appeals has considered whether an action to partition a joint tenancy, coupled with the joint tenant's counterclaim for partition, constituted an instrument of severance. In *Wendt*, one of the joint tenants died before the court had issued a

judgment ordering severance of the joint tenancy. Heirs of the deceased tenant argued that the action severed the joint tenancy and that they inherited an interest in the property. The court strictly construed § 500.19, subd. 5, and held that the partition action did not constitute an instrument of severance. The court stated that the mutual intent of the joint tenants to sever the joint tenancy was irrelevant and that the documents filed by each in the partition action did not satisfy § 500.19, subd. 5.

Minnesota courts are reluctant to find that parties have, by their actions or general language, severed a joint tenancy within the meaning of § 500.19, subd. 5. To hold that the general language of the joint will in the present action constitutes an instrument of severance would undermine the purpose of the statute. In the present case, the joint will states that "[w]e give, devise and bequeath unto the survivor of us all and any real and personal property owned by us, either jointly or severally." By this language the parties recognized their jointly held property, but did not sever the joint tenancy.

Although the real property did not pass to decedent pursuant to the terms of the will, the real property was estate property and thus subject to the terms of the will. Any personal property owned by them as joint tenants was also estate property and subject to the terms of the will. According to the joint will, decedent and her husband agreed to devise to the survivor "all and any real and personal property owned by us, either jointly or severally." We find that this language demonstrates their intent that the estate property include property they each owned separately and property they owned as joint tenants. See, *Knolle v. Hunt*, 551 S.W.2d 755, 758 (Tex. Civ. App. 1977) (the language "devise [to survivor] all property of every kind" caused jointly held property to be subject to the terms of the will, but such property did not pass by virtue of the will); *Moline Nat'l Bk. v. Flemming*, 91 Ill App. 3d 398, 414 N.E.2d 936 (1980) (testators intended that the personal property they owned jointly be subject to the terms of their joint will); *First United Pres. Church v. Christenson*, 64 Ill. 2d 491, 356 N.E.2d 532 (1976) (testators intended that the real property they owned jointly be subject to the terms of their joint will).

We now must determine what power the surviving testator

has over the estate property.

Although a joint will does not contain any express restrictions on the survivor's use and disposition of estate property, the survivor implicitly agrees that she or he will carry out the testamentary intent of the joint will. *Robison v. Graham*, 799 P.2d 610 (Okla. 1990); *Knolle*, 551 S.W.2d at 758 (the language "the estate remaining in the hands of such survivor of us . . . shall vest or pass" indicates that the survivor reserves a right to do with the property as he or she chooses, but may not change the disposition plan of the will or make other testamentary transfers contrary to the will). In other words, the survivor has a contractual duty not to intentionally or unreasonably defeat the purpose of the joint will. See, *Pruss v. Pruss, ante* p. 521, 514 N.W.2d 335 (1994); *Knolle, supra*.

We emphasize that this contractual duty does not prohibit the survivor from using her property for the necessities and comforts of life. The survivor is not prohibited from changing the form of the property and is not prohibited from making reasonable gifts of estate property to third parties. Reasonableness of a gift would depend upon the proportion that the value of the gift bears to the value of the estate. *Humphries v. Whiteley*, 565 So.2d 96 (Ala. 1990); *Robison, supra*; Thomas E. Atkinson, Handbook of the Law of Wills § 49 (2d ed. 1953); William M. McGovern, Jr., et al., Wills, Trusts and Estates § 9.5 (1988); 79 Am. Jur. 2d *Wills* § 339 (1975); 94 C.J.S. *Wills* § 119 (1956); 97 C.J.S. *Wills* § 1367 e.(2) (1957); *Pruss, supra*. See, also, *Blackmon v. Estate of Battcock*, 78 N.Y.2d 735, 587 N.E.2d 280, 579 N.Y.S.2d 642 (1991) (stating that an agreement between joint testators which does not specifically prevent lifetime gifts does not necessarily prohibit such gifts); *Foulds v. First Nat. Bank*, 103 N.M. 361, 707 P.2d 1171 (1985) (stating that survivor had defeated the contractual agreement when she removed 95 percent of the assets from the joint estate); *Ikegami v. Ikegami*, 1 Haw. App. 505, 620 P.2d 768 (1980) (explaining that decedent could not divest himself of the bulk of his estate in derogation of the contract to devise).

The joint will executed by decedent and her husband states that upon her death or the death of her husband, "all and any

real and personal property owned by us, either jointly or severally, [would be devised for the survivor's] own use." The will further states that upon the death of the survivor, certain named beneficiaries would receive a percentage of "all of the rest, residue and remainder of our estate of every kind and nature . . . whether or not owned by us or hereinafter acquired by us." We find that this language gave decedent the power to dispose of the estate as a survivor may desire, provided that decedent did not make dispositions which defeated the testamentary purpose of their joint will.

Based on the foregoing principles, the issue becomes whether decedent's use of the proceeds from the sale of the real property and her use of any other estate property were intended to defeat the purpose of the joint will or were so unreasonable that the result was to defeat the purpose of the will.

After examining the record before us, we find it is impossible to determine whether decedent violated her contractual duties by defeating the purpose of the will. The record is void of any evidence regarding decedent's intent in disposing of the estate property or of the value of such dispositions in relation to the value of the entire estate. When this action was tried, however, the parties could not foresee the principles adopted in our opinion. We therefore reverse the decision of the district court and remand the cause for further proceedings.

To summarize, we find that Minnesota law applies to the issues presented by the parties, that the real property passed to decedent pursuant to the joint tenancy title, that such property was estate property and subject to the terms of the will, and that any other property which decedent acquired by will or joint title was also estate property and subject to the terms of the joint will. For the reasons addressed in this opinion, appellants' motion for new trial should have been granted. We remand the cause to the district court to allow it to decide whether decedent's use or disposition of the estate property defeated the testamentary intent and purpose of the joint will.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

ROBERT E. LEE, APPELLEE, V. NEBRASKA STATE RACING COMMISSION, APPELLANT.
GERTRUDE L. LEE, APPELLEE, V. NEBRASKA STATE RACING COMMISSION, APPELLANT.

513 N.W.2d 874

Filed April 8, 1994. Nos. S-92-525, S-92-526.

1. **Administrative Law: Pleadings: Time: Appeal and Error.** When the petition instituting review pursuant to the Administrative Procedure Act is filed in the district court on or after July 1, 1989, the review by the district court shall be de novo on the record.
2. **Administrative Law: Final Orders: Appeal and Error.** A final order rendered by a district court under the Administrative Procedure Act may be reversed, vacated, or modified by the Supreme Court or the Court of Appeals for errors appearing on the record.
3. _____: _____: _____. When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.

Appeal from the District Court for Douglas County: MICHAEL MCGILL, Judge. Affirmed.

Don Stenberg, Attorney General, and L. Jay Bartel for appellant.

Michael J. Lehan, of Kelley & Lehan, P.C., for appellees.

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

WHITE, J.

Nebraska State Racing Commission (commission) appeals from an order of the Douglas County District Court reversing and dismissing the orders of the commission which temporarily suspended appellee Robert E. Lee's license as trainer-owner and appellee Gertrude L. Lee's license as groom. We affirm the decision of the district court.

Robert Lee was charged with violating Nebraska State Racing Commission rule 18.018, unauthorized use of a hypodermic needle. Gertrude Lee was charged with violating Nebraska State Racing Commission rule 18.001, engaging in dishonest or corrupt practices, fraudulent acts, or other

conduct detrimental to racing. These charges stemmed from an incident which occurred on July 18, 1991, at Ak-Sar-Ben racing complex.

On July 18, 1991, State Trooper John White was summoned to Ak-Sar-Ben racing complex by a commission investigator to assist in an investigation. White was directed to stall 1, which housed the Lees' horse, Tree Date. From another stall, White observed the activities in stall 1. During this surveillance, White saw Gertrude Lee hold Tree Date's head while Robert Lee appeared to administer an injection into Tree Date's neck. White observed Robert Lee with a syringe, but never saw a hypodermic needle. Because of the positioning of Robert Lee, White was unable to observe exactly what Robert Lee did to Tree Date with the syringe.

White then observed the Lees enter a tack room and close the door. After a few minutes, they emerged from the room and White approached them. After White identified himself and stated his purpose for being there, Robert Lee produced an oral syringe which he stated was the one White saw him use to administer cough medicine to Tree Date.

Shortly thereafter, commission investigators, who were called to the barn by White, conducted an extensive search for the hypodermic needle that Robert Lee had allegedly used. The search included the barn, all four tack rooms, Tree Date's stall, the area surrounding the barn, all of the nearby trash bins, and the Lees' car. No physical search of the Lees was conducted. The investigators, however, could not find a hypodermic needle. A state veterinarian was called to examine Tree Date, and he took a blood sample approximately 30 minutes after White observed the alleged injection.

Subsequently, the commission held a hearing to determine whether the Lees violated the rules. Several veterinarians and chemists testified at the commission hearing regarding the probability that the blood samples taken from Tree Date could establish whether the medicine administered to Tree Date was given orally or intravenously. These witnesses agreed that the blood sample contained the drug phenylbutazone; however, they disagreed on whether the blood samples could establish how the drug had been administered. The presence of

phenylbutazone in Tree Date's blood does not constitute a violation of the commission's rules or the laws of this state.

The commission issued two orders dated October 9, 1991. In one order, the commission found that Robert Lee violated rule 18.018. Rule 18.018 provides in relevant part:

> The use of hypodermic needles is hereby forbidden, except when used by a veterinarian licensed by the State of Nebraska or the written permission of either the Stewards or the Racing Commission. Possession of such equipment or any accessories thereto is forbidden unless permission has been secured from the Stewards or the authorized representative of the Commission, in writing.

294 Neb. Admin. Code, ch. 18, § 018 (1984). The commission ordered that Robert Lee's license as an owner-trainer be suspended from August 22 through October 3, 1991, and that his license be restored in good standing after the suspension period. In the other order, the commission found that Gertrude Lee had violated rule 18.001. Rule 18.001 provides in relevant part:

> All persons guilty of any dishonest or corrupt practices, fraudulent, or other conduct detrimental to racing, including bookmaking or touting, committed while within or without any racing enclosures, either a licensee or not, shall be ruled off all racing enclosures under the jurisdiction of the Commission and it shall be the duty of Stewards and those authorized by them to exclude from all places under their jurisdiction persons who commit such offenses or are so ruled off.

294 Neb. Admin. Code, ch. 18, § 001 (1984). The commission ordered that Gertrude's Lee's license as a groom be suspended from August 22 through October 3, 1991, and that her license be restored in good standing after the suspension period.

The Lees filed petitions for review in district court, challenging the orders of the commission pursuant to Neb. Rev. Stat. § 84-917 (Cum. Supp. 1992). After conducting a de novo review of the record in accordance with § 84-917(5)(a), the district court reversed the commission's order and dismissed the charges. The court, in its journal entry, stated that "the Court finds that the investigating officer never saw a hypodermic

needle and that none was recovered." The commission timely filed a notice of appeal.

The commission contends that the district court erred in reversing the commission's suspension orders because the reversals were based on the findings by the district court that the Lees were not seen using a needle and because no needle was ever recovered.

When the petition instituting review pursuant to the Administrative Procedure Act is filed in the district court on or after July 1, 1989, the review by the district court shall be de novo on the record. § 84-917(5)(a); *Bell Fed. Credit Union v. Christianson*, 244 Neb. 267, 505 N.W.2d 710 (1993); *Davis v. Wright*, 243 Neb. 931, 503 N.W.2d 814 (1993). The final order rendered by the district court may be reversed, vacated, or modified by the Supreme Court or the Court of Appeals for errors appearing on the record. Neb. Rev. Stat. § 84-918(3) (Cum. Supp. 1992); *Christianson, supra*; *Davis, supra*. When reviewing an order for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Davis, supra*; *Stratbucker Children's Trust v. Zoning Bd. of Appeals*, 243 Neb. 68, 497 N.W.2d 671 (1993).

The commission contends that the decision of the district court is "plainly erroneous." Brief for appellant at 11. The commission argues that the district court reversed the commission's orders for the wrong reason. Specifically, the commission states that the only reason supporting the district court's decision was the lack of direct evidence—no one observed Robert Lee use a needle and no needle was recovered. The commission then contends that there is overwhelming circumstantial evidence in the record such that the only conclusion the court should have reached is that the Lees violated rules 18.018 and 18.001.

The statement of the district court in its journal entry is itself irrelevant to whether the court committed error appearing in the record. In our review of the district court's decision, we shall not overanalyze the purported reasons supporting that decision. The proper scope of our review is whether the decision

of the district court is supported by the law and the record.

After a review of the record, we find that the decision of the district court is consistent with applicable law, supported by the record, and neither arbitrary, capricious, nor unreasonable. We therefore affirm the decision of the district court.

AFFIRMED.

ALAN J. MACKIEWICZ, TRUSTEE, ET AL., APPELLANTS, V. J.J. & ASSOCIATES, A NEBRASKA GENERAL PARTNERSHIP, ET AL., APPELLEES.

514 N.W.2d 613

Filed April 8, 1994. No. S-92-583.

1. **Actions: Foreclosure: Equity.** A foreclosure action is grounded in equity.
2. **Actions: Liens: Equity.** An action to determine the priority of liens is grounded in equity.
3. **Equity: Appeal and Error.** In an appeal of an equity action, an appellate court tries the factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where credible evidence is in conflict on a material issue of fact, the 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.
4. **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.
5. **Mortgages: Liens: Title.** In a mortgage, the mortgagor subjects his or her property to a lien as security for a debt, but retains title and right to possession of the property.
6. **Mortgages.** A mortgage is a mere pledge or collateral security for the payment of money.
7. **Contracts: Real Estate: Sales: Title.** As in a mortgage, one selling under an installment land contract agrees to accept payments from the buyer, generally by a series of installments over time, until the purchase price as established by the contract has been paid. When the contract price has been paid, the seller must deliver a deed of title to the buyer.
8. _____: _____: _____: _____. Under an installment land contract, the seller retains the legal title as security for the deferred installments of the purchase price, and the buyer acquires equitable ownership of the property.
9. _____: _____: _____: _____. The net result of an installment land contract is that the seller holds the legal title in trust for the buyer.

10. **Contracts: Real Estate: Sales.** Under an installment land contract, the buyer in possession is, for all practical purposes, the owner of the property, with all the rights of an owner, subject only to the terms of the contract.
11. **Conveyances: Property: Intent: Equity.** In construing instruments conveying property, equity concerns itself with the substance and not the form of the transaction, and the particular form or words of a conveyance are unimportant if the intention of the parties can be ascertained.
12. **Equity: Courts.** A court of equity will look to the substance of the transaction, rather than give heed to the mere form it may assume.
13. **Contracts: Mortgages: Intent.** If an instrument executed by parties is intended by them as security for a debt, whatever may be its form or name, it is in equity a mortgage.
14. **Contracts: Real Estate: Sales: Title.** Where the owner of real estate enters into a contract of sale, retaining legal title until purchase money is paid, the ownership of the realty passes to and vests in the purchaser, and the interest or estate acquired by the buyer is land, and the rights conferred by the contract upon and vested in the seller are personal property.
15. **Contracts: Real Estate: Sales: Escrow: Deeds: Title.** Where a land contract has an escrow provision stating that the deed will be held in escrow until payment of the purchase price, the grantor of an instrument held in escrow loses control over it so long as the grantee does not default, even though the grantor retains bare legal title in the land as security for payment of the purchase price.
16. **Mortgages: Liens: Intent.** Where the holder of a senior mortgage discharges it of record and contemporaneously takes a new mortgage, the holder will not, in the absence of paramount equities, be held to have subordinated his or her security to an intervening lien unless the circumstances of the transaction indicate this to have been the holder's intention, or such intention upon the holder's part is shown by extrinsic evidence.
17. **Mortgages: Title: Presumptions: Intent.** Ordinarily, it is presumed that where it was essential to one's security against an intervening title, one must have intended to keep alive the mortgage title; this presumption applies although one, through ignorance of such intervening title, may have actually discharged the mortgage and canceled the notes and intended to extinguish them.
18. **Contracts: Real Estate: Sales: Title: Liens: Mortgages.** Because a seller in a land contract retains the title as security for the unpaid purchase money and has an equitable lien on the land to the extent of the debt, a seller has, for all intents and purposes, a purchase-money mortgage.
19. **Trial.** Where facts are conceded, undisputed, or are such that reasonable minds can draw but one conclusion therefrom, it is the duty of the court to decide the question as a matter of law.
20. **Accord and Satisfaction: Words and Phrases.** An accord and satisfaction is a discharge of an existing indebtedness by the rendering of some performance different from that which was claimed as due and the acceptance of such substituted performance by the claimant in full satisfaction of the claim.
21. **Accord and Satisfaction.** To constitute an accord and satisfaction, there must be (1) a bona fide dispute between the parties, (2) substitute performance tendered

in full satisfaction of the claim, and (3) acceptance of the tendered performance.

22. **Liability: Debtors and Creditors: Contracts.** Two conditions must be met in order for an agreement to constitute a novation: (1) The agreement must completely extinguish the existing liability, and (2) a new liability must be substituted in its place.

Appeal from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Affirmed as modified.

Alan J. Mackiewicz, of Lich, Herold & Mackiewicz, for appellants.

G. Michael Wiseman, of Wiseman Law Office, for appellees Wiseman and Resolution Trust Corporation.

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

CAPORALE, J.

I. STATEMENT OF CASE

In this foreclosure action, the plaintiff-appellant trustee, Alan J. Mackiewicz, and the plaintiffs-appellants vendors and trustees-beneficiaries, George D. Goos and George W. Venteicher, seek to enforce the terms of the deeds of trust executed by the defendant-appellee purchaser, J.J. & Associates, a partnership. The district court determined that the lien of the defendant-appellee Resolution Trust Corporation (RTC), for which the defendant-appellee G. Michael Wiseman serves as successor trustee, was superior to those of Goos-Venteicher and ordered foreclosure in accordance with that determination. Goos-Venteicher then undertook this appeal, persuading us, pursuant to the provisions of Neb. Rev. Stat. § 24-1106(2) (Cum. Supp. 1992) and Neb. Ct. R. of Prac. 2B (rev. 1992), to bypass the Nebraska Court of Appeals. The appellants' assignments of error combine to claim, in summary, that the district court mistakenly determined (1) that they were not entitled to liens with priority over RTC's lien and (2) that even if they were entitled to priority, there had been an accord and satisfaction between them and J.J. & Associates. RTC argues that even if there had been no accord and satisfaction, there was a novation precluding Goos-Venteicher from asserting prior liens. We

affirm as modified.

II. SCOPE OF REVIEW

A foreclosure action is grounded in equity, *Metropolitan Life Ins. Co. v. Kissinger Farms*, 244 Neb. 620, 508 N.W.2d 568 (1993), as is an action to determine the priority of liens, *Reilly v. First Nat. Bank & Trust Co.*, 220 Neb. 443, 370 N.W.2d 163 (1985).

In an appeal of an equity action, an appellate court tries the factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where credible evidence is in conflict on a material issue of fact, the 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. *How v. Mars, ante* p. 420, 513 N.W.2d 511 (1994); *Fritsch v. Hilton Land & Cattle Co., ante* p. 469, 513 N.W.2d 534 (1994); *Lange Indus. v. Hallam Grain Co.*, 244 Neb. 465, 507 N.W.2d 465 (1993).

However, regarding a question of law, an appellate court has an obligation to reach a correct conclusion independent of that reached by the court below. *Powell v. American Charter Fed. Sav. & Loan Assn., ante* p. 551, 514 N.W.2d 326 (1994); *Jasa v. Douglas County*, 244 Neb. 944, 510 N.W.2d 281 (1994).

III. FACTS

On December 21, 1987, Goos-Venteicher sold two lots to J.J. & Associates under separate installment land contracts which were recorded on December 30, 1987. According to the terms of the contracts, J.J. & Associates paid $10,000 down on each lot, and the balances of $33,000 and $34,500 were to be paid in three subsequent installments, the first installment becoming due on December 21, 1988. Contemporaneously with the execution of the land contracts, Goos-Venteicher executed warranty deeds to J.J. & Associates for each lot, and J.J. & Associates executed quitclaim deeds for the lots to Goos-Venteicher. All four deeds were placed in escrow; under the terms of the land contracts, the warranty deeds were to be delivered to J.J. & Associates upon payment in full of the purchase price; the quitclaim deeds were to be recorded upon written notification to the escrow

agent that J.J. & Associates had defaulted.

Unknown to Goos-Venteicher, J.J. & Associates executed, on May 10, 1988, a promissory note to Occidental Nebraska Federal Savings Bank in the amount of $500,000, together with a deed of trust covering four lots, the two Goos-Venteicher lots and two Occidental lots. This Occidental deed of trust was recorded on June 9, 1988. J.J. & Associates used the Occidental loan to refinance the purchase price and improvements on the two Occidental lots and to provide an influx of operating cash to a corporation owned by it. RTC, as the receiver for Occidental, is the assignee of Occidental's beneficial interest under the Occidental deed of trust.

When J.J. & Associates failed to make the December 21, 1988, payment due Goos-Venteicher, the latter executed an amendment and modification to each of the land contracts, under which the December 21 payment was changed to an interest-only payment and the principal part of the payment was deferred to August 1, 1989; the second and third installments remained the same. However, J.J. & Associates also failed to make the payments due August 1. Goos-Venteicher then executed warranty deeds dated September 15, 1989, for each of the lots they had sold. Each deed recites that it "is given in satisfaction of a Land Contract dated December 21, 1987." On October 18, 1989, J.J. & Associates delivered to Goos-Venteicher promissory notes, deeds of trust, and acknowledgments of deeds of trust for each of the two lots. The warranty deeds, Goos-Venteicher deeds of trust, and acknowledgments of those deeds were recorded on October 24, 1989. The principal amounts due under the promissory notes are the same as the principal amounts due under the land contracts as amended and modified. Under the terms of the notes, J.J. & Associates was required to pay monthly all accrued interest on the unpaid balance and, in addition, pay $1,000 on each March 15 and September 15 until the principal and interest were paid in full.

This action resulted as the consequence of J.J. & Associates' failure to make the payments due on September 15, 1990. J.J. & Associates is also in default on the Occidental transaction.

IV. ANALYSIS OF SUMMARIZED ASSIGNMENTS OF ERROR

With that factual background in mind, we turn our attention to the summarized assignments of error.

1. Superiority of Liens

In maintaining in the first assignment of error that the district court erred in finding they did not have first liens on each lot they had sold, the appellants urge that (a) there is no essential difference between a lien created under a land contract and one created by a mortgage, and (b) the documents executed after J.J. & Associates' initial default did not operate so as to permit an intervening lien to take priority.

(a) Nature of Land Contract

In a mortgage, the mortgagor subjects his or her property to a lien as security for a debt, but retains title and right to possession of the property. See, *Dupuy v. Western State Bank*, 221 Neb. 230, 375 N.W.2d 909 (1985); *Morrill v. Skinner*, 57 Neb. 164, 77 N.W. 375 (1898); *Davidson v. Cox*, 11 Neb. 250, 9 N.W. 95 (1881). A mortgage is a mere pledge or collateral security for the payment of money. *Fiske v. Mayhew*, 90 Neb. 196, 133 N.W. 195 (1911).

As in a mortgage, one selling under an installment land contract agrees to accept payments from the buyer, generally by a series of installments over time, until the purchase price as established by the contract has been paid. When the contract price has been paid, the seller must deliver a deed of title to the buyer. *Matter of Estate of Ventling*, 771 P.2d 388 (Wyo. 1989). Under such an arrangement, the seller retains the legal title as security for the deferred installments of the purchase price, and the buyer acquires equitable ownership of the property. *DeBoer v. Oakbrook Home Assn.*, 218 Neb. 813, 359 N.W.2d 768 (1984). See, *Beren Corp. v. Spader*, 198 Neb. 677, 255 N.W.2d 247 (1977); *Buford v. Dahlke*, 158 Neb. 39, 62 N.W.2d 252 (1954). The net result is that the seller holds the legal title in trust for the buyer. *Matter of Estate of Ventling, supra*; *Bank of Santa Fe v. Garcia*, 102 N.M. 588, 698 P.2d 458 (N.M. App. 1985), *cert. denied sub nom., Espinoza v. Bank of Santa Fe*, 102 N.M. 613, 698 P.2d 886. The buyer in possession, on the

other hand, is, for all practical purposes, the owner of the property, with all the rights of an owner, subject only to the terms of the contract. *Bean v. Walker*, 95 A.D.2d 70, 464 N.Y.S.2d 895 (1983).

This court has uniformly recognized that in construing instruments conveying property, equity concerns itself with the substance and not the form of the transaction and that the particular form or words of a conveyance are unimportant if the intention of the parties can be ascertained. See, *Koehn v. Koehn*, 164 Neb. 169, 81 N.W.2d 900 (1957); *Campbell v. Ohio National Life Ins. Co.*, 161 Neb. 653, 74 N.W.2d 546 (1956); *Ashbrook v. Briner*, 137 Neb. 104, 288 N.W. 374 (1939); *Northwestern State Bank v. Hanks*, 122 Neb. 262, 240 N.W. 281 (1932). Stated another way, a court of equity will look to the substance of the transaction, rather than give heed to the mere form it may assume. *Peoples Bank v. Trowbridge*, 123 Neb. 312, 242 N.W. 647 (1932). The duty of the courts is to carry into effect the true intent of the parties. Neb. Rev. Stat. § 76-205 (Reissue 1990); *Dupuy v. Western State Bank, supra*; *In re Estate of Darr*, 114 Neb. 116, 206 N.W. 2 (1925); *Jackson v. Phillips*, 57 Neb. 189, 77 N.W. 683 (1898). See *Davison v. Inselman*, 185 Neb. 236, 175 N.W.2d 85 (1970). This intention may be evidenced not only by the document but also by the declarations and conduct of the parties. *Id.*

More specifically, it is "generally accepted that if an instrument executed by parties is intended by them as security for a debt, whatever may be its form or name, it is in equity a mortgage." *Campbell v. Ohio National Life Ins. Co.*, 161 Neb. at 659, 74 N.W.2d at 552. See, *Northwestern State Bank v. Hanks, supra* (particular form or words of the conveyance are unimportant); *Fiske v. Mayhew, supra*.

As with the terms used in describing a mortgage, this court has repeatedly termed a purchaser's interest under an executory land contract as both a "security" and a "lien" upon the land. See, *DeBoer v. Oakbrook Home Assn., supra* (legal title remaining in seller only as security for payment); *Beren Corp. v. Spader, supra* (seller retains legal title as security for deferred installment payments); *Hendrix v. Barker*, 49 Neb. 369, 68 N.W. 531 (1896) (purchaser's interest under an executory land

sale contract is security for the debt of unpaid purchase money); *Birdsall v. Cropsey*, 29 Neb. 672, 44 N.W. 857 (1890), *modified* 29 Neb. 679, 45 N.W. 921 (seller of real estate under a land contract has an equitable lien upon the land).

In *Hendrix*, this court stated:

> All the authorities agree that in an executory contract for the sale of real estate the vendor retains the legal title to secure the payment of the unpaid purchase money. In *Church v. Smith*, 39 Wis. 492, the court says: "The vendor of land by an ordinary land contract holds the legal title as security for the unpaid purchase money.["] (*Sparks v. Hess*, 15 Cal., 186.) And in *Graham v. McCampbell*, 33 Am. Dec., 126, the supreme court of Tennessee says: "We are not able to draw any sensible distinction between the cases of a legal title conveyed to secure the payment of a debt and a legal title retained to secure the payment of a debt. In both cases courts of chancery consider the estate only as security for the payment of the debt, upon the discharge of which the debtor is entitled to a conveyance in the one instance and a reconveyance in the other."
>
> . . . And the authorities are harmonious that in an executory contract for the sale of real estate the vendor, upon default made by the vendee, may treat the contract as an ordinary real estate mortgage and foreclose it as such. In *Fitzhugh v. Maxwell*, 34 Mich., 138, the court said: "A contract for the sale of land conveys to the vendee an equitable title, and the only principle upon which the vendor may sue for his money, and at the same time seek security against the land, is the one which recognizes the analogy to a vendor's lien in cases where the legal title has been conveyed; and the vendee's title can only be divested by a sale. The claim of a vendor in a land contract is but an ordinary money debt secured by the contract, and his proceedings to enforce the lien upon the land should be governed by the analogies of proceedings to enforce other equitable liens and be executed by a sale to satisfy the amount due." . . . In *Sparks v. Hess*, 15 Cal., 186, the court said the position of a vendor in an executory contract for the sale of real estate is similar to that of a

> party executing a conveyance and taking back a mortgage. He "may sue at law for the balance of the purchase money or file his bill in equity for the specific performance of the contract and take an alternative decree that if the purchaser will not accept a conveyance and pay the purchase money the premises be sold to raise such money and that the vendee pay any deficiency remaining after the application of the proceeds arising upon such sale."

49 Neb. at 372-73, 68 N.W. at 532-33.

Where the owner of real estate enters into a contract of sale, retaining legal title until purchase money is paid, the ownership of the realty passes to and vests in the purchaser, and the interest or estate acquired by the buyer is land, and the rights conferred by the contract upon and vested in the seller are personal property. *Buford v. Dahlke*, 158 Neb. 39, 62 N.W.2d 252 (1954). Cf. *Northwestern State Bank v. Hanks*, 122 Neb. 262, 240 N.W. 281 (1932) (in mortgage transaction, legal title is retained by mortgagor-borrower, and equitable interest of mortgagee-lender is personal property only). That rule has also been applied in risk of loss cases. *Monroe v. Lincoln City Employees Credit Union*, 203 Neb. 702, 279 N.W.2d 866 (1979).

Moreover, where a land contract has an escrow provision stating that the deed will be held in escrow until payment of the purchase price, the grantor of an instrument held in escrow loses control over it so long as the grantee does not default, even though the grantor retains bare legal title in the land as security for payment of the purchase price. *DeBoer v. Oakbrook Home Assn.*, 218 Neb. 813, 359 N.W.2d 768 (1984) (seller loses right to control the property or any incidents of ownership except those which are necessary to protect his security rights); *Beren Corp. v. Spader*, 198 Neb. 677, 255 N.W.2d 247 (1977); *Valentine Oil Co. v. Powers*, 157 Neb. 71, 59 N.W.2d 150 (1953) (grantor loses control over the instrument placed in escrow).

We have also refused to strictly enforce the traditional remedy of forfeiture in the event of a default on a land contract in favor of recognizing the right of a seller to foreclose as if the contract were a mortgage. See, *Ryan v. Kolterman*, 215 Neb. 355, 338 N.W.2d 747 (1983) (before relief under strict forfeiture

may be granted, it must be clear that property is of less value than amount due on contract for its sale at time of trial and that it would not bring surplus over amount due if sale were ordered); *State Securities Co. v. Daringer*, 206 Neb. 427, 293 N.W.2d 102 (1980) (contract for purchase of real estate may be strictly foreclosed where it is clear that property is of less value than contract price and that it would not bring surplus over and above amount due if sale were ordered, and such procedure would not offend justice and equity). See, also, *Heartline Farms, Inc. v. Daly*, 934 F.2d 985 (8th Cir. 1991) (permitting strict foreclosure of vendee's interest in installment land contract would offend equity and justice); *Porter v. Smith*, 240 Neb. 928, 486 N.W.2d 846 (1992); *Jones v. Burr*, 223 Neb. 291, 389 N.W.2d 289 (1986); *Carman v. Gibbs*, 220 Neb. 603, 371 N.W.2d 283 (1985). In addition, we have recognized the right of a seller in an executory land contract to treat the contract in an installment land action like the note given in a mortgage transaction to support an action at law and sue the purchaser for a deficiency judgment. See *Carman v. Gibbs, supra*.

From the foregoing, we conclude that the land contracts in question are to be treated as mortgages.

(b) Postdefault Documents

That determination makes it necessary that we determine the effect of the documents executed after J.J. & Associates' August 1, 1989, default. Where the holder of a senior mortgage discharges it of record and contemporaneously takes a new mortgage, the holder will not, in the absence of paramount equities, be held to have subordinated his or her security to an intervening lien unless the circumstances of the transaction indicate this to have been the holder's intention, or such intention upon the holder's part is shown by extrinsic evidence. *Larson Cement Stone Co. v. Redlim Realty Co.*, 179 Neb. 134, 137 N.W.2d 241 (1965); *Hadley v. Schow*, 146 Neb. 163, 18 N.W.2d 923 (1945). Ordinarily, it is presumed that where it was essential to one's security against an intervening title, one must have intended to keep alive the mortgage title; this presumption applies although one, through ignorance of such intervening title, may have actually discharged the mortgage and canceled

the notes and intended to extinguish them. *Commercial Fed. S. & L. Assn. v. Grabenstein*, 231 Neb. 647, 437 N.W.2d 775 (1989); *Hadley v. Schow, supra.*

As we said in *Peoples Bank v. Trowbridge*, 123 Neb. 312, 315-16, 242 N.W. 647, 648 (1932), quoting *American Sav. Bank & Trust Co. v. Helgesen*, 67 Wash. 572, 122 P. 26 (1912):

> "The cancelation of the old mortgage and the substitution of the new were contemporaneous acts. The manifest intention of all parties interested and participating was not to discharge the lien of the mortgage but to continue it. The purpose was not to create a new incumbrance, but merely to change the form of the old. . . ."

Here, there was no intent on the part of Goos-Venteicher or J.J. & Associates to give up the priority of the liens created by the land contracts. Rather, according to the evidence, the contracts were changed to deeds of trust to put Goos-Venteicher "in a position that was easier and quicker to dispose of in case we had to go to foreclosure at a later date." Indeed, the district court so found, stating: "The logical conclusion is the parties intended the transaction(s) in the fall of 1989 [to] be a substitution for the rights and obligations under the existing land contracts."

In *Troyer v. Mundy*, 60 F.2d 818 (8th Cir. 1932), the father sold land to his son-in-law and took back a purchase-money mortgage for $11,000. When the father died, the son-in-law's wife received $6,800 of the mortgage, and her sister received $3,700. To divide the estate, the sisters released the original $11,000 mortgage and took back two mortgages of equal priority, one for $6,800 and one for $3,700. When a third party offered to advance $3,700 for the wife's sister's mortgage if he could have a first mortgage, the sisters filed releases, and the son-in-law renewed the mortgages, executing a first mortgage to the third party for $3,700 and a second mortgage to his wife for $8,500. The son-in-law subsequently declared bankruptcy, and the trustee in bankruptcy argued that he, the trustee, had priority because the son-in-law's wife was not entitled to the protection of a purchase-money mortgage.

The court of appeals stated:

> Being a purchase-money mortgage, given to secure a

> particular debt, it remained valid in equity for that purpose, whatever form the debt might assume, if it could be traced. . . . The lien of a purchase-money mortgage having attached, it was not displaced by any change in the form of the security. Defendant has clearly traced her debt and mortgage to the original purchase-money mortgage, and in equity her purchase-money mortgage interest should be sustained. . . . The subsequent dealings with the original mortgage have not changed the inherent nature of the mortgages taken in its place. They are to be regarded as purchase-money mortgages.

Id. at 821.

Because this court has uniformly recognized that a seller in a land contract retains the title as security for the unpaid purchase money and has an equitable lien on the land to the extent of the debt, a seller has, for all intents and purposes, a purchase-money mortgage. See, *Hendrix v. Barker*, 49 Neb. 369, 68 N.W. 531 (1896); *Birdsall v. Cropsey*, 29 Neb. 672, 44 N.W. 857 (1890), *modified* 29 Neb. 679, 45 N.W. 921; *Dorsey v. Hall*, 7 Neb. 460 (1878). See, also, *Commerce Savings Lincoln v. Robinson*, 213 Neb. 596, 331 N.W.2d 495 (1983) (a purchase-money mortgage is given for unpaid purchase money on sale of land as part of same transaction as deed, and its funds are actually used to buy land). Under the reasoning in *Troyer*, therefore, Goos-Venteicher's deeds of trust traceable to the original purchase-money mortgage created by the land contracts would maintain the priority of those contracts.

In finding that the October 18 deeds of trust did not have the first priority of the land sale contracts, the district court stated that "the execution and delivery of the warranty deeds was not done contemporaneously with the execution and delivery of the promissory notes and trust deeds." The court reasoned that the

> warranty deeds were executed, and presumably delivered, by Goos and Venteicher on September 15, 1989. The promissory notes and trust deeds were not executed and delivered until October 18, 1989. Thusly, for a period of time exceeding 30 days, these lots had no lien other than that possessed by [RTC].

The essential fact to render delivery effective is that the deed

itself has left the control of the grantor, who has reserved no right to recall it, and it has passed to the grantee. *Robinson v. Thompson*, 192 Neb. 428, 222 N.W.2d 123 (1974); *Kellner v. Whaley*, 148 Neb. 259, 27 N.W.2d 183 (1947).

It is essential to the validity of a deed that there be delivery. *Krueger v. Callies*, 190 Neb. 376, 208 N.W.2d 685 (1973); *Moseley v. Zieg*, 180 Neb. 810, 146 N.W.2d 72 (1966), *on reargument* 181 Neb. 691, 150 N.W.2d 736 (1967). The district court presumed delivery of the warranty deeds as of the date of their execution.

The evidence is uncontroverted that the warranty deeds were delivered on the same day that the promissory notes and Goos-Venteicher deeds of trust and deeds of trust acknowledgments were executed. Not only did J.J. & Associates' general partner testify that on October 18, 1989, simultaneously with the receipt of the warranty deeds, he signed the promissory notes, deeds of trust, and deeds of trust acknowledgments, but the parties stipulated that contemporaneously with the execution of the promissory notes, deeds of trust, and deeds of trust acknowledgments by J.J. & Associates, Goos-Venteicher delivered to J.J. & Associates the warranty deeds to both lots.

Where facts are conceded, undisputed, or such that reasonable minds can draw but one conclusion therefrom, it is the duty of the court to decide the question as a matter of law. *Palmtag v. Gartner Constr. Co., ante* p. 405, 513 N.W.2d 495 (1994); *Johnson v. First Nat. Bank & Trust Co.*, 207 Neb. 521, 300 N.W.2d 10 (1980); *Woodsmall v. Marijo, Inc.*, 206 Neb. 405, 293 N.W.2d 378 (1980). Our independent review of the record clearly shows that the warranty deeds were delivered by Goos-Venteicher on October 18, the same date the promissory notes and deeds of trust were executed and delivered by J.J. & Associates.

Moreover, a finding that the warranty deeds were executed and delivered on September 18, prior to the execution and delivery of the notes and deeds of trust, alone would not prevent a holding that a mortgage was created. In *Prout v. Burke*, 51 Neb. 24, 70 N.W. 512 (1897), promissory notes, a mortgage, and a deed were executed on different dates, and no

evidence was presented clearly disclosing the dates of delivery. We reasoned that because the evidence showed that the papers were intended by the parties to be, and were in fact, parts of the same transaction, the mortgage must, in legal effect, be regarded as having been executed and delivered simultaneously with the deed of purchase. Even if a deed conveys title in fee simple, this court looks to the intent and relationship of the parties where it is contended that the conveyance is in actuality a mortgage. See, Neb. Rev. Stat. § 76-251 (Reissue 1990); *Stava v. Stava*, 222 Neb. 343, 383 N.W.2d 765 (1986); *Cizek v. Cizek*, 201 Neb. 4, 266 N.W.2d 68 (1978); *Davison v. Inselman*, 185 Neb. 236, 175 N.W.2d 85 (1970); *Koehn v. Koehn*, 164 Neb. 169, 81 N.W.2d 900 (1957); *Campbell v. Ohio National Life Ins. Co.*, 161 Neb. 653, 74 N.W.2d 546 (1956).

Although J.J. & Associates was given additional time in which to purchase the Goos-Venteicher lots, such "stretching out" of installment payments does not, under the circumstances, result in a loss of priority. See, *Larson Cement Stone Co. v. Redlim Realty Co.*, 179 Neb. 134, 137 N.W.2d 241 (1965) (where, prior to advancement of any funds, renewal mortgage was executed permitting extension of date of first payment, renewal mortgage was paramount and superior to intervening liens for material and labor); *Eurovest Ltd. v. 13290 Biscayne Island Terrace Corp.*, 559 So. 2d 1198 (Fla. App. 1990); *Guleserian v. Fields*, 351 Mass. 238, 218 N.E.2d 397 (1966). Contra *C&S Nat'l Bank of S. C. v. Smith*, 277 S.C. 162, 284 S.E.2d 770 (1981) (extension of senior mortgage results in loss of its priority as against an intervening lienor).

The case cited by the district court, *Rice v. Winters*, 45 Neb. 517, 63 N.W. 830 (1895), in support of its finding that Goos-Venteicher's deeds of trust executed October 18, 1989, were not first liens, is clearly distinguishable. In *Rice*, one party owned real estate on which two parties had mortgages. The plaintiff paid off the first mortgage on the property. Thereafter, the first mortgagee released his mortgage, and the mortgagor-borrower attempted to give the plaintiff the priority of the first mortgage. We said no, holding that the plaintiff was not entitled to be subrogated to the lien held by the first mortgagee, and reasoning that the right of subrogation is never

accorded in equity to one who is a mere volunteer in paying a debt of one person to another, but is accorded to one who must act on compulsion to save himself from loss by reason of a superior lien or claim on the part of the person to whom he pays the debt.

The promissory notes executed by J.J. & Associates to RTC state that they were secured by second deeds of trust on the Goos-Venteicher lots. Granting Goos-Venteicher's October 18, 1989, deeds of trust the priority created under their land contracts, RTC is left in the same position it would have been in had the Goos-Venteicher deeds of trust not been executed and the land contracts not been released.

We therefore hold that the Goos-Venteicher liens, evidenced by the promissory notes, deeds of trust, and deeds of trust acknowledgments executed on October 18, 1989, continue the liens first created by the land contracts and constitute first purchase-money mortgages and that the liens thus created have priority over the lien created by the Occidental transaction.

2. Accord and Satisfaction

In the second and last summarized assignment of error, Goos-Venteicher challenges the district court's finding that in any event, the documents executed after J.J. & Associates' default on the payment due August 1, 1989, constituted an accord and satisfaction of the land contracts.

In so ruling, the district court stated that those documents established "as a matter of law an accord and satisfaction of their rights and obligations under the land contract. This is further evidenced by the express statement on the warranty deeds that they were given 'in satisfaction' of the land contracts."

We agree with the statement in *United States v. Aetna Casualty & Surety Co.*, 480 F.2d 1095 (8th Cir. 1973), that an accord and satisfaction is a discharge of an existing indebtedness by the rendering of some performance different from that which was claimed as due and the acceptance of such substituted performance by the claimant in full satisfaction of the claim.

To constitute an accord and satisfaction, there must be (1) a

bona fide dispute between the parties, (2) substitute performance tendered in full satisfaction of the claim, and (3) acceptance of the tendered performance. *Peterson v. Kellner, ante* p. 515, 513 N.W.2d 517 (1994); *Mahler v. Bellis*, 231 Neb. 161, 435 N.W.2d 661 (1989).

It is essential that there be a bona fide dispute between the parties, that the substituted performance be tendered in full satisfaction of the claim, and that the tendered performance be accepted. *Rees v. Huffman*, 222 Neb. 493, 384 N.W.2d 631 (1986); *High-Plains Cooperative Assn. v. Stevens*, 204 Neb. 664, 284 N.W.2d 846 (1979).

In *Cass Constr. Co. v. Brennan*, 222 Neb. 69, 81, 382 N.W.2d 313, 321 (1986), we said:

> A bona fide dispute serves as the necessary consideration underlying the new agreement in an accord and satisfaction. This form of consideration is based on the theory that if the amount due is disputed or unliquidated, the forbearance from suit and the willingness to compromise is in itself valuable consideration, even if an ultimate factual showing may later establish that the claim or defense was invalid in whole or in part. . . .
>
> With regard to good faith in an accord and satisfaction, one court has defined it as follows: "An indispensible element contributing to the establishment of this defense consists in an actual and substantial difference of opinion. One must assert the validity of his claim and the other must in good faith deny all or part of it. His denial cannot be fabricated for use as a pretext to evade the discharge of an obligation. Disclaimer must be *bona fide* and based upon real faith that the demand is not meritorious."

There is no evidence that there ever was any dispute between Goos-Venteicher and J.J. & Associates in regard to the amount due on the subject properties. In point of fact, the principal amounts of the later-executed promissory notes were for the same amounts as the balances of the purchase price due under the land contracts. Goos testified that the words "in satisfaction," as written on the warranty deeds, did not mean that the purchase price had been paid in full, but, rather, that

the deeds of trust were a substitution for the land contracts and that the purchase price remained due.

The case upon which RTC relies, *Kearney State Bank & Trust v. Scheer-Williams*, 229 Neb. 705, 428 N.W.2d 888 (1988), is distinguishable from the case now before us. In *Kearney State Bank & Trust*, the bank had taken a security interest in the inventory of the defendants' store in exchange for a promissory note. The defendants defaulted, and the bank filed an action in replevin to secure the collateral. Thereafter, the parties entered into a written agreement under which the bank agreed to forgo part of the defendants' indebtedness in return for the defendants' surrendering possession of all their collateral to the bank for sale, with the proceeds to be applied to the remaining indebtedness. In the agreement, the defendants waived all rights to notification of the sale of the collateral. When the sale failed to produce enough revenue to satisfy the remaining indebtedness, the bank filed suit for the balance. The defendants argued that the failure of the bank to give notice of the sale as required under statute precluded the bank from obtaining a deficiency judgment. Considering that the agreement forgave a great amount of indebtedness, released a personal guaranty, and limited the amount of a deficiency judgment, we held that it was not unreasonable to conclude that the defendants had waived notice of the impending sale and, more significantly, that the agreement constituted a valid accord and satisfaction. However, unlike the situation in *Kearney State Bank & Trust*, here the amount of the indebtedness was not reduced in the October 18 transaction. Additionally, the trial court in *Kearney State Bank & Trust* appeared to find that a bona fide dispute existed between the parties.

RTC urges that *Kearney State Bank & Trust* is applicable because J.J. & Associates tendered a deed of trust and a promissory note for the balance owing on the land contracts in return for Goos-Venteicher not exercising their right under the land contracts. The testimony of Goos and J.J. & Associates' general partner precludes such a finding. The only testimony given regarding the reason for the change to the deed of trust came from Goos, who stated, as first noted in subpart (1)(b)

above, that the deeds of trust were utilized to make it easier to foreclose on the property should J.J. & Associates default on its notes.

Nor is the case *Waters v. Lanier*, 116 Ga. App. 471, 157 S.E.2d 796 (1967), on point. In *Waters*, the Georgia Court of Appeals found the creditor entered an accord and satisfaction by accepting a warranty deed given "in satisfaction" of a promissory note held by the creditor, collection of which had been barred by bankruptcy.

The key element of accord and satisfaction is the intent of the parties, which, although as a general rule presents a question of fact, becomes a question of law when the evidence creates no conflict as to intent. *Mahler v. Bellis*, 231 Neb. 161, 435 N.W.2d 661 (1989).

There is simply no evidence of a bona fide dispute or intent on the part of Goos-Venteicher and J.J. & Associates to extinguish the prior indebtedness owing under the land contracts and to accept the executed deeds of trust as an accord and satisfaction. Absent the intent of the parties to enter into an accord and satisfaction of the land contracts, the words "in satisfaction" on the warranty deed do not constitute an accord and satisfaction.

V. ANALYSIS OF NOVATION CLAIM

RTC argues that if there was no accord and satisfaction, Goos-Venteicher's intention to replace the remedies applicable to land contracts with those available under deeds of trust makes the October 18 transaction a novation.

Two conditions must be met in order for an agreement to constitute a novation: (1) The agreement must completely extinguish the existing liability, and (2) a new liability must be substituted in its place. See, *Wheat Belt Pub. Power Dist. v. Batterman*, 234 Neb. 589, 452 N.W.2d 49 (1990); *Thomas v. George*, 105 Neb. 44, 178 N.W. 922 (1920), *modified* 105 Neb. 51, 181 N.W. 646 (1921). A novation will never be presumed. The complete discharge of the original debtor must be shown to have been expressly agreed upon or must be necessarily and clearly inferred from the express terms of the agreement. *Id.*

As we have determined previously, see part IV(1)(b) above,

the liens arising by virtue of the execution of the installment land contracts were never extinguished. Thus, it follows without the need of further explication that the October 18 transaction cannot constitute a novation.

VI. JUDGMENT

Accordingly, the district court's decree of foreclosure is affirmed but modified so as to give priority to Goos-Venteicher's liens over that of RTC.

AFFIRMED AS MODIFIED.

MILO P. VACANTI, APPELLANT, V. MASTER ELECTRONICS CORPORATION, A NEBRASKA CORPORATION, APPELLEE.

514 N.W.2d 319

Filed April 8, 1994. No. S-92-650.

1. **Property.** Under a defense-of-property defense, the use of force is privileged when an invader takes property from another's possession and it appears that the invader is about to remove the property from the possessor's premises. The privilege allows only for the use of reasonable force. The privilege may be exercised by anyone in possession of property who has, as against the invader, a superior right to the property.
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. **Actions: Assault: Battery: Damages.** In an action for assault and battery, provocation cannot be considered in mitigation of damages.
4. **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.
5. **Rules of Evidence: Medical Assistance: Health Care Providers.** Neb. Evid. R. 803(3), Neb. Rev. Stat. § 27-803(3) (Reissue 1989), applies to persons seeking medical assistance from persons who are expected to provide some form of health care.
6. **Expert Witnesses: Physicians and Surgeons: Records.** An expert medical witness may base an opinion on the medical records of another treating doctor when the records are of a type reasonably relied upon by experts in the particular field.
7. **Expert Witnesses: Records: Hearsay.** The mere fact that an expert witness relied

on medical records does not transform those records from inadmissible hearsay into admissible evidence.

8. **Verdicts: Appeal and Error.** An appellate court will not reverse a jury verdict 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.

Appeal from the District Court for Douglas County: JOHN D. HARTIGAN, JR., Judge. Affirmed.

Frank Meares for appellant.

Dean F. Suing, of Katskee, Henatsch & Suing, for appellee.

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

WHITE, J.

Milo P. Vacanti brought a civil assault and battery action against Master Electronics Corporation based on the conduct of Master's employees. The jury returned its verdict in favor of Vacanti, but awarded him less than his claimed damages. Vacanti appealed to the Nebraska Court of Appeals. Under the authority granted by Neb. Rev. Stat. § 24-1106(3) (Cum. Supp. 1992) to regulate the caseload of this court and the Court of Appeals, we removed the matter to this court. We affirm.

The basic facts underlying this action are not in dispute. In April 1989, Vacanti's wife delivered a compact disc (CD) player to Master's place of business for repair. Seven months later, on November 21, 1989, Vacanti went to Master's place of business to pick up the CD player. Vacanti believed that the repairs would be covered by warranty. Vacanti was told by a Master employee, Arthur William Hull, that the CD player had been repaired but that Vacanti would be responsible for the bill. Vacanti grabbed the CD player and attempted to leave Master's place of business. Hull and at least one other Master employee, Robert A. Dolezal, attempted to stop Vacanti and succeeded in taking the CD player from him.

Vacanti then brought the present action, claiming that as a result of being "attacked" by Master employees, Vacanti had suffered a "torn" hand, a "muscle separation on a rib," torn

ligaments, and injury to his "neck musculature and lip." At trial Vacanti presented evidence of medical bills totaling $3,150. The jury returned a verdict in favor of Vacanti for $1,795.07. Vacanti timely filed a motion for new trial, which was overruled. Vacanti then perfected this appeal.

Vacanti asserts that (1) the trial court erred in giving certain jury instructions, (2) the trial court erred in refusing to admit a medical report into evidence, and (3) the verdict is the result of mistake and is inadequate. We address each of these assigned errors in turn.

Vacanti first asserts that the trial court erred in giving jury instructions Nos. 2, 6, and 9.

Jury instruction No. 2 explains the allegations of the parties. It states, in relevant part:

> Defendant generally denies Plaintiff's claim, and asserts that: Plaintiff made inquiry of Defendant concerning repairs to a CD player; that Plaintiff became abusive and attempted to take his CD player without paying for the repairs; that Defendant's employees tried to stop Plaintiff from removing the CD player without paying for these repairs; and that Plaintiff aggravated or provoked this incident.

Jury instruction No. 6 explains the elements of Plaintiff's prima facie case:

> Before the Plaintiff can recover from the Defendant, the burden is upon the Plaintiff to establish by a preponderance of the evidence each of the following propositions:
>
> 1. That on or about the date alleged in the Petition an individual or individuals unlawfully and without just cause assaulted the Plaintiff, causing him personal injuries;
>
> 2. The nature and extent of such injuries;
>
> 3. The amount of Plaintiff's damages; and
>
> 4. That at the time of these events the individual or individuals were acting as Defendant's agents, within the scope and course of their employment by the Defendant
>
> . . . .

Jury instruction No. 9 explains that Master had an artisan's

lien on the CD player and therefore had a right to retain the CD player:

> Nebraska Statutes provide that when any person, firm or corporation who repairs or in anyway [sic] enhances the value of any equipment such as the CD unit involved in this case, at the request of or with the consent of the owner, or owners thereof shall have a lien on such equipment while in his possession, for his reasonable or agreed charges for the work done or material furnished, and shall have the right to retain such property until such charges are paid.
>
> You are instructed that on November 21, 1989, the Defendant Master Electronics Corporation had a lien on the subject CD unit to the extent of its reasonable or agreed charges for the work done and was entitled to retain possession of the CD unit until such charges were paid.

At the instruction conference, Vacanti objected to each of these three instructions.

The questioned jury instructions all relate to Master's theory of the case: defense of property. Under a defense-of-property defense, the use of force is privileged when an invader takes property from another's possession and it appears that the invader is about to remove the property from the possessor's premises. See *Wright v. Haffke*, 188 Neb. 270, 196 N.W.2d 176 (1972). The privilege allows only for the use of reasonable force. *Id.* The privilege may be exercised by anyone in possession of property who has, as against the invader, a superior right to the property. W. Page Keeton et al., Prosser & Keeton on the Law of Torts § 21 (5th ed. 1984).

Vacanti argues that Master was not entitled to a defense-of-property instruction. Vacanti also argues that even if Master had been entitled to such an instruction, the instruction given by the trial court did not properly explain defense of property to the jury. Vacanti concludes that the instructions constitute reversible error. We disagree.

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. *Pugh v. Great Plains Ins. Co.*, 239 Neb. 171, 474 N.W.2d 677 (1991); *State v. Harney*, 237 Neb. 512, 466 N.W.2d 540 (1991); *Rose v. City of Lincoln*, 234 Neb. 67, 449 N.W.2d 522 (1989).

Assuming, arguendo, that the instructions were erroneous with respect to defense of property, Vacanti has suffered no prejudice. Vacanti received a judgment in his favor; Master was found liable. The judgment necessarily implies that the jury rejected Master's claimed defense of property.

Vacanti argues that he was prejudiced because the instructions misled the jury into believing that the jury should mitigate damages if the assault and battery were provoked. We disagree.

Vacanti correctly states that in an action for assault and battery, provocation cannot be considered in mitigation of damages. *Haumont v. Alexander*, 190 Neb. 637, 211 N.W.2d 119 (1973); *Horky v. Schroll*, 148 Neb. 96, 26 N.W.2d 396 (1947). The damage instruction in the present case informed the jury that if they found for Vacanti on the question of liability, then it would be the jury's duty to award damages for Vacanti's injuries, his pain and suffering, and the reasonable value of his medical care reasonably needed to date. The damage instruction does not mention either provocation or defense of property, and does not suggest that the jury would be entitled to mitigate damages based on Vacanti's behavior.

Two other instructions, not discussed by Vacanti, demonstrate that the trial court properly explained the role of provocation. First, the trial court instructed the jury that "words or acts that do not amount to an assault, even when spoken or performed for the purpose of provoking an assault[,] are not a defense to a civil action on the ground of assault." Second, the trial court instructed the jury that the allegations of the parties, including Master's claim that Vacanti provoked the incident, were not to be considered evidence in the case. We find that the jury instructions, when read as a whole, do not suggest that the jury could mitigate damages based on provocation.

Because the jury instructions did not prejudice Vacanti either as to liability or as to damages, we conclude that Vacanti is not entitled to reversal based upon the jury instructions.

Vacanti next asserts that the trial court erred in refusing to admit a medical report into 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. *State v. Anderson, ante* p. 237, 512 N.W.2d 367 (1994); *State v. Baker, ante* p. 153, 511 N.W.2d 757 (1994); *State v. Wood, ante* p. 63, 511 N.W.2d 90 (1994).

The source of the medical report requires some explanation. Vacanti testified that he was still experiencing back pain 3 or 4 months after the incident. At that time, he went to the Mayo Clinic in Scottsdale, Arizona. After Vacanti had returned from Arizona, Dr. Michael A. Covalciuc of the Mayo Clinic sent Vacanti a report. The report is in the form of a letter detailing Vacanti's examination and evaluation, and includes numerous test results as well as a bill for services.

At trial, Master's expert witness, Dr. John Goldner, testified that he had read the report and that he had relied on the report in forming his diagnosis and opinion. During cross-examination, Vacanti offered the report into evidence, but Master objected on the grounds of hearsay, and the trial court sustained the objection.

Medical reports produced out of court are hearsay. *Zier v. Shamrock Dairy of Phoenix, Inc.*, 4 Ariz. App. 382, 420 P.2d 954 (1966); *Matter of Fox*, 504 So. 2d 101 (La. App. 1987); *Pietrowski v. Mykins*, 498 S.W.2d 572 (Mo. App. 1973); *Ankeny v. Grunstead*, 170 Mont. 128, 551 P.2d 1027 (1976); *Potts v. Howser*, 274 N.C. 49, 161 S.E.2d 737 (1968); *Brewer v. Erwin*, 287 Or. 435, 600 P.2d 398 (1979); *Cross v. Houston Belt & Terminal Railway Company*, 351 S.W.2d 84 (Tex. Civ. App. 1961). The report in the present action is an out-of-court statement by the Mayo Clinic doctors who examined and conducted tests on Vacanti. The report was offered to prove the truth of the matter asserted; in his offer of proof, Vacanti's counsel informed the court that if admitted into evidence, the report "would have shown what is contained [therein]." As hearsay, the report is inadmissible unless it falls within one of the hearsay exceptions. See Neb. Evid. R. 802, Neb. Rev. Stat.

§ 27-802 (Reissue 1989).

Vacanti advances two arguments in support of the report's admissibility. First, Vacanti argues that the report is admissible under the hearsay exception for statements made for purposes of medical diagnosis or treatment. Neb. Evid. R. 803(3), Neb. Rev. Stat. § 27-803(3) (Reissue 1989). We disagree.

Rule 803(3) provides an exception, regardless of the availability of the declarant, for "[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." This hearsay exception is identical to Fed. R. Evid. 803(4). Commentators agree on the rationale for this hearsay exception: the reliability of statements for purposes of medical diagnosis or treatment is assured "by the likelihood that the patient believes that the effectiveness of the treatment will depend on the accuracy of the information provided." 2 McCormick on Evidence § 277 at 246 (John W. Strong 4th ed. 1992). See, 4 Jack B. Weinstein & Margaret A. Berger, Weinstein's Evidence ¶ 803(4)[01] (1993); Richard Collin Mangrum, *The Law of Hearsay in Nebraska*, 25 Creighton Law Review 499 (1992).

At the heart of this hearsay exception lie statements made by a patient to a treating physician. However, the exception casts its net wider than the patient-physician relationship. Under the federal and Nebraska rules of evidence, the statement need not be made by the patient and need not be made to a physician. 2 McCormick on Evidence, *supra*. See, also, Fed. R. Evid. 803(4) advisory committee's note (allowing statements to hospital attendants, ambulance drivers, or even family members, if the statement is made for purposes of medical diagnosis or treatment); Mangrum, *supra* (stating that one of the foundational elements of the exception is a statement *to a health care provider*). As a general rule, then, this hearsay exception applies to persons seeking medical assistance from persons who are expected to provide some form of health care.

The report in the present case does not lie within this hearsay exception. The report is the opposite of a statement covered by

the exception; the report is a letter *by* a doctor *to* his patient. In addition, Vacanti has failed to demonstrate that the report was provided for the purpose of medical diagnosis or treatment. Accordingly, we find that the report is not admissible under Neb. Evid. R. 803(3).

Second, Vacanti argues that because Dr. Goldner was asked about the report on direct examination, Vacanti was entitled to have the report admitted into evidence during cross-examination. Vacanti argues that the full report is necessary to "bring to light the whole transaction." Brief for appellant at 21. We disagree.

An expert medical witness may base an opinion on the medical records of another treating doctor when the records are of a type reasonably relied upon by experts in the particular field. *Clark v. Clark*, 220 Neb. 771, 371 N.W.2d 749 (1985). See Neb. Evid. R. 703, Neb. Rev. Stat. § 27-703 (Reissue 1989). The mere fact that an expert relied on medical records, however, does not transform those records from inadmissible hearsay into admissible evidence. *Streight v. Conroy*, 279 Or. 289, 566 P.2d 1198 (1977); *Ankeny v. Grunstead*, 170 Mont. 128, 551 P.2d 1027 (1976); *Pietrowski v. Mykins*, 498 S.W.2d 572 (Mo. App. 1973); *Cross v. Houston Belt & Terminal Railway Company*, 351 S.W.2d 84 (Tex. Civ. App. 1961). To allow such a transformation "would deprive opposing parties of an opportunity to cross-examine on the background, competency and completeness of the report and the qualifications of the doctor." *Streight*, 279 Or. at 294-95, 566 P.2d at 1201. We conclude that the trial court did not err in refusing to admit the medical report into evidence.

Vacanti next asserts that the verdict is the result of mistake and is inadequate. The law is well established that an appellate court will not reverse a jury verdict 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.

Sanwick v. Jenson, 244 Neb. 607, 611, 508 N.W.2d 267, 270 (1993).

Vacanti claims that the jury verdict was the result of two mistakes. The first mistake, Vacanti argues, is that the jury improperly awarded him damages for the repair of his CD player. To support this argument, Vacanti notes that the medical bills admitted into evidence were whole dollar figures, that the repair bill for the CD player amounted to $70.*07*, and that the award of damages was $1,795.*07*. The second mistake, Vacanti argues, is that the jury overlooked one of the medical bills, because the amount awarded is less than the amount of the bills. To support this argument, Vacanti notes that exhibit 15 consists of two bills—one totaling $1,300 and one totaling $1,400—on thin paper, stapled together. A third bill was stipulated at $460.

We find that the award is not the result of mistake; rather, it is the result of conflicting evidence presented at trial.

At trial, the witnesses gave conflicting testimony as to the proximate cause of Vacanti's injuries. Vacanti testified that immediately after the incident at Master's place of business, he experienced back pain and went to see a Dr. Bolamperti. Vacanti testified that the pain worsened and later developed into numbness on his right side, down his right arm, and through his leg. Vacanti testified that the numbness was still occurring. Vacanti admitted that due to his work as a bricklayer he had been treated for back pain prior to the incident, but Vacanti also stated that he was not having any back trouble at the time of the incident.

Dr. Edward Schima, a neurologist, testified that he first examined Vacanti on April 6, 1992. After examining Vacanti and ordering several tests, Dr. Schima diagnosed Vacanti as having a posttraumatic cervical disk, lumbar spondylosis, and degenerative lumbar disease. Dr. Schima explained that a bulging or herniated disk could cause weakness in the limbs. He testified that in his opinion, the cervical disk problems were permanent and were caused by the incident.

Dr. Goldner, also a neurologist, testified that he examined Vacanti on June 24, 1991. Dr. Goldner testified that in his opinion, the pain and numbness on Vacanti's right side were not caused by the incident.

In deciding whether Vacanti's injuries were indeed caused by the incident, the jury no doubt considered the conflicting

descriptions of the incident itself. Vacanti testified that three people attacked him, although he could identify only two. Vacanti testified that he was choked by Hull, who put his arms around Vacanti's neck from the back and then hung on while the two struggled through the store and out the door. Vacanti also testified that he felt someone grab his neck and arms, felt someone hold his legs, and felt someone bite his finger.

Hull testified that he held onto Vacanti's upper arms while Vacanti dragged Hull outside the building and pushed him against a wall. Hull also testified that Dolezal took the CD player away from Vacanti but did not grab Vacanti.

Dolezal testified that he saw two people "scuffling" and that once Dolezal reached the outside, he saw Hull pinned against a wall behind Vacanti. Dolezal testified that he took the CD player away from Vacanti, but otherwise did not touch him.

Lois Fernald, also a Master employee at the time of the incident, testified that she saw Hull's hand on Vacanti's arm. Fernald also stated that she saw Dolezal take the CD player from Vacanti.

Based on the conflicting testimony presented at trial, the jury could have reached any number of factual conclusions and awarded damages accordingly. The jury was entitled to determine what portion of the claimed injury was proximately caused by the incident and what portion of the medical bills was reasonably required. See, *Nickal v. Phinney*, 207 Neb. 281, 298 N.W.2d 360 (1980) (jury is not obliged to accept undisputed testimony of plaintiff and his doctor as to the full extent of the claimed damages); *Cooper v. Hastert*, 175 Neb. 836, 124 N.W.2d 387 (1963) (jury has the right to decide whether the incident was the proximate cause of the injuries and the medical bills, even when the evidence is undisputed). The jury could have concluded that Vacanti's back pain, but not his right-side numbness, was caused by the incident. Alternatively, the jury could have concluded that the medical bills, which were incurred while Vacanti was under Dr. Schima's care, 2 1/2 years after the incident, were not reasonably required. See *Cooper, supra* (jury might have found it significant that medical bills were incurred 2 years after the accident).

"[W]here 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." *Sanwick v. Jenson*, 244 Neb. 607, 610, 508 N.W.2d 267, 270 (1993). Accord, *Nickal, supra*; *Hunter v. Sorensen*, 201 Neb. 153, 266 N.W.2d 529 (1978); *Cullinane v. Milder Oil Co.*, 174 Neb. 162, 116 N.W.2d 25 (1962). In the present case, the instructions were not prejudicially erroneous, no improper influences have been claimed, and the extent of the damages was hotly disputed. We conclude that the jury verdict was a valid attempt to resolve the conflicting evidence presented at trial. The verdict was not the result of mistake and was not inadequate.

In summary, we hold that the jury instructions were not prejudicial to Vacanti, that the medical report was properly excluded as inadmissible hearsay, and that the award of damages was not the result of mistake and was not inadequate. The judgment of the district court is affirmed.

AFFIRMED.

LANPHIER, J., not participating.

IVAN KLIMENT AND ETHEL KLIMENT, HUSBAND AND WIFE, APPELLEES AND CROSS-APPELLANTS, V. NATIONAL FARMS, INC., A DELAWARE CORPORATION, DOING BUSINESS AS NATIONAL FARM PRODUCTS, AND O.N. CORPORATION, A NEBRASKA CORPORATION, APPELLANTS AND CROSS-APPELLEES.

514 N.W.2d 315

Filed April 8, 1994. No. S-92-804.

1. **Principal and Agent.** Where the agent makes a report to the principal or to another agent, and all that appears is that the principal had authorized the agent to make such a report, a statement in the report is not the principal's and is not an extrajudicial admission of the principal. Authority merely to report to a principal or a fellow agent is not authority to commit the principal.
2. **Actions: Costs.** Nothing can be taxed as costs in an action except such items as are prescribed by statutes or are expressly authorized by the consent or agreement of the parties.
3. **Expert Witnesses: Fees.** A witness who testifies as an expert on a subject

requiring special knowledge and skill is generally entitled only to the statutory witness fee.

Appeal from the District Court for Holt County: WILLIAM CASSEL, Judge. Affirmed.

David A. Domina, Cletus W. Blakeman, and James J. Kube, of Domina & Copple, P.C., for appellants.

Steven D. Burns and Jeffrey S. Schmidt, of Burns & Associates, for appellees.

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

HASTINGS, C.J.

Ivan Kliment and Ethel Kliment, husband and wife, brought this action against defendants, National Farms, Inc., and O.N. Corporation, seeking damages for a private nuisance because of the swine-raising activities of defendants. Following a jury trial which resulted in a verdict for plaintiffs in the amount of $13,000, defendants appealed. Because of the action of this court in affirming a case involving the same issues and these same defendants, *Kopecky v. National Farms, Inc.*, 244 Neb. 846, 510 N.W.2d 41 (1994), defendants have dismissed their appeal. However, remaining is plaintiffs' cross-appeal, in which it is claimed the trial court erred in certain evidentiary rulings and in failing to award plaintiffs reimbursement for several items they claim to be legitimate costs. We affirm as to the cross-appeal.

The facts of this case are substantially the same as those in *Kopecky*. Here, plaintiffs attempted to introduce exhibits 14, 14A, 15, and 15A, which were reports made for defendants by L.M. Safely, Jr., as to waste-handling matters at the subject swine-raising facility. The reports were transmitted by Safely to defendants, which reports described the waste disposal system at this swine-raising facility as being significantly overloaded. Safely was not called as a witness by either defendants or plaintiffs. The offer of the exhibits by plaintiffs was rejected by the trial court upon defendants' objection as hearsay.

Plaintiffs contend that the exhibits should have been received under the provisions of Neb. Rev. Stat. § 27-801 (Reissue

1989), which provides:

> (4) A statement is not hearsay if:
>
> . . . [.]
>
> (b) The statement is offered against a party and is . . . (iii) a statement by a person authorized by him to make a statement concerning the subject, or (iv) a statement by his agent or servant within the scope of his agency or employment . . . .

Because Greg Gilsdorf, executive vice president of National Farms, testified that he had the authority to request Safely to make this report, plaintiffs argue that Safely was a person authorized by National Farms to make a statement concerning the subject or that his report was a statement by National Farms' agent or servant within the scope of his agency or employment. See § 27-801.

However, plaintiffs overlook two problems. Firstly, Gilsdorf was authorized to request the report, and Safely was requested to make the report. That is far different from making a statement on behalf of the principal or agent. Secondly, the report discusses the overloading of the waste disposal system which explains the objectionable odors, thus making out a case for liability of National Farms for maintaining a nuisance; an issue which the jury by its verdict determined favorably to plaintiffs. The report does not address the issue of damages.

Plaintiffs direct us to *Bump v. Firemens Ins. Co.*, 221 Neb. 678, 380 N.W.2d 268 (1986), as a case, very similar to the present case, in which this court held that the statements of an insurance company's claims adjuster in advising the insured that his loss was covered were binding on the principal. In *Bump*, we said:

> The hallmarks of reliability and trustworthiness are more evident in a situation involving an insurance adjuster's vicarious admission than in the case of statements made by generic agents or employees. "An 'adjuster' or 'insurance adjuster' is a person, copartnership or corporation who undertakes to ascertain and report the actual loss to the subject-matter of insurance due to the hazard insured against." [Citation omitted.] As a result of its policy, an insurance company

> has a contractual obligation to pay its insured's valid claim and, therefore, often dispatches one with special knowledge—the adjuster—to separate fact from fiction regarding a claim and obtain information to enable the insurance company to distinguish the valid claim from a claim for which the insurance company is not liable under its policy. Otherwise, an insurance company's sending an inept or incompetent adjuster, or one who is otherwise incapable of ascertaining and reporting a loss, spawns skepticism about good faith dealing with an insured—a specter the insurance industry has long labored to dispel. In the present case there is nothing to indicate that Johnson, acknowledged as Firemens' adjuster, was other than one qualified to ascertain the loss and attendant circumstances on which Bumps' claim was based.

Id. at 686-87, 380 N.W.2d at 275. This court went on to state:

> Unquestionably, communication with an insured is a vital and integral part of services rendered by an insurance adjuster for validation or rejection of an insured's claim against the insuring company. Such communication constitutes a statement within the scope of an adjuster's agency or employment by the insurance company. We, therefore, hold that the adjuster's statement made to Brenda Bump concerning insurance coverage supplied by Firemens' policy was admissible under [Neb. Evid. R.] 801(4)(b)(iv). Because the statement contained evidence bearing upon the issue of causation for the loss claimed by Bumps, the adjuster's statement was relevant. See Neb. Evid. R. 401.

221 Neb. at 688, 380 N.W.2d at 275-76.

Here, unlike the situation in *Bump*, there is nothing to suggest that Safely was employed for any purpose other than to give technical advice to National Farms. Safely's employment or agency did not include making statements on behalf of National Farms. Plaintiffs could have called Safely to testify at trial, but his report under these circumstances is hearsay and not subject to any of the exceptions.

We adopt the rule laid down in *United States v. United Shoe Machinery Corporation*, 89 F. Supp. 349, 352 (D. Mass. 1950):

> Where the agent makes a report to the principal or to another agent, and all that appears is that the principal had authorized the agent to make such a report, a statement in the report is not the principal's and is not an extrajudicial admission of the principal. . . . Authority merely to report to a principal or a fellow agent is not authority to commit the principal.

(Emphasis omitted.)

Furthermore, the information imparted by Safely went to the issue of liability for a nuisance, not the damages incurred. Plaintiffs were successful on the issue of liability, and therefore, any error that might have been committed because of the rejection by the trial court of Safely's report is at best harmless error.

Plaintiffs attempted to recover for their costs incurred, which included costs of expert witnesses and expenses of their attorneys in attending on the depositions of various witnesses. Plaintiffs point to Neb. Rev. Stat. § 25-1708 (Reissue 1989), which provides: "Where it is not otherwise provided by this and other statutes, costs shall be allowed of course to the plaintiff, upon a judgment in his favor, in actions for the recovery of money only, or for the recovery of specific real or personal property."

This court has held that " 'nothing can be taxed as costs in an action except such items as are prescribed by those statutes or are expressly authorized by the consent or agreement of the parties.' " *State v. Jungclaus*, 176 Neb. 641, 650, 126 N.W.2d 858, 864 (1964). We have been directed to no statutes or case law, nor have we been able to find any, which define costs to include travel, meals, lodging, fees to attorneys or witnesses, or the expenses of making extra copies of depositions or of enlarging exhibits. An obvious exception, of course, is Neb. Rev. Stat. § 76-720 (Reissue 1990), which provides in part:

> If an appeal is taken from the award of the appraisers by the condemnee and the amount of the final judgment is greater by fifteen percent than the amount of the award, or if appeal is taken by the condemner and the amount of the final judgment is not less than eighty-five percent of the award, or if appeal is taken by both parties and the

> final judgment is greater in any amount than the award, the court may in its discretion award to the condemnee a reasonable sum for the fees of his or her attorney and for fees necessarily incurred for not more than two expert witnesses.

Plaintiffs direct us to *Lockwood v. Lockwood*, 205 Neb. 818, 290 N.W.2d 636 (1980), as authority for their proposition that the fees paid to an expert witness may be taxed as costs. However, in that case, we stated: "It has long been the rule that a witness who testifies as an expert on a subject requiring special knowledge and skill is, in the absence of a contract for those services, entitled only to the statutory witness fee." *Id.* at 821, 290 N.W.2d at 639. The court went on to say:

> In this action, the accountant who was Connie's expert witness testified that the accounting firm of which he was a partner was employed by Connie to examine certain documents furnished to Connie by Fred in preparation for trial. These documents dealt with the financial status of the various marital assets and were, in large part, accepted as evidence at trial. He testified that the documents were examined in preparation for the accountant's testimony as a witness in the dissolution proceedings and also testified as to the value of the services rendered. From this testimony, we conclude that there was a contract for those services and that the taxing of the accountant's fees in the amount of $1,100 as costs was proper.
>
> The same may be said for the cost of the appraisal of the marital residence and of certain farm property. Section 42-367, R. R. S. 1943, provides in part: "When dissolution of marriage or a legal separation is decreed, the court may decree costs against either party and award execution for the same . . . ."

205 Neb. at 821-22, 290 N.W.2d at 639.

In the case at hand, the only evidence of a contract of hire is the following testimony of the expert witness, Leon Chesnin:

> Q. Doctor, you indicated that on occasion you, in your professional career now, do testify in the courtroom as you are doing today.
>
> A. Yes.

Q. For both plaintiffs and defendants or one side or the other.

A. Both sides. Whoever hires me first, that is the way it works, and I don't work for the plaintiff or the defendant. I work for the attorney that contracts my services.

Q. And you are here today at the request of myself, is that right?

A. That's correct.

Q. And you are being paid for your services?

A. Hopefully.

There was no testimony by the witness as to the value of his services. The only other reference to witness fees is found in the supplemental transcript, in a portion of the bill of costs submitted by plaintiffs, which simply reads, "8. Expert Witness Fees $14,545.59."

The most recent citation of *Lockwood* may be found in *Vredeveld v. Clark*, 244 Neb. 46, 57, 504 N.W.2d 292, 300 (1993), a tort action for damages resulting from an automobile accident, in which we said:

> Plaintiff assigns as error the trial court's failure to assess the costs of the expert witnesses to defendant.
>
> In *Hefti v. Hefti*, 166 Neb. 181, 88 N.W.2d 231 (1958), this court stated that expert witness fees could be taxed above the statutory fee where a special contract existed. In *Lockwood v. Lockwood*, 205 Neb. 818, 290 N.W.2d 636 (1980), this court upheld the taxing of expert witness fees to the husband in a divorce action. It found evidence of a contract where the expert testified he had been employed by the wife to examine certain financial documents furnished to the wife by the husband in preparation for the trial, he had testified to the value of his services, and these documents and the expert's testimony were accepted into evidence at trial. In *Hefti* and *Lockwood*, costs for expert witness fees were permitted pursuant to Neb. Rev. Stat. § 42-367 (Reissue 1988) and its predecessor, which permit a court to direct costs against either party involved in a divorce action. These cases are thus distinguishable from the present case. The court did not err in refusing to tax expert witness fees to defendant.

As is apparent, we have further limited the rule announced in *Lockwood* to be applicable only to similar cases in which the special statutory provisions exist.

Applying the reasoning of the foregoing authorities to the record before us, we find that the trial court did not err in refusing to award expert witness costs to plaintiffs or in failing to award costs for attorney fees, expenses of litigation, and expenses for making additional copies of depositions or enlargements of exhibits.

The judgment of the district court is affirmed.

AFFIRMED.

FAHRNBRUCH, J., concurs in the result.

PATRICK B. LYNCH, APPELLEE AND CROSS-APPELLANT, V. NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES, APPELLANT AND CROSS-APPELLEE.

514 N.W.2d 310

Filed April 8, 1994. No. S-92-894.

1. **Judgments: Final Orders: Appeal and Error.** A judgment rendered or final order made by the district court may be reversed, vacated, or modified on appeal for errors appearing on the record.
2. **Judgments: Appeal and Error.** An appellate court, in reviewing a judgment of the district court for errors appearing on the record, will not substitute its factual findings for those of the district court where competent evidence supports those findings.
3. **Administrative Law: Pleadings: Time: Appeal and Error.** When a petition instituting proceedings for review under the Administrative Procedure Act is filed in the district court on or after July 1, 1989, the review shall be conducted by the district court de novo on the record.
4. **Due Process: Administrative Law.** If there is a constitutionally protected liberty interest at stake, then at a minimum, disciplinary proceedings must comply with constitutionally adequate due process standards.
5. **Due Process: Prisoners.** In order to implicate the protections of the Due Process Clause, there must be a protectable liberty interest of the inmate's at stake.

6. **Due Process: Sentences.** In Nebraska, the reduction of sentence for good behavior is a statutory right which may not be taken away without following minimum due process procedures.
7. **Constitutional Law: Prisoners.** Prison disciplinary proceedings are not treated as criminal prosecutions, and therefore, the full panoply of rights due a criminal defendant does not apply; instead, there must be a mutual accommodation between the institutional needs and objectives and the provisions of the Constitution.
8. **Due Process: Prisoners: Notice: Evidence.** When good time credits are a protectable liberty interest, an inmate facing disciplinary charges must receive (1) advance written notice of the disciplinary charges; (2) an opportunity, when consistent with institutional safety and correctional goals, to call witnesses and present documentary evidence in his defense; and (3) a written statement by the fact finder of the evidence relied on and the reasons for the disciplinary action.
9. **Due Process: Prisoners.** In order to comport with minimum requirements of due process, the findings of a prison board must be supported by "some evidence" in the record which has some "indicia of reliability" of the information that forms the basis for prison disciplinary actions.
10. **Administrative Law.** Agency regulations, properly adopted and filed with the Secretary of State of Nebraska, have the effect of statutory law.
11. **Constitutional Law: Statutes: Due Process.** When a legislative enactment is challenged on vagueness grounds, the issue is whether the two requirements of procedural due process are met: (1) adequate notice to citizens and (2) adequate standards to prevent arbitrary enforcement.
12. **Due Process: Proof.** The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to instruct the fact finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.
13. **Due Process: Prisoners: Proof.** In regard to prison disciplinary proceedings, only a minimum standard of proof is necessary to comport with minimum due process requirements, and the disciplinary committee's findings will be upheld under a due process analysis as long as appropriate procedural safeguards are provided and the findings are supported by "some evidence" which has some "indicia of reliability."

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

Don Stenberg, Attorney General, and Laurie Smith Camp for appellant.

Patrick B. Lynch, pro se.

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

LANPHIER, J.

A Nebraska State Penitentiary disciplinary committee found that inmate Patrick B. Lynch violated prison rules by participating in an escape attempt. An initial report filed by a guard on duty in one of the security towers did not mention Lynch's participation in the attempt. A second report filed by the same guard on the following day stated that the officer saw Lynch with what appeared to be a jar or bottle in his hands with a rag protruding from the top of it. The second report was the basis for the allegations of Lynch's participation in the attempted escape. Lynch appealed the decision to the Nebraska Department of Correctional Services (DCS) Appeals Board, which affirmed the committee's decision. The district court for Lancaster County reversed the decision of the appeals board. The DCS appeals that decision. We affirm.

FACTS

On August 31, 1991, several inmates attempted an escape in the prisonyard of the Nebraska State Penitentiary. The attempt resulted in two officers suffering burn injuries and one officer being doused with a flammable liquid. Several officers filed reports describing their observations both before and during the escape attempt. A search of the prisonyard uncovered evidence of the escape attempt.

Lynch was implicated in the escape attempt by an Officer Blake, who was a guard on duty at the time of the escape attempt. Officer Blake filed two reports about the incident. The first, filed shortly after control was regained in the prisonyard, placed Lynch in the yard at the time of the escape attempt. The second report filed by Officer Blake a day later implicated Lynch in the escape by stating that the officer saw Lynch carrying "what appeared to be a bottle or a jar in his hands." The report added that the bottle had a rag protruding from the top of it.

At a disciplinary hearing on January 2, 1992, Lynch was found guilty of escape, possession of escape paraphernalia, and possession or manufacturing of weapons. The penalties consisted of loss of good time and disciplinary segregation.

The appeals board reviewed Lynch's appeal and upheld the

decision of the disciplinary committee. Lynch timely filed an administrative appeal to the district court. The district court reversed the decision of the appeals board after finding that the appeals board's conclusions were not supported by competent, material, and substantial evidence.

The DCS has appealed the decision of the district court, alleging that the district court erred when it found that the decision of the appeals board was unsupported by competent, material, and substantial evidence. On cross-appeal, Lynch claims that the district court erred when it failed to pass on the merits of his claim that the DCS rule at 68 Neb. Admin. Code, ch. 5, § 004 (1990), "Standard of Proof Required" (Rule 5.004), is unconstitutionally vague.

STANDARD OF REVIEW

A judgment rendered or final order made by the district court may be reversed, vacated, or modified on appeal for errors appearing on the record. Neb. Rev. Stat. § 84-918(3) (Cum. Supp. 1992). An appellate court, in reviewing a judgment of the district court for errors appearing on the record, will not substitute its factual findings for those of the district court where competent evidence supports those findings. *Bell Fed. Credit Union v. Christianson*, 244 Neb. 267, 505 N.W.2d 710 (1993).

The district court reversed the decision of the appeals board under Neb. Rev. Stat. § 84-917(6)(a) (Cum. Supp. 1992) because the appeals board's decision was not supported by competent, material, and substantial evidence. The district court applied the wrong standard of review. When a petition instituting proceedings for review under the Administrative Procedure Act is filed in the district court on or after July 1, 1989, the review shall be conducted by the district court de novo on the record. § 84-917(5)(a); *Bell Fed. Credit Union v. Christianson, supra.* However, applying the standard of review articulated in *Bell Fed. Credit Union v. Christianson*, 237 Neb. 519, 466 N.W.2d 546 (1991), the predecessor to the formerly cited case, we may review the record to determine if as a matter of law the evidence was insufficient to demonstrate that Lynch violated the prison rule as found by the disciplinary committee.

For reasons set forth below, we find that the district court properly reversed the disciplinary action imposed on Lynch.

EVIDENTIARY STANDARD

Before considering whether the evidence was sufficient to support the findings of the disciplinary committee, we must determine what evidentiary standard must be met before an appellate court may affirm the findings of the disciplinary committee that an inmate has violated a prison rule. If there is a constitutionally protected liberty interest at stake, then at a minimum, the disciplinary proceedings must comply with constitutionally adequate due process standards. *Wolff v. McDonnell*, 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974).

In order to implicate the protections of the Due Process Clause, there must be a protectable liberty interest of the inmate's at stake. *Billups v. Nebraska Dept. of Corr. Servs. Appeals Bd.*, 238 Neb. 39, 469 N.W.2d 120 (1991). In Nebraska, the reduction of sentence for good behavior is a statutory right which may not be taken away without following minimum due process procedures. *Wolff v. McDonnell, supra.* When determining what minimum due process is required for prison disciplinary proceedings, it is important to note that such proceedings are not treated as criminal prosecutions, and therefore, the full panoply of rights due a criminal defendant does not apply. *Id.* Instead, there must be a mutual accommodation between the institutional needs and objectives and the provisions of the Constitution. *Id.* In *McDonnell*, the Supreme Court held that when good time credits are a protectable liberty interest, an inmate facing disciplinary charges must receive (1) advance written notice of the disciplinary charges; (2) an opportunity, when consistent with institutional safety and correctional goals, to call witnesses and present documentary evidence in his defense; and (3) a written statement by the fact finder of the evidence relied on and the reasons for the disciplinary action. In *McDonnell*, the Court did not specify what amount of evidence would be necessary to support the fact finder's decision. In *Superintendent v. Hill*, 472 U.S. 445, 454, 105 S. Ct. 2768, 86 L. Ed. 2d 356 (1985), the

Court held that in order to comport with minimum requirements of due process, the findings of the prison board must be supported by "some evidence" in the record.

Other jurisdictions have added that although only "some evidence" is required to meet minimum due process requirements, that evidence must have some "indicia of reliability of the information that forms the basis for prison disciplinary actions." *Cato v. Rushen*, 824 F.2d 703, 705 (9th Cir. 1987). See, also, *Mendoza v. Miller*, 779 F.2d 1287 (7th Cir. 1985), *cert. denied* 476 U.S. 1142, 106 S. Ct. 2251, 90 L. Ed. 2d 697 (1986); *Kyle v. Hanberry*, 677 F.2d 1386 (11th Cir. 1982).

Applying the foregoing to the case before us, we find that under the minimum evidentiary standard required by the Due Process Clause, the district court was only required to find that "some evidence" supported the findings of the disciplinary committee. However, this evidence must be supported by some "indicia of reliability." We find that the district court correctly found that the evidence was insufficient to uphold the findings of the disciplinary committee. The district court found that although there was evidence of weapons and escape paraphernalia found in the prisonyard, none of the evidence was ever shown to be connected to Lynch. Clothing belonging to other inmates was tested and found to have traces of xylene. There was no evidence that any testing was performed on the clothing Lynch was wearing at the time of the incident.

The district court also found that the only evidence incriminating Lynch's participation in the escape attempt was the second report written by Officer Blake. The second report written by the officer was nearly identical to the first, except that in the second report the officer added that Lynch carried "what appeared to be a bottle or jar" with a rag protruding from it. We find, as apparently the district court did, that there was a discrepancy between the two reports. Also, Lynch's claim is undisputed that officers did not contact him until approximately 3 hours after the escape attempt. This would be unlikely if Officer Blake believed Lynch was carrying a potentially dangerous substance. These facts reduce the "indicia of reliability" necessary to support the findings of the disciplinary board. The reliability of the report is further

questioned by the fact that Officer Blake was not clear in his second misconduct report that Lynch was carrying a jar or bottle at the time of the incident. Instead, as noted by the district court, the officer qualified his observations in the second report by stating that Lynch "appeared" to be carrying a jar or bottle. Based on the foregoing, we find that the only evidence implicating Lynch, namely Officer Blake's second report, was not sufficient to support the findings of the disciplinary committee because it lacks a sufficient "indicia of reliability." We therefore affirm the judgment of the district court.

CROSS-APPEAL

On cross-appeal, Lynch claims that Rule 5.004 is unconstitutionally vague. Lynch contends that Rule 5.004 does not define the degree of persuasion necessary to determine whether an inmate is guilty or not of the infraction charged. There is no merit in this claim. The standard set by Rule 5.004 is not unconstitutional.

Rule 5.004 states the standard of proof required:

> An inmate commits an offense only when he or she engages in conduct which fulfills all the necessary elements of the offense. The conduct must be voluntary and be intentional or reckless or grossly negligent. The accused must have had notice that the conduct was proscribed by the Code of Offenses or applicable statutes.

Lynch argues that this standard of proof deprives him of due process because it fails to delineate the degree of proof necessary to establish his guilt.

Agency regulations, properly adopted and filed with the Secretary of State of Nebraska, have the effect of statutory law. *Nucor Steel v. Leuenberger*, 233 Neb. 863, 448 N.W.2d 909 (1989). When a legislative enactment is challenged on vagueness grounds, the issue is whether the two requirements of procedural due process are met: (1) adequate notice to citizens and (2) adequate standards to prevent arbitrary enforcement. *City of Lincoln v. ABC Books, Inc.*, 238 Neb. 378, 470 N.W.2d 760 (1991).

As stated earlier, the reduction of sentence for good behavior

is a statutory right which may not be taken away without following minimum due process procedures. *Wolff v. McDonnell*, 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974).

> The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to "instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication."

Addington v. Texas, 441 U.S. 418, 423, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979) (quoting *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)).

In the case *Goff v. Dailey*, 991 F.2d 1437 (8th Cir. 1993), the court held that using "some evidence" as a standard of proof for its factual determinations at disciplinary hearings did not violate an inmate's due process rights. The court reasoned that under *Superintendent v. Hill*, 472 U.S. 445, 105 S. Ct. 2768, 86 L. Ed. 2d 356 (1985), although prison inmates have an interest in ensuring that disciplinary actions which infringe on their protected liberties are not imposed arbitrarily, this interest must be balanced with the prison authorities' interest in maintaining safety and security within the prison facilities and avoiding burdensome administrative requirements. Therefore, as long as the inmate was afforded the procedural safeguards afforded in *Wolff v. McDonell, supra*, due process was satisfied if the committee's findings were based on "some evidence." *Goff v. Dailey, supra*.

In regard to prison disciplinary proceedings, only a minimum standard of proof is necessary to comport with minimum due process requirements. In other words, the disciplinary committee's findings will be upheld under a due process analysis as long as appropriate procedural safeguards are provided and the findings are supported by "some evidence" which has some "indicia of reliability." We find that Rule 5.004 satisfies that standard.

CONCLUSION

We affirm the district court's decision because the findings

made by the disciplinary committee were not supported by "some evidence" which had some "indicia of reliability." As to Lynch's cross-appeal, the standard of proof is not unconstitutionally vague.

AFFIRMED.

WRIGHT, J., participating on briefs.

ERIN COLLEEN DEVAUX, APPELLEE, V. RICHARD ARLEN DEVAUX II, APPELLANT.

514 N.W.2d 640

Filed April 15, 1994. No. S-92-234.

1. **Demurrer: Pleadings.** In considering a demurrer, a court must assume that the pleaded facts, as distinguished from the legal conclusions, are true as alleged and must give the pleading the benefit of any reasonable inferences from the facts alleged; however, a court 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. **Res Judicata.** The doctrine of res judicata rests on the necessity to terminate litigation and on the belief that a person should not be vexed twice for the same cause.
3. **Res Judicata: Judgments.** Res judicata bars relitigation of any right, fact, or matter directly addressed or necessarily included in a former adjudication if (1) the former judgment was rendered by a court of competent jurisdiction, (2) the former judgment was a final judgment, (3) the former judgment was on the merits, and (4) the same parties or their privies were involved in both actions.
4. **Res Judicata: Demurrer: Pleadings.** Res judicata may be raised in a demurrer when the pleading challenged by the demurrer sets forth the facts to which the rule of res judicata applies.
5. **Child Support: Paternity.** A fundamental fact necessary to sustain an order of child support is paternity by the man judicially obligated to pay such support.
6. **Divorce: Courts: Jurisdiction: Paternity: Child Support.** The district courts of Nebraska have jurisdiction to enter dissolution decrees. In entering such decrees, the district courts also have jurisdiction to determine whether the husband is the father of any minor children to be supported as a result of the dissolution proceedings.
7. **Divorce: Time.** During the 6-month period following rendition of a dissolution decree, the control of the decree rests within the discretion of the trial court.
8. **Divorce: Paternity: Judgments.** A paternity determination in a dissolution decree is a final judgment.

9. **Divorce: Paternity: Res Judicata.** Under the doctrine of res judicata, a finding of paternity in a dissolution decree precludes the parties to the decree from relitigating paternity.
10. **Judgments: Equity: Time.** A litigant seeking the vacation or modification of a prior judgment after term may take one of two routes. The litigant may proceed either under Neb. Rev. Stat. § 25-2001 (Reissue 1989) or under the district court's independent equity jurisdiction.
11. **Motions for New Trial: Evidence: Proof.** In order to make a sufficient showing for a new trial on the grounds of newly discovered evidence, the proof in support thereof must show that such evidence is now available which neither the litigant nor counsel could have discovered by the exercise of reasonable diligence and that the evidence is not merely cumulative, but competent, relevant, and material, and of such character as to reasonably justify a belief that its admission would bring about a different result if a new trial were granted.
12. **Motions for New Trial: Evidence.** Newly discovered evidence is not grounds for a motion for new trial where the exercise of reasonable diligence would have produced the evidence.
13. **Motions for New Trial: Evidence: Time.** A motion for new trial on the grounds of newly discovered evidence must allege that the evidence could not have been discovered during term with the exercise of reasonable diligence.
14. **Demurrer: Pleadings.** Following the sustaining of a demurrer, the losing party is entitled to amend the pleadings unless there exists no reasonable possibility that amendment will remedy the deficiency.
15. **Motions for New Trial: Evidence: Words and Phrases.** For purposes of a motion for new trial on the basis of newly discovered evidence, "reasonable diligence" means appropriate action where there is some reason to awaken inquiry and direct diligence in a channel in which it will be successful.
16. **Modification of Decree: Attorney Fees.** In a proceeding to modify a dissolution decree, the decision to award attorney fees rests within the trial court's discretion.
17. **Attorney Fees: Appeal and Error.** On appeal, a trial court's decision awarding or denying attorney fees will be upheld absent an abuse of discretion.

Appeal from the District Court for Sarpy County: GEORGE A. THOMPSON, Judge. Affirmed in part, and in part reversed and remanded with directions.

Robert J. Hovey, P.C., of Law Offices of Sanders & Hovey, P.C., for appellant.

Jerome J. Ortman for appellee.

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

WHITE, J.

Erin Colleen Zaback (Zaback), formerly known as Erin

Colleen DeVaux, filed an application to modify her dissolution decree to reflect that her former husband, Richard Arlen DeVaux II (DeVaux), was not the father of her minor child. The district court granted the modification, and the former husband appealed to the Nebraska Court of Appeals. Under our authority to regulate the caseloads of the appellate courts of this state, we removed the matter to this court. We reverse in part, affirm in part, and remand the cause with directions.

On February 14, 1979, Zaback and DeVaux married. On December 9, 1986, a child was born. On December 12, 1988, Zaback filed for dissolution of the marriage. On March 17, 1989, the district court entered its decree of dissolution. In entering the decree, the district court found that the minor child was the only issue born to the marriage. The court awarded Zaback custody of the minor child, subject to DeVaux's reasonable visitation rights. The court ordered DeVaux to pay monthly child support.

On November 13, 1990, Zaback filed an application to modify the decree. In the application, Zaback alleged that she had discovered, through the administration of blood tests, that DeVaux was not the natural father of the minor child. Zaback requested that the court modify the decree by "specifically finding that [DeVaux] is not the father of the minor child of the parties" and by terminating the child support and visitation provisions of the decree.

DeVaux demurred to this application, alleging, among other things, that the minor child's paternity was res judicata. The trial court overruled the demurrer. DeVaux then filed an answer alleging "unclean hands," repeating the claim of res judicata, and requesting attorney fees.

On March 26, 1991, the district court, on its own motion, held a hearing. Zaback admitted that during her marriage to DeVaux she had sexual relations with her current husband, Terry Lee Zaback. Zaback also admitted that she had not informed DeVaux of her extramarital sexual relations until after the dissolution decree had been entered. According to her testimony, Zaback first questioned the minor child's paternity in the summer of 1990, when she met Terry Lee Zaback's family and noticed the family's strong resemblance to her child.

Subsequent blood tests established a 98.4 percent likelihood that Terry Lee Zaback was the father of the minor child. At the close of the hearing, the court ordered additional testing to determine whether DeVaux could be the father of the minor child.

On January 2, 1992, the test results were furnished to the court, although they were not admitted into evidence. The court granted a continuance for trial and appointed a guardian ad litem for the minor child.

On February 20, the court held a trial on the application to modify. The court first invited Terry Lee Zaback to intervene in the action, and he intervened pro se. The parties then stipulated to the results of the blood tests, which established that DeVaux was "excluded from being the biological father of the child[.]" The court then heard additional testimony from all three parties. All three agreed that the minor child has a substantial, beneficial relationship with DeVaux.

The district court found that Terry Lee Zaback was the natural father of the minor child. The court terminated DeVaux's support obligation and his visitation rights; however, the court allowed for temporary visitation pending its receipt of a report by the guardian ad litem. (The court later extended the temporary visitation to include the pendency of this appeal.) The court ordered Zaback to repay DeVaux the child support payments she had received from December 1, 1990, through January 30, 1992. Finally, the court ordered each party to pay his or her own attorney fees and costs.

DeVaux appealed. DeVaux asserts, in summary, that the trial court erred (1) in overruling the demurrer; (2) in allowing Terry Lee Zaback to intervene; (3) in finding that Terry Lee Zaback was the father of the minor child; (4) in denying DeVaux the opportunity to testify regarding his relationship with the minor child; (5) in ordering Zaback to return only a portion of the child support payments she had received; and (6) in failing to award DeVaux attorney fees and costs.

DeVaux first asserts that the trial court erred in overruling his demurrer. DeVaux argues that the demurrer should have been sustained because the minor child's paternity was res judicata by virtue of the dissolution decree. This argument presents us

with this question: Under the doctrine of res judicata, does a finding of paternity in a dissolution decree prevent the parties to the decree from relitigating paternity? We answer this question: Yes.

In considering a demurrer, a court must assume that the pleaded facts, as distinguished from the legal conclusions, are true as alleged and must give the pleading the benefit of any reasonable inferences from the facts alleged; however, a court cannot assume the existence of facts not alleged, make factual findings to aid the pleading, or consider evidence which might be adduced at trial. *Wheeler v. Nebraska State Bar Assn.*, 244 Neb. 786, 508 N.W.2d 917 (1993); *St. Paul Fire & Marine Ins. Co. v. Touche Ross & Co.*, 244 Neb. 408, 507 N.W.2d 275 (1993); *Gallion v. Woytassek*, 244 Neb. 15, 504 N.W.2d 76 (1993).

The doctrine of res judicata rests on the necessity to terminate litigation and on the belief that a person should not be vexed twice for the same cause. *Dakota Title v. World-Wide Steel Sys.*, 238 Neb. 519, 471 N.W.2d 430 (1991); *Farmers State Bank v. Germer*, 231 Neb. 572, 437 N.W.2d 463 (1989). Res judicata bars relitigation of any right, fact, or matter directly addressed or necessarily included in a former adjudication if (1) the former judgment was rendered by a court of competent jurisdiction, (2) the former judgment was a final judgment, (3) the former judgment was on the merits, and (4) the same parties or their privies were involved in both actions. See, e.g., *Antelope Cty. Farmers Coop. v. Citizens State Bank*, 240 Neb. 760, 484 N.W.2d 822 (1992); *Kerndt v. Ronan*, 236 Neb. 26, 458 N.W.2d 466 (1990); *State v. Gerdes*, 233 Neb. 528, 446 N.W.2d 224 (1989); *NC + Hybrids v. Growers Seed Assn.*, 228 Neb. 306, 422 N.W.2d 542 (1988); *DeCosta Sporting Goods, Inc. v. Kirkland*, 210 Neb. 815, 316 N.W.2d 772 (1982). Res judicata may be raised in a demurrer when the pleading challenged by the demurrer sets forth the facts to which the rule of res judicata applies. See, *Tedco Development Corp. v. Overland Hills, Inc.*, 205 Neb. 194, 287 N.W.2d 49 (1980); *Card v. Card*, 174 Neb. 124, 116 N.W.2d 21 (1962); *In re Estate of McCleneghan*, 145 Neb. 707, 17 N.W.2d 923 (1945); *Marsh-Burke Co. v. Yost*, 102 Neb. 814, 170 N.W. 172 (1918). Thus, in deciding whether the

minor child's paternity is res judicata, we can consider only those facts presented in the pleading challenged by the demurrer—the application to modify.

As a threshold matter, we must consider whether the minor child's paternity was directly addressed or necessarily included in the parties' dissolution proceeding. The application to modify alleges that under the provisions of a previously entered dissolution decree, Zaback was awarded custody "of the minor child *of the parties*." (Emphasis supplied.) This language indicates that the dissolution proceeding directly addressed the minor child's paternity. Cf. *State ex rel. Ondracek v. Blohm*, 363 N.W.2d 113 (Minn. App. 1985) (holding that the issue of paternity is required to be raised in every dissolution proceeding). In addition, the application to modify alleges that under the decree, DeVaux was obligated to pay child support. "A fundamental fact necessary to sustain an order of child support is paternity by the man judicially obligated to pay such support." *Younkin v. Younkin*, 221 Neb. 134, 143, 375 N.W.2d 894, 900 (1985). Because the trial court could not have ordered child support without finding that DeVaux was the father of the child, paternity was an issue necessarily included in the dissolution proceeding. See *Hackley v Hackley*, 426 Mich. 582, 395 N.W.2d 906 (1986) (a divorce judgment and a support order arising from the divorce constitute an adjudication of paternity).

Having found that the minor child's paternity was adjudicated in the dissolution proceedings, we must now decide whether the four elements of res judicata are present.

We must first determine whether the paternity findings in the dissolution decree were rendered by a court of competent jurisdiction. The application to modify, addressed to the district court for Sarpy County, Nebraska, alleges that a dissolution decree was entered "herein." We read this allegation to mean that the district court for Sarpy County entered the dissolution decree. The district courts of Nebraska have jurisdiction to enter dissolution decrees. See Neb. Rev. Stat. § 42-351 (Reissue 1988). In entering such decrees, the district courts also have jurisdiction to determine whether the husband is the father of any minor children to be supported as a result of the dissolution

proceedings. *Younkin, supra*; *Farmer v. Farmer*, 200 Neb. 308, 263 N.W.2d 664 (1978). The decree, including the paternity findings, was rendered by a court of competent jurisdiction.

Second, we must determine whether the paternity findings in the dissolution decree constitute a final judgment. Courts which have addressed this issue have overwhelmingly ruled that the paternity findings in a dissolution decree are a final judgment and are res judicata. See, *Ex Parte Presse*, 554 So. 2d 406 (Ala. 1989); *Peercy v. Peercy*, 154 Colo. 575, 392 P.2d 609 (1964); *In re Marriage of Klebs*, 196 Ill. App. 3d 472, 554 N.E.2d 298 (1990); *In re Marriage of Detert*, 391 N.W.2d 707 (Iowa App. 1986); *Anderson v. Anderson*, 407 Mass. 251, 552 N.E.2d 546 (1990); *Hackley, supra*; *Clay v. Clay*, 397 N.W.2d 571 (Minn. App. 1986), *appeal dismissed* 484 U.S. 804, 108 S. Ct. 49, 98 L. Ed. 2d 14 (1987); *Markert v. Behm*, 394 N.W.2d 239 (Minn. App. 1986); *Butler v. Brownlee and Dist. Ct.*, 152 Mont. 453, 451 P.2d 836 (1969); *Arnold v. Arnold*, 207 Okla. 352, 249 P.2d 734 (1952); *Adoption of Young*, 469 Pa. 141, 364 A.2d 1307 (1976); *Luedtke v. Koopsma*, 303 N.W.2d 112 (S.D. 1981); *Lerman v. Lerman*, 148 Vt. 629, 528 A.2d 1121 (1987); *Johns v. Johns*, 64 Wash. 2d 696, 393 P.2d 948 (1964); *N.C. v. W.R.C.*, 173 W. Va. 434, 317 S.E.2d 793 (1984). But see *Hansom v. Hansom*, 75 Misc. 2d 3, 346 N.Y.S.2d 996 (1973) (admission of paternity in legal separation proceedings did not preclude father from challenging paternity in later support proceeding). These courts reason that the parties to a dissolution action had a full and fair opportunity to litigate the issue of paternity during the dissolution proceedings. See, *Markert, supra*; *Lerman, supra*.

Zaback contends that under certain circumstances paternity findings in a dissolution decree are not final. Zaback relies primarily on two cases: *Cline v. Cline*, 200 Neb. 619, 264 N.W.2d 680 (1978), and *Younkin v. Younkin*, 221 Neb. 134, 375 N.W.2d 894 (1985). We find that both of these cases are distinguishable and not controlling.

In *Cline*, the court entered a default decree dissolving the marriage and awarding custody of the minor child to the husband. The wife subsequently filed a motion to modify the decree. The wife alleged that her husband had promised her,

prior to the entry of the decree, that he would make sure she got custody of the minor child if she did not " 'cause any problems.' " 200 Neb. at 620, 264 N.W.2d at 681. The wife also alleged that but for this promise, she would have appeared at the divorce hearing. We recognized that the best interests of the children govern decisions relating to custody:

> [W]here facts affecting *the custody* and best interests of children . . . are not called to the attention of the court, and, particularly in default cases, where the issues affecting custody have not been fully tried, the court, upon a proper motion for modification, may consider all facts and circumstances, including those existing prior to and at the time of the judgment or decree, in making a subsequent determination *of custody*.

(Emphasis supplied.) *Id.* at 622, 264 N.W.2d at 682. We concluded that the district court properly modified the divorce decree in the best interests of the child.

Cline is a custody case. Custody is based on the best interests of the child. In contrast, paternity is not based on the best interests of the child. The fact that child custody may be modified does not permit paternity findings to be disturbed. *Arnold, supra.* See, *Soltis v. Soltis*, 470 So. 2d 1250 (Ala. Civ. App. 1985) (although child custody is never res judicata, paternity cannot be disputed in a subsequent proceeding); *Dept. of Human Services v. Lowatchie*, 569 A.2d 197 (Me. 1990) (unlike alimony, child support, custody, or ground for divorce, paternity is not subject to change).

In *Younkin*, the dissolution decree named the husband as the father of the parties' unborn child and ordered the husband to pay child support. Within 6 months of the date of the decree, the husband brought an action to modify the paternity findings of the decree pursuant to Neb. Rev. Stat. § 42-372 (Reissue 1984), which provided: "A decree dissolving a marriage shall not become final or operative until six months after the decree is rendered . . . . [T]he court may, at any time within such six months, vacate or modify its decree." During the 6-month period, the control of the decree rests within the discretion of the trial court. *Zachry v. Zachry*, 185 Neb. 336, 175 N.W.2d 616 (1970); *Willie v. Willie*, 167 Neb. 449, 93 N.W.2d 501 (1958).

However, a court will not vacate or modify a decree during the 6-month period without a showing of good cause. *Miller v. Miller*, 190 Neb. 816, 212 N.W.2d 646 (1973); *Willie, supra*. We found that the wife's representations to the husband and the lack of tests which could establish, in utero, the paternity of the unborn child constituted good cause. We held that the father was entitled to an evidentiary hearing on the issue of paternity.

The decree in *Younkin* was not a final judgment. The husband in *Younkin* was permitted to challenge the paternity findings in the decree because the 6-month waiting period had not elapsed and the decree had not become "operative" or final. The holding of *Younkin* was based on the specific statutory provision under which the husband sought relief. The present version of that statute also provides for a 6-month waiting period before a dissolution decree becomes final. See § 42-372 (Reissue 1988). In the present action, Zaback's application to modify was filed long after the 6-month waiting period had expired. *Younkin* is inapplicable to the present action.

One final case, not cited by either of the parties, merits discussion. In *Snodgrass v. Snodgrass*, 241 Neb. 43, 486 N.W.2d 215 (1992), a former husband sought to establish his nonpaternity of one of the minor children named in his dissolution decree. The former husband raised no new facts or circumstances. We held that the husband was not entitled to a modification of the decree. We reasoned that a party seeking to modify paternity findings in a decree must at least present a change of circumstances in order to overcome the finality of those findings. Our opinion in *Snodgrass* did not discuss whether and under what conditions the paternity findings in a decree could be modified. To the extent that *Snodgrass* is applicable to the present action, it stands for the proposition that paternity findings in a dissolution decree can be a final judgment.

We find the cases from other jurisdictions persuasive and not in conflict with any of our prior decisions. "There is no more forceful example of the rationale underlying the requirement of finality of judgments than the chaos and humiliation which would follow from allowing [persons] to challenge, long after a

final judgment has been entered, the legitimacy of children born during their marriages." *Hackley v Hackley*, 426 Mich. 582, 599, 395 N.W.2d 906, 914 (1986). We conclude that a paternity determination in a dissolution decree is a final judgment.

Third, we must determine whether the dissolution decree was a judgment on the merits. For purposes of res judicata, a judgment on the merits is one which is based on legal rights, as distinguished from mere matters of practice, procedure, jurisdiction, or form. *Kerndt v. Ronan*, 236 Neb. 26, 458 N.W.2d 466 (1990). One commentator explains that summary judgments, judgments on a directed verdict, judgments after trial, default judgments, and consent judgments are all generally considered to be on the merits for purposes of res judicata. Jack H. Friedenthal et al., Civil Procedure § 14.7 (2d ed. 1993). In contrast, dismissals on technical procedural grounds are generally *not* on the merits for purposes of res judicata. See *id.* See, also, *Omaha Road Equipment Co. v. Thurston County*, 122 Neb. 35, 238 N.W. 919 (1931) (dismissal for lack of jurisdiction does not bar future claims); *Morris v. Linton*, 74 Neb. 411, 104 N.W. 927 (1905) (dismissal without prejudice does not bar future claims).

The application to modify alleges that a dissolution decree was entered and that the decree provided for custody "of the minor child of the parties," child support, and visitation rights. In entering the decree, the district court reached the merits of the parties' cause—the dissolution of their marriage—and decided the issue of paternity. The decree was not based on technical procedural grounds. The dissolution decree was a judgment on the merits.

Fourth, we must determine whether the parties are identical in both proceedings. This issue is beyond dispute. Zaback and DeVaux, the parties to the dissolution action, are the same parties identified in the application to modify.

We conclude that under the doctrine of res judicata, a finding of paternity in a dissolution decree precludes the parties to the decree from relitigating paternity.

Zaback argues that the doctrine of res judicata notwithstanding, the district court's independent equity

jurisdiction provides the authority for the court to vacate or modify the decree. Assuming, without deciding, that Zaback's argument is correct, we find that Zaback is not entitled to a new trial.

A litigant seeking the vacation or modification of a prior judgment after term may take one of two routes. The litigant may proceed either under Neb. Rev. Stat. § 25-2001 (Reissue 1989) or under the district court's independent equity jurisdiction. See, *Joyce v. Joyce*, 229 Neb. 831, 429 N.W.2d 355 (1988); *Emry v. American Honda Motor Co.*, 214 Neb. 435, 334 N.W.2d 786 (1983).

Under § 25-2001, a district court has the power to vacate or modify its own judgment after term for one of nine reasons enumerated in the statute. The only one of these reasons applicable to Zaback's claim is a motion for new trial based on newly discovered evidence. See § 25-2001(1). For purposes of the following analysis, we will treat Zaback's application to modify as a motion for new trial on the basis of newly discovered evidence. Cf. *Abboud v. Cutler*, 238 Neb. 177, 469 N.W.2d 763 (1991) (motion to vacate a dismissal is equivalent to a motion for new trial).

In the present action, Zaback is not entitled to relief under § 25-2001 because she is out of time; claims of newly discovered evidence must be filed within 1 year of the final judgment. See Neb. Rev. Stat. § 25-1145 (Reissue 1989). However, this does not dispose of Zaback's argument because, as stated above, § 25-2001 is not the exclusive remedy for vacating or modifying a judgment after term. Section 25-2001 is concurrent with the courts' independent equity jurisdiction. *Joyce, supra*; *Emry, supra*. We find, however, that Zaback's application to modify does not survive demurrer because it does not comply with the substantive requirements for a motion for new trial on the basis of newly discovered evidence.

As a general rule, in order to make a sufficient showing for a new trial on the grounds of newly discovered evidence, the proof in support thereof must show that such evidence is now available which neither the litigant nor counsel could have discovered by the exercise of reasonable diligence and that the evidence is not merely cumulative, but competent, relevant, and material, and of such character as to reasonably justify a belief

that its admission would bring about a different result if a new trial were granted. *Ipock v. Union Ins. Co.*, 242 Neb. 448, 495 N.W.2d 905 (1993); *Federal Dep. Ins. Corp. v. Swanson*, 231 Neb. 148, 435 N.W.2d 659 (1989), *overruled on other grounds, Eccleston v. Chait*, 241 Neb. 961, 492 N.W.2d 860 (1992). In the present action, we are more particularly concerned with the requirement of reasonable diligence.

Newly discovered evidence is not grounds for a motion for new trial where the exercise of reasonable diligence would have produced the evidence. *Miles v. Box Butte County*, 241 Neb. 588, 489 N.W.2d 829 (1992); *Gruenewald v. Waara*, 229 Neb. 619, 428 N.W.2d 210 (1988); *Reilly v. First Nat. Bank & Trust Co.*, 220 Neb. 443, 370 N.W.2d 163 (1985). A motion for new trial on the grounds of newly discovered evidence must allege that the evidence could not have been discovered during term with the exercise of reasonable diligence. *Smith v. Goodman*, 100 Neb. 284, 159 N.W. 418 (1916). See, also, *Younkin v. Younkin*, 221 Neb. 134, 375 N.W.2d 894 (1985) (Krivosha, C.J., dissenting); *American National Red Cross v. Young*, 133 Neb. 558, 276 N.W. 194 (1937). Zaback's application fails to allege that the results of the blood tests could not have been discovered with the exercise of reasonable diligence. Therefore, Zaback is not entitled to a new trial on the basis of newly discovered evidence.

We hold that under the doctrine of res judicata, a finding of paternity in a dissolution decree precludes the parties to the decree from relitigating paternity. In addition, Zaback has failed to allege facts which would entitle her to a new trial on the basis of newly discovered evidence. Accordingly, Zaback cannot maintain the present action to modify the paternity findings of the decree. We express no opinion regarding Terry Lee Zaback's right or ability to maintain a paternity action.

Because Zaback's application to modify is fatally deficient, the district court erred in failing to sustain DeVaux's demurrer on the ground of res judicata. Following the sustaining of a demurrer, the losing party is entitled to amend the pleadings unless there exists no reasonable possibility that amendment will remedy the deficiency. *Hoch v. Prokop*, 244 Neb. 443, 507

N.W.2d 626 (1993); *LaPan v. Myers*, 241 Neb. 790, 491 N.W.2d 46 (1992).

In the present action, no amendment can alter our conclusion of res judicata. Upon a review of the record, it appears that Zaback also would be unable to amend her pleading to remedy her deficiency regarding reasonable diligence.

For purposes of a motion for new trial on the basis of newly discovered evidence, "reasonable diligence" means appropriate action where there is some reason to awaken inquiry and direct diligence in a channel in which it will be successful. *State v. Munson*, 204 Neb. 814, 285 N.W.2d 703 (1979).

Zaback testified that she first questioned the minor child's paternity in July 1990, when the child was 3 1/2 years old. Zaback called Boys Town, which directed her to the University of Nebraska Medical Center, which in turn directed her to call either an attorney or a medical doctor. Zaback contacted counsel, and the tests were performed in August 1990. Zaback testified that at all times prior to the entry of the decree she was unaware that blood tests could determine the minor child's paternity. Zaback's belated realization regarding the minor child's paternity and her lack of awareness regarding blood tests are immaterial. Zaback was aware of her extramarital sexual relations. These sexual relations provided her with "some reason to awaken inquiry" as to the paternity of the minor child. If Zaback had been reasonably diligent, she would have discovered the possibility of blood tests at an earlier date. We conclude that Zaback is not entitled to amend her application.

In view of our decision that the district court should have sustained DeVaux's demurrer, we need not consider summarized assignments of error (2) through (5), which allege errors occurring at trial.

DeVaux asserts that the trial court erred in failing to award him attorney fees. In a proceeding to modify a dissolution decree, the decision to award attorney fees rests within the trial court's discretion. *Meyers v. Meyers*, 222 Neb. 370, 383 N.W.2d 784 (1986). On appeal, a trial court's decision awarding or denying attorney fees will be upheld absent an abuse of discretion. *In re Estate of Watkins*, 243 Neb. 583, 501 N.W.2d

292 (1993); *Sports Courts of Omaha v. Meginnis*, 242 Neb. 768, 497 N.W.2d 38 (1993). We find that the trial court did not abuse its discretion in failing to award costs and fees to DeVaux.

In summary, we hold that the trial court erred in overruling DeVaux's demurrer but did not err in denying DeVaux fees and costs. Accordingly, we reverse in part and in part affirm. We remand the cause with directions to sustain the demurrer without leave to amend. As a result of our decision today, the provisions of the divorce decree, including those provisions for support and visitation, are reinstated.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

IN RE INTEREST OF J.T.B. AND H.J.T., CHILDREN UNDER 18 YEARS OF AGE.
SAINT JOSEPH CENTER FOR MENTAL HEALTH, APPELLEE, V. COUNTY OF DOUGLAS, NEBRASKA, A POLITICAL SUBDIVISION, APPELLANT.

514 N.W.2d 635

Filed April 15, 1994. No. S-92-450.

1. **Parental Rights: Appeal and Error.** Juvenile cases are reviewed de novo on the record, and the appellate court is required to reach a conclusion independent of the trial court's findings; however, where the evidence is in conflict, the appellate court will consider and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another.
2. **Jurisdiction: Appeal and Error.** When a lower court lacks the power, that is, the subject matter jurisdiction, to adjudicate the merits of a claim, issue, or question, an appellate court also lacks the power to determine the merits of the claim, issue, or question presented to the lower court.
3. **Jurisdiction: Judgments: Final Orders: Appeal and Error.** Although an extrajurisdictional act of a lower court cannot vest the appellate court with jurisdiction to review the merits of the appeal, the appellate court has

jurisdiction and, moreover, the duty to determine whether the lower court had the power, that is, the subject matter jurisdiction, to enter the judgment or other final order sought to be reviewed.

4. **Jurisdiction: Words and Phrases.** Subject matter jurisdiction is a court's power to hear and determine a case of the general class or category to which the proceedings in question belong and to deal with the general subject involved in the action before the court.
5. _____: _____. Jurisdiction of the subject matter means the authority to hear and determine both the class of actions to which the action before the court belongs and the particular question which it assumes to determine.
6. **Juvenile Courts: Costs.** A juvenile court can order a juvenile under its jurisdiction to receive medical, psychological, or psychiatric study or treatment. The juvenile court can order the costs of such study or treatment to be paid by the parent or guardian of the juvenile; by the Department of Social Services if the juvenile has been committed to that department's custody; or, if not otherwise provided for by law, by the county in which the petition is filed.
7. **Parental Rights: Juvenile Courts.** A juvenile court has the discretionary power to prescribe a reasonable plan for parental rehabilitation to correct the conditions underlying the adjudication that a child is a juvenile within the Nebraska Juvenile Code.
8. **Jurisdiction.** 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.

Appeal from the Separate Juvenile Court of Douglas County: SAMUEL P. CANIGLIA, Judge. Judgment vacated, and cause remanded with direction to dismiss.

James S. Jansen, Douglas County Attorney, and Marjorie A. Records for appellant.

Patricia A. Zieg and Mark E. Novotny, of Kennedy, Holland, DeLacy & Svoboda, for appellee.

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

FAHRNBRUCH, J.

Douglas County appeals an order of the Douglas County Separate Juvenile Court directing Douglas County to pay Saint Joseph Center for Mental Health (St. Joseph) $27,204.75 for services St. Joseph claims it rendered to the mother of two minor children who were under the jurisdiction of the juvenile court.

The juvenile court had previously temporarily ordered that

the mother's two minor children be placed in foster care while they were in the custody of the Department of Social Services (DSS). The court subsequently ordered that the children's mother be transported from a jail to St. Joseph for treatment.

Douglas County moved for (1) a new trial and (2) vacation of the court's order requiring Douglas County to pay St. Joseph's claim for services. The motions were overruled, and Douglas County appealed.

Because the Douglas County Separate Juvenile Court lacked subject matter jurisdiction to order Douglas County to pay St. Joseph's claim for services to the mother, we vacate the juvenile court's payment order and remand the matter to the juvenile court with direction to dismiss St. Joseph's application for payment.

ASSIGNMENTS OF ERROR

In substance, Douglas County asserts that the juvenile court (1) lacked subject matter jurisdiction to require it to pay St. Joseph's claim for services to the children's mother, (2) lacked personal jurisdiction over the county because it failed to afford the county notice and an opportunity to be heard, and (3) erred in denying the county's motion for new trial.

STANDARD OF REVIEW

Juvenile cases are reviewed de novo on the record, and the appellate court is required to reach a conclusion independent of the trial court's findings; however, where the evidence is in conflict, the appellate court will consider and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another. *In re Interest of L.P. and R.P.*, 240 Neb. 112, 480 N.W.2d 421 (1992).

FACTS

After an April 9, 1991, adjudication hearing, the juvenile court determined that J.T.B. and H.J.T. were children within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1988) and gave temporary custody of the children to DSS for foster care placement. As far as relevant here, § 43-247(3)(a) sets forth that the juvenile court has jurisdiction of

> [a]ny juvenile . . . who lacks proper parental care by

> reason of the fault or habits of his or her parent, guardian, or custodian; whose parent . . . neglects or refuses to provide proper or necessary subsistence, education, or other care necessary for the health, morals, or well-being of such juvenile; . . . or who is in a situation . . . dangerous to life or limb or injurious to the health or morals of such juvenile.

In its adjudication order, the juvenile court found that the children's mother, C.B., "uses alcohol to excess which affects her ability to properly parent" her children and that the mother "has failed to follow through with medical care" for her children. At the time of the April 9 hearing, the mother had been incarcerated by a criminal court for 45 days for lewd conduct. She was not scheduled to be released until April 20.

The juvenile court held a disposition hearing May 9, 1991, and on May 10 found that it was in the best interests of the two minor children that they continue in the custody of DSS. The court ordered the children's mother to obtain a chemical dependency evaluation and to enter a treatment program if recommended by the evaluator. The disposition order did not designate where the treatment was to take place or who should pay for it.

On June 1, the mother, who was then 18 years old, was arrested for being a minor in possession of alcohol. She failed to appear for a June 28 court hearing on that charge, and a warrant for her arrest was issued by the court in which the charge was pending.

The mother did appear at a July 9, 1991, juvenile court hearing for a review of her children's case. At that hearing, there was evidence that the mother continued to "drink a lot and has been getting drunk." The juvenile court's probation officer and DSS recommended, inter alia, that the court order the mother to enter a dual-track, inpatient program for psychiatric and chemical dependency treatment. The county attorney representing the State, the guardian ad litem for the children, and the mother's attorney all concurred in this recommendation. After the July 9 hearing, the juvenile court again ordered that the mother's two children remain in the custody of DSS and ordered the mother to enter a dual-track,

inpatient treatment program as recommended. The court did not specify where the treatment was to take place or who should pay for it.

Following the July 9 hearing, pursuant to an arrest warrant, which apparently was issued by another court on her minor-in-possession charge, the mother was arrested and taken to the Douglas County Correctional Center.

On July 12, 1991, the juvenile court on its own motion entered an order finding that the mother (1) was in jail and would not be transferred to the Hastings Regional Center for treatment until August 10 and (2) was in need of aid at St. Joseph. The juvenile court then ordered that the mother be transported to St. Joseph for "any treatment." In addition, the court ordered that any services required by the mother be paid by Douglas County.

Nothing in the record indicates that the mother was in need of emergency treatment at the time she was transferred to St. Joseph, nor does the record reflect what type of treatment, if any, the mother received at St. Joseph from July 12 through August 13, 1991. The record does reflect that after the mother left St. Joseph, DSS continued its efforts to have the mother admitted into the Hastings Regional Center's dual-track treatment program. The mother eventually entered the Hastings Regional Center on March 30, 1992. She stayed only 5 days and left voluntarily against medical advice.

Previously, on January 15, 1992, St. Joseph filed an application in the children's case in juvenile court for an order requiring payment of $27,204.75 for services St. Joseph claimed it had rendered to the mother from July 12 through August 13, 1991. St. Joseph alleged that it had submitted its bill to Douglas County and that payment had been refused. The record is silent as to whether that refusal was appealed to any court.

On March 9, 1992, the juvenile court, on its own motion, entered an "Order to Clarify" its July 12, 1991, order. In the clarification order, the juvenile court declared that the cost of treating the mother at St. Joseph "shall be borne by Douglas County to the extent allowable under the law." St. Joseph then filed a motion to reconsider the order to clarify because the

order was not timely made under Neb. Rev. Stat. § 25-2001 (Reissue 1989), which provides when a court may vacate or modify its own judgments or orders after the term of court. After an April 7, 1992, hearing on St. Joseph's motion, the juvenile court on April 9 filed an order in which the court (1) granted St. Joseph's motion to reconsider the order to clarify dated March 9, 1992; (2) vacated its March 9, 1992, order as being void ab initio in that said order was made out of term of the court; (3) found that St. Joseph had relied upon the court's July 12, 1991, order in subsequently rendering care to the mother; (4) granted St. Joseph's application for payment; and (5) directed Douglas County to pay St. Joseph $27,204.75. The April 9 order was signed and approved as to form and content by an assistant Douglas County Attorney.

On April 17, 1992, the county moved for a new trial and vacation of an order for payment. The motion was overruled on May 7, and Douglas County timely filed a notice of appeal on May 28.

ANALYSIS

To dispose of this appeal, it is only necessary that we review the juvenile court's April 9 order and its May 7 denial of the county's motion for new trial.

With that in mind, we turn to Douglas County's claim that the juvenile court lacked subject matter jurisdiction because it had no authority to order the county to pay for the mother's treatment at St. Joseph. In the juvenile court, the county raised the issue of that court's subject matter jurisdiction to order payment for services to the mother. The juvenile court's ruling on the issue was unfavorable to the county.

When a lower court lacks the power, that is, the subject matter jurisdiction, to adjudicate the merits of *a claim, issue, or question*, an appellate court also lacks the power to determine the merits of the claim, issue, or question presented to the lower court. See, *Riley v. State*, 244 Neb. 250, 506 N.W.2d 45 (1993); *In re Interest of L.D. et al.*, 224 Neb. 249, 398 N.W.2d 91 (1986). Although an extrajurisdictional act of a lower court cannot vest the appellate court with jurisdiction to review the merits of the appeal, the appellate court has jurisdiction and,

moreover, the duty to determine whether the lower court had the power, that is, the subject matter jurisdiction, to enter the judgment or other final order sought to be reviewed. See, *In re Interest of M.J.B.*, 242 Neb. 671, 496 N.W.2d 495 (1993); *In re Interest of L.D. et al., supra.*

Subject matter jurisdiction is a court's power to hear and determine a case of the general class or category to which the proceedings in question belong and to deal with the general subject involved in the action before the court. *Riley, supra*; *Kane v. Vodicka*, 238 Neb. 436, 471 N.W.2d 136 (1991). This court has stated further that jurisdiction of the subject matter means the authority to hear and determine both the class of actions to which the action before the court belongs and *the particular question which it assumes to determine.* See, *McCollister v. McCollister*, 229 Neb. 769, 428 N.W.2d 908 (1988); *State ex rel. Bauersachs v. Williams*, 215 Neb. 757, 340 N.W.2d 431 (1983).

Here, the particular questions which the juvenile court assumed to determine in its April 9 order were whether the county owed the $27,204.75 claimed by St. Joseph in its application for payment and whether Douglas County should be ordered to pay St. Joseph that amount for services rendered to the mother. We are unable to find any statutory or case-law authority granting a juvenile court subject matter jurisdiction to determine these questions.

In *In re Interest of L.D. et al., supra*, this court stated that subject matter jurisdiction is vested in the juvenile court by an adjudication that a child is a juvenile described in § 43-247. Subsection 5 of § 43-247 extends the juvenile court's jurisdiction to parents, guardians, or custodians who have custody of any juvenile described in the section. The juvenile court thus acquired jurisdiction over the children and their mother in this case when it found at its April 9, 1991, adjudication hearing that the children were within the meaning of § 43-247(3)(a). It should be remembered, however, that the juvenile court's jurisdiction over the mother was as a parent, and not as a juvenile described in § 43-247.

A juvenile court can order a *juvenile* under its jurisdiction to receive medical, psychological, or psychiatric study or

treatment. The juvenile court can order the costs of such study or treatment to be paid by the parent or guardian of the juvenile; by DSS if the juvenile has been committed to DSS' custody; or, if not otherwise provided for by law, by the county in which the petition is filed. See Neb. Rev. Stat. § 43-290 (Cum. Supp. 1992). However, this appeal does not deal with medical, psychological, or psychiatric care rendered to a juvenile under the court's jurisdiction. Rather, it deals with whether the juvenile court has the power to order a county to pay for such type of care rendered to a mother of juveniles under the court's jurisdiction.

We have previously held that a juvenile court has the discretionary power to prescribe a reasonable plan for parental rehabilitation to correct the conditions underlying the adjudication that a child is a juvenile within the Nebraska Juvenile Code. *In re Interest of A.H.*, 237 Neb. 797, 467 N.W.2d 682 (1991); *In re Interest of L.H.*, 227 Neb. 857, 420 N.W.2d 318 (1988). See, also, Neb. Rev. Stat. § 43-288(1) (Reissue 1988). However, we are unable to find any statutory or case-law authority under which a juvenile court can order a county to pay for a mother's rehabilitative treatment, nor has any such authority been cited to us.

Although the juvenile court's April 9 order directing Douglas County to pay St. Joseph $27,204.75 was approved in writing as to form and content by an assistant Douglas County Attorney, such approval cannot create subject matter jurisdiction where none exists. 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. *Rohde v. Farmers Alliance Mut. Ins. Co.*, 244 Neb. 863, 509 N.W.2d 618 (1994).

Therefore, we hold that the juvenile court did not have subject matter jurisdiction to order Douglas County to pay St. Joseph for services claimed to have been rendered to the mother of children under the jurisdiction of the juvenile court. Because of this holding, we need not address Douglas County's two other assignments of error.

The Douglas County Separate Juvenile Court's order directing Douglas County to pay St. Joseph's claim for services to the mother of the children in this case is vacated, and the

cause is remanded to the Douglas County Separate Juvenile Court with direction to dismiss St. Joseph's application for payment.

JUDGMENT VACATED, AND CAUSE REMANDED WITH DIRECTION TO DISMISS.

DENNIS R. BAUERS ET AL., APPELLANTS, V. CITY OF LINCOLN, A MUNICIPAL CORPORATION, APPELLEE.

514 N.W.2d 625

Filed April 15, 1994. Nos. S-92-552, S-92-554 through S-92-558.

1. **Summary Judgment: Appeal and Error.** 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. In appellate review of a summary judgment, the court reviews 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. **Municipal Corporations: Actions: Claims.** To maintain an action against a city, a claimant must file a claim with the city pursuant to Neb. Rev. Stat. § 15-840 (Reissue 1991).
3. **Limitations of Actions: Time: Damages.** An action accrues and the statutory time within which the action must be filed begins to run when the injured party has the right to institute and maintain a lawsuit, although the party may not know the nature and extent of the damages.
4. **Limitations of Actions: Claims.** When the only unperformed act, such as filing a claim with a city, required to maintain a lawsuit is an act that the claimant must perform, the claimant may not withhold performance of such act to defeat the purpose of the statutory limitation.
5. **Claims: Actions.** A claim accrues for purposes of Neb. Rev. Stat. § 15-840 (Reissue 1991) when all factors have arisen which would allow the claimant to commence and maintain an action in court with the exception of the filing of the claim pursuant to § 15-840.
6. **Limitations of Actions: Pensions: Contracts: Damages.** Pension benefits are similar to installment contracts, and the action which may arise from a particular installment is limited to that installment. The recovery of damages, therefore, is limited to the installments which fell within the period of the applicable statute of limitations.
7. **Constitutional Law: Municipal Corporations: Claims: Actions: Statutes.** Statutes which require that claims against a city be filed with the city as a condition precedent to maintaining an action in court are an impermissible

limitation on an injured party's right to maintain an action for violation of their federal constitutional rights under 42 U.S.C. § 1983 (1988).

8. **Civil Rights: Limitations of Actions: States.** Each state must apply only one statute of limitations to all 42 U.S.C. § 1983 (1988) actions. For purposes of selecting one statute of limitations, § 1983 actions shall be characterized as personal injury actions because recovery is based upon a finding that a party has suffered injury to his personal rights.
9. **Civil Rights: Limitations of Actions: Time.** Actions filed under 42 U.S.C. § 1983 (1988) are subject to the statute of limitations provided in Neb. Rev. Stat. § 25-207 (Reissue 1988), which requires that actions for an injury to the plaintiff's rights be filed within 4 years from the date on which the action accrued.

Appeal from the District Court for Lancaster County: WILLIAM D. BLUE, Judge. Affirmed in part, and in part reversed and remanded.

K. Kristen Newcomb and Robert F. Bartle, of Healey & Wieland Law Firm, for appellants.

William F. Austin, Lincoln City Attorney, and James D. Faimon for appellee.

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

WHITE, J.

Appellants, former firefighters for the City of Lincoln (City), filed claims with the City requesting a return of their pension contributions. The City denied their claims, and they appealed to the Lancaster County District Court. The district court dismissed their combined action because it found that the claims were filed after the statutory time for filing such claims had expired. The firefighters filed appeals with the Nebraska Court of Appeals, and, on our own motion, we removed the cases to this court. We also granted the firefighters' motion to consolidate the cases for purposes of appeal. We affirm in part and reverse in part the decision of the district court and remand the cause.

This case involves six former firefighters who were employed by the City. (This action originally included a seventh firefighter, John Simpson; however, Simpson has dismissed his appeal, and thus, his action is not before us for consideration.)

All six contributed to a pension plan (plan) while employed by the City. Participation in the plan was mandatory pursuant to Neb. Rev. Stat. § 15-1001 et seq. (Reissue 1983 & Cum. Supp. 1986). The statutory sections which constituted the material provisions of the plan were repealed in September 1987. The City then adopted substantially similar provisions in Lincoln Mun. Code ch. 2.64. The firefighters concede, and we agree, that any differences between the provisions of the plan pursuant to § 15-1001 et seq. and the provisions found in chapter 2.64 are immaterial to the issues raised in the present action.

The firefighters seek to have their entire respective contributions to the plan returned to them in one lump-sum payment. Four of the six firefighters also seek to have returned to them the amounts that the City deducted from their monthly pension payments to offset the workers' compensation benefits they each received. The following is a summary of the facts related to each of the firefighters' cases.

Dennis R. Bauers was employed as a firefighter for the City from September 1966 through September 1987. During his employment, Bauers contributed a total of $38,782.13 to the plan. On September 23, 1987, Bauers was forced to terminate his employment because of employment-related injuries he suffered. Pursuant to an executive order, Bauers was awarded a duty-related disability pension. On October 17, 1990, Bauers filed a claim with the City and contended that he was entitled to receive the total amount of his contributions to the plan. The City denied the claim on December 6.

Thomas L. Scharbach was employed as a firefighter for the City from July 1969 through November 1988. During his employment, Scharbach contributed a total of $45,014.93 to the plan. On November 17, 1988, Scharbach was forced to terminate his employment because of physical disabilities he suffered. Pursuant to an executive order, Scharbach was awarded a non-duty-related disability pension. On October 17, 1990, Scharbach filed a claim with the City and contended that he was entitled to receive the total amount of his contributions to the plan. The City denied the claim on December 6.

James E. Johnson was employed as a firefighter for the City

from May 1975 through July 1989. During his employment, Johnson contributed a total of $31,366.86 to the plan. On July 18, 1989, Johnson terminated his employment as a firefighter because of employment-related injuries he suffered. Pursuant to an executive order, Johnson was awarded a duty-related disability pension. On October 17, 1990, Johnson filed a claim with the City and contended that he was entitled to receive the total amount of his contributions to the plan. The City denied the claim on December 6.

In his petition to the district court, Johnson included an additional claim which he did not raise in his claim filed with the City: He alleged that he had received workers' compensation benefits which the City deducted from his pension benefits. Johnson contended that from October 1989 through December 1990, the City deducted a total of $15,157 from his pension. Because Johnson did not properly raise the validity of the deductions for workers' compensation benefits in his claim to the City, that issue was not before the district court and is not now before this court for review. See, Neb. Rev. Stat. § 15-1201 (Reissue 1991); *Cather & Sons Constr., Inc. v. City of Lincoln*, 200 Neb. 510, 264 N.W.2d 413 (1978) (parties appealing to the district court from a decision of the City pursuant to § 15-1201 may not raise issues which were not the subject of the City's decision).

Jerry Peterson was employed as a firefighter for the City from October 1977 through January 1987. During his employment, Peterson contributed a total of $10,855.17 to the plan. On February 26, 1987, Peterson was forced to terminate his employment because of employment-related injuries he suffered. Pursuant to an executive order, Peterson was awarded a duty-related disability pension. Peterson also received $6,000 in workers' compensation benefits. From January 26 through June 22, 1987, the City deducted a total of $4,680 from Peterson's pension to offset the workers' compensation benefits he received. (We note that in the petition Peterson filed in district court, he alleged that the City deducted only $3,779.37 from his pension. This discrepancy, however, is irrelevant to our decision.) On October 17, 1990, Peterson filed a claim with the City and contended that he was entitled to

receive the total amount of his contributions to the plan and the amount deducted from his pension for the workers' compensation benefits. The City denied the claim on December 6.

David C. Bowlin was employed as a firefighter for the City from January 1982 through February 1986. During his employment, Bowlin contributed a total of $5,678.49 to the plan. On February 20, 1986, Bowlin was forced to terminate his employment as a firefighter because of employment-related injuries he suffered. Pursuant to an executive order, Bowlin was awarded a duty-related disability pension. Bowlin also received $8,114.40 in workers' compensation benefits. From August 1986 through at least the time that he filed his petition in district court, the City deducted a total of $9,917.60 from his pension for the workers' compensation benefits he received. On October 17, 1990, Bowlin filed a claim with the City and contended that he was entitled to receive the total amount of his contributions to the plan and the amounts that the City has deducted and continues to deduct for workers' compensation benefits. The City denied the claim on December 6.

Roger L. Carmichael was employed as a firefighter with the City from August 1978 through September 1987. During his employment, Carmichael contributed a total of $12,761.03 to the plan. On September 1, 1987, Carmichael was forced to terminate his employment because of employment-related injuries. Pursuant to an executive order, Carmichael was awarded a duty-related disability pension. Carmichael also received $21,480.30 in workers' compensation benefits. From June 1988 through August 1989, the City deducted a total of $15,480.30 from his pension for the workers' compensation benefits he had received. On October 17, 1990, Carmichael filed a claim with the City and contended that he was entitled to receive the total amount of his contributions to the plan and the total amount that the City deducted from his pension for workers' compensation benefits. The City denied the claim on December 6.

After the City denied each of their claims, the firefighters timely filed notices of appeal to the district court pursuant to § 15-1201. The firefighters' actions with regard to the return of

their contributions are substantially similar. The firefighters contend that the City's actions pursuant to Lincoln Mun. Code § 2.64.024 (1987) (formally set forth in Neb. Rev. Stat. § 15-1013.02 (repealed in 1987)) (1) violate their right to equal protection and deprive them of property without due process of law contrary to the 14th Amendment to the U.S. Constitution and Neb. Const. art. I, §§ 3 and 25; (2) violate the Nebraska Wage Payment and Collection Act, Neb. Rev. Stat. § 48-1228 et seq. (Reissue 1988 & Cum. Supp. 1990); and (3) violate the Nebraska Fair Employment Practice Act, Neb. Rev. Stat. § 48-1101 et seq. (Reissue 1988 & Cum. Supp. 1990).

Also similar are the actions filed by the three firefighters who properly presented their claims for a return of the money that the City deducted from their pensions for the workers' compensation benefits they received. These firefighters contend that the City's actions pursuant to Lincoln Mun. Code §§ 2.64.011(e) and 2.64.018 (1988) (formally set forth in Neb. Rev. Stat. §§ 15-1006 and 15-1008 (repealed in 1987)) (1) deprive them of property without due process of law contrary to the 14th Amendment to the U.S. Constitution and Neb. Const. art. I, §§ 3 and 25; (2) violate the Nebraska Wage Payment and Collection Act; and (3) deprive them of property rights and remedies that they are entitled to pursuant to Neb. Rev. Stat. § 48-130 (Reissue 1988) of the Nebraska Workers' Compensation Act.

Additionally, all of the firefighters have apparently asserted a cause of action under 42 U.S.C. § 1983 (1988). We will separately discuss the firefighters' § 1983 actions following our consideration of the application of Neb. Rev. Stat. § 15-840 (Reissue 1991) to the other theories of recovery raised by the firefighters.

The City filed a motion for summary judgment. The district court granted the City's motion because the court found that the firefighters' claims accrued on the first date each of them was placed on the pension roll, and therefore, none of the firefighters had filed claims with the City within 1 year of the accrual of their claims as required by § 15-840.

On appeal, the firefighters contend that the district court applied the wrong rule to determine when their claims accrued.

Specifically, they contend that after they were placed on the pension roll, the City had a continuing obligation to pay each pension installment, and thus, their right to file their claims accrued each time that an installment was due.

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. In appellate review of a summary judgment, the court reviews 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. *Rowe v. Allely*, 244 Neb. 484, 507 N.W.2d 293 (1993); *Murphy v. Spelts-Schultz Lumber Co.*, 240 Neb. 275, 481 N.W.2d 422 (1992); *Union Pacific RR. Co. v. Kaiser Ag. Chem. Co.*, 229 Neb. 160, 425 N.W.2d 872 (1988). If there exists any real issue of material fact, then the judgment shall be reversed. See *Newman v. Hinky Dinky*, 229 Neb. 382, 427 N.W.2d 50 (1988).

The only issues with which we are presented are determining when the firefighters' claims accrued and whether their actions are barred by applicable statutory limitations.

To maintain an action against a city, a claimant must file a claim with the city pursuant to § 15-840. See *Andrews v. City of Lincoln*, 224 Neb. 748, 401 N.W.2d 467 (1987). Section 15-840 provides:

> All liquidated and unliquidated claims and accounts payable against the city shall: (1) Be presented in writing; (2) state the name of the claimant and the amount of the claim; and (3) fully and accurately identify the items or services for which payment is claimed or the time, place, nature, and circumstances giving rise to the claim. The finance director shall be responsible for the preauditing and approval of all claims and accounts payable, and no warrant in payment of any claim or account payable shall be drawn or paid without such approval. *In order to maintain an action for a claim, other than a tort claim as defined in section 13-903, it shall be necessary, as a condition precedent, that the claimant file such claim*

> *within one year of the accrual thereof*, in the office of the city clerk, or other official whose duty it is to maintain the official records of a primary-class city.

(Emphasis supplied.) Section 15-840 is a condition precedent to filing a lawsuit. Although a condition precedent to maintaining an action is not the same as the application of a statute of limitations, our analysis is guided by the principles we have applied to determine when an action has accrued and whether that action is barred by a statute of limitations.

In applying a statute of limitations, we have held that an action accrues and the statutory time within which the action must be filed begins to run when the injured party has the right to institute and maintain a lawsuit, although the party may not know the nature and extent of the damages. *Murphy, supra*; *L.J. Vontz Constr. Co. v. Department of Roads*, 232 Neb. 241, 440 N.W.2d 664 (1989); *Hoffman v. Reinke Mfg. Co.*, 227 Neb. 66, 416 N.W.2d 216 (1987); *Lake v. Piper, Jaffray & Hopwood Inc.*, 219 Neb. 731, 365 N.W.2d 838 (1985); *Westinghouse Electric Supply Co. v. Brookley*, 176 Neb. 807, 127 N.W.2d 465 (1964); *Dewey v. Dewey*, 163 Neb. 296, 79 N.W.2d 578 (1956). See 1A C.J.S. *Actions* § 230 (1985). Section 15-840 requires that the claimant file a claim with the city before the claimant can maintain a lawsuit. When the only unperformed act, such as filing a claim with a city, required to maintain a lawsuit is an act that the claimant must perform, the claimant may not withhold performance of such act to defeat the purpose of the statutory limitation. 51 Am. Jur. 2d *Limitations of Actions* § 111 (1970). See, *Schaub v. City of Scottsbluff*, 164 Neb. 805, 83 N.W.2d 775 (1957); *Barney v. City of Lincoln*, 144 Neb. 537, 13 N.W.2d 870 (1944). See, also, *Board of Trustees v. Koman*, 133 Colo. 598, 298 P.2d 737 (1956); *Dillon v. Board of Pension Com'rs*, 18 Cal. 2d 427, 116 P.2d 37 (1941). We hold that a claim accrues for purposes of § 15-840 when all factors have arisen which would allow the claimant to commence and maintain an action in court with the exception of the filing of the claim pursuant to § 15-840.

The firefighters essentially raise two claims: whether they are entitled to a return of their contributions and whether they should be reimbursed for the money deducted by the City to

offset the workers' compensation benefits they received. We will separately consider the accrual of these two claims.

The firefighters first contend that the provisions of the plan, together with the City's actions, violate the U.S. and Nebraska Constitutions and are contrary to the Nebraska Wage Payment and Collection Act and the Nebraska Fair Employment Practice Act. Specifically, the firefighters argue that the provision of the plan which permits nondisabled firefighters whose employment has been terminated before the age of retirement to collect a lump-sum return of their contributions unconstitutionally and illegally discriminates against disabled firefighters. That provision of the plan allows certain firefighters to elect to receive a lump-sum payment upon termination of their employment:

> Any firefighter or police officer of the city who terminates employment, either voluntarily or involuntarily, for reasons other than death or disability before becoming eligible to retire shall:
>
> (a) Receive the lump-sum return of accumulated contributions with regular interest to the date of termination if he or she has less than ten (10) years of service; or
>
> (b) If he or she has ten (10) years or more of service but has not attained age fifty-five (55), have the option to receive:
>
> (1) The lump-sum return of accumulated contributions . . . and a reduced paid-up deferred annuity . . . or
>
> (2) A deferred annuity to commence at age fifty-five (55). . . .

Lincoln Mun. Code § 2.64.024. See, also, Neb. Rev. Stat. § 15-1013.02 (repealed 1987).

Both parties rely heavily on this court's decision in *Barney, supra*. In *Barney*, the plaintiff had worked as a firefighter for the City of Lincoln from December 10, 1923, through November 18, 1928, at which time he alleged he was forced to retire because injuries he received in the line of duty rendered him disabled. The plaintiff did not apply for pension benefits until July 27, 1942, and the City denied his application. On appeal, this court held that Comp. Stat. §§ 2439 and 2441

(1922) barred the plaintiff's action because he did not bring the action within 4 years of the time the cause of action had accrued. The court found that the plaintiff's action accrued on the date his employment was terminated because of his disability.

The court explained that " 'the cause of action for a pension accrues when a suit may be maintained thereon, and the statute of limitations begins to run at that time. . . .' " 144 Neb. at 539, 13 N.W.2d at 871 (quoting 40 Am. Jur. *Pensions* § 38 (1942)). The court stated that an action for pension is separate and distinct from an action to recover on the installments of a pension which has already been granted. The court opined that once a pension has been granted, the recipient is entitled to each installment, and the obligor has a continuing obligation to pay each installment that becomes due. As to each installment, if a cause of action arises, the statute of limitations shall begin to run from the date of such installment. *Barney, supra.*

The plaintiff in *Barney* had not established his initial right to the pension. The court stated that the pension law itself does not create a continuing obligation to pay the pension and that the obligation to pay the pension accrued when the plaintiff became totally disabled. The court explained that once the last act occurred which brought the plaintiff within the terms of the pension act, the statute of limitations began to run. The court held that the plaintiff's cause of action to establish his right to the pension could have been maintained, and the statute of limitations began to run, when the plaintiff terminated his employment; thus, his action accrued on November 18, 1928.

In the present case, the firefighters argue that once they were placed on the pension roll, the City had a continuing obligation to pay them, and thus, their claims accrued each month a payment became due. This argument is without merit.

The firefighters correctly note that after the City placed them on the pension roll, they were entitled to each installment of their pension, and the City had a corresponding continuing obligation to pay each installment. See *Barney, supra.* This rule, however, does not lead to the conclusion that the firefighters' claims to collect the entirety of their contributions accrued with each installment that became due.

Once the firefighters' employment was terminated and they were awarded their pensions, they became entitled to receive an installment each month and were not entitled to elect to collect a lump-sum payment. This limitation did not occur with each monthly installment, it occurred once—when each firefighter terminated his employment before he had reached the age of retirement and when such termination was not caused by death or disability.

In the present action, the firefighters' claims for the return of their contributions are analogous to a cause of action for the right to a pension. The firefighters' claims for the return of their contributions does not arise from the installments to which they are entitled. The provisions of the plan do not permit any firefighters, disabled or otherwise, to elect at any time to collect the lump-sum amount of their contributions. Instead, Lincoln Mun. Code § 2.64.024 provides that *at the time of termination* certain firefighters may elect to collect the lump-sum amount. The last act which brought the firefighters within the provision at issue occurred when the firefighters terminated their employment.

We therefore find that the claims asserted by the firefighters flow from the termination of their employment and the award of monthly pension benefits pursuant to the express terms of the pension plan. The right to maintain their actions accrued when their employment terminated and they were awarded a pension.

There is no genuine issue of material fact regarding the date when each of the firefighters was forced to terminate his employment and was awarded his respective pension. All of the firefighters filed claims with the City more than 1 year after their actions accrued. Their actions to recover their entire contributions, therefore, are barred by the 1-year limitation provided for in § 15-840.

Three of the six firefighters have also alleged that the City wrongfully deducted amounts representing workers' compensation benefits from their pension benefits. As stated above, an action accrues and the statutory time within which the action must be filed begins to run when the injured party has the right to institute and maintain a lawsuit.

These firefighters contend that the deductions for workers' compensation benefits (1) deprive them of property without due process of law contrary to the 14th Amendment to the U.S. Constitution and Neb. Const. art. I, §§ 3 and 25; (2) violate the Nebraska Wage Payment and Collection Act; and (3) deprive them of property rights and remedies that they are entitled to pursuant to § 48-130.

The provisions of the plan which permitted the City to deduct from firefighters' pensions the workers' compensation benefits which they received were set forth in Lincoln Mun. Code §§ 2.64.011(e) and 2.64.018. Section 2.64.011(e) provided: "All payments of pensions provided by this section shall be reduced by the sum of the following amounts: (1) amounts paid by the city or its insurer under the provisions of the Nebraska worker's compensation act as provided in Sections 2.64.005 to 2.64.032 . . . ." Section 2.64.018 stated:

> Notwithstanding any prior provisions of this act, no firefighter or police officer shall be entitled during any period of disability to receive in full both his or her pension or salary and earned fringe benefits, as herein provided, and in addition benefits under the Nebraska worker's compensation act. All Nebraska worker's compensation act benefits shall be payable in full to such firefighter or police officer or his or her dependents as provided in such act, but all amounts paid by the city or its insurer under such act to any disabled firefighter or police officer entitled to receive a salary and earned fringe benefits or pension during such disability, or to the surviving spouse or children of any deceased firefighter or police officer, shall be considered as payments on account of such salary and earned fringe benefits or pension and shall be credited thereon. The remaining balance of such pension or salary and earned fringe benefits, if any, shall be payable as otherwise provided by this ordinance.

As discussed above, once the firefighters were placed on the pension roll, such firefighters became entitled to each installment of the pension. See *Barney v. City of Lincoln*, 144 Neb. 537, 13 N.W.2d 870 (1944). In this respect, pension benefits are similar to installment contracts, and courts have

stated that with each installment a cause of action arises from that installment regardless of when the initial breach occurred. These courts, however, have also stated that the action which may arise from a particular installment is limited to that installment. An injured party must bring the action within the applicable statute of limitations, and although the same conduct occurred in relation to installments for which the statute of limitations had already expired, the aggrieved party may not recover for such installments. The recovery of damages, therefore, is limited to the installments which fell within the period of the applicable statute of limitations. See, *Ballantyne House Assoc. v. Newark*, 269 N.J. Super. 322, 635 A.2d 551 (1993) (explaining that although the initial breach of contract occurred in 1982, the failure to perform constituted a series of continuing breaches and plaintiffs could maintain an action in 1990, but only based on actions which constituted breaches within the preceding 6 years, which was the applicable statute of limitations); *Harris v Allen Park*, 193 Mich. App. 103, 107, 483 N.W.2d 434, 436 (1992) (stating that "[p]ension benefits are similar to installment contracts and the period of limitation runs from the date each installment is due" and that plaintiffs may bring an action and recover for those payments due within the limitation period); *Singer Co. v. BG&E*, 79 Md. App. 461, 558 A.2d 419 (1989) (stating that defendant had a continuing obligation to supply electrical power to plaintiff, and with each failure, a separate cause of action arose; however, plaintiff could only maintain an action and recover for breaches which occurred within the statute of limitations period). See, also, *Magna Associates v. Torgrove*, 585 F. Supp. 585 (D. Colo. 1984) (cause of action arises from each time an installment becomes due); *Application of Church*, 833 P.2d 813 (Colo. App. 1992) (statute of limitations begins to run as to each installment which becomes due, but only as to such installments which fall within the statute of limitations period); 1A C.J.S. *Actions* § 233 (1985) (discussing installment debts and stating that an action for default on one installment accrues when that installment is due, but does not accrue for purposes of recovery of the entire debt unless so provided for in the contract).

As to each pension installment from which the City deducted

workers' compensation benefits, the firefighters' claims to challenge the validity of such deductions accrued. See *Barney, supra*. We emphasize, however, that such a claim accrued only to that particular installment; the firefighters do not have a general right to challenge at any time the validity of all of the deductions that occurred. The firefighters' claims flow from the terms of the plan, together with the City's actions, in deducting for the workers' compensation benefits.

We therefore find that the firefighters' claims flow from the City's act of deducting from their pension payments amounts representing the workers' compensation benefits they each received. Each time that the City deducted for workers' compensation benefits, the firefighters' claims accrued.

The evidence regarding when the City made the deductions from the firefighters' pensions is not in dispute. Bowlin is the only firefighter whose action to recover amounts which the City deducted from his pension to offset the workers' compensation benefits he received is not barred. Bowlin contended that the City began deducting from his pension in August 1986. Bowlin further stated in his claim he filed with the City and in his petition he filed in district court that the City was still deducting amounts representing workers' compensation benefits from his pension. Bowlin's claims regarding the installments from which the City made deductions within a year preceding the claim he filed with the City are not barred by the filing requirement set forth in § 15-840.

We now separately address the firefighters' 42 U.S.C. § 1983 actions. Although the firefighters failed to argue or brief this issue, we are compelled to consider whether the limitations set forth in § 15-840 apply to actions arising under § 1983. The firefighters have asserted causes of action arising under § 1983 with regard to both of their claims: a return of their contributions and a return of the amounts which the City deducted from their pension benefits for the workers' compensation benefits which three of the firefighters received.

The firefighters allege in their petitions that the City's actions pursuant to the relevant provisions of the Lincoln Municipal Code constitute a deprivation of their federal constitutional rights—equal protection and due process—and, therefore, they

contend that they have an action arising under § 1983. The firefighters first asserted their § 1983 actions in the petitions they filed in district court on appeal from the denial of their claims. We find that their § 1983 actions may be raised in the procedural context of the district court's reviewing a City's denial of a claim pursuant to § 15-840. See, *Maine v. Thiboutot*, 448 U.S. 1, 100 S. Ct. 2502, 65 L. Ed. 2d 555 (1980); *Maldonado v. Nebraska Dept. of Pub. Welfare*, 223 Neb. 485, 490, 391 N.W.2d 105, 109 (1986) (discussing *Thiboutot* and stating that "a claim under § 1983 may be brought in a state court in the procedural context of a state court's reviewing the actions of a state administrative agency, and attorney fees may be awarded under § 1988 in such a case"). See, also, *Monell v. City of New York Dept. of Social Services*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978) (stating that cities and other municipalities constitute "persons" within the meaning of § 1983 and thus may be subject to a § 1983 action).

The U.S. Supreme Court has held that statutes which require that claims against a city be filed with the city as a condition precedent to maintaining an action in court are an impermissible limitation on an injured party's right to maintain an action for violation of their federal constitutional rights under § 1983. *Felder v. Casey*, 487 U.S. 131, 108 S. Ct. 2302, 101 L. Ed. 2d 123 (1988). In the present case, the firefighters' theory of recovery under § 1983, therefore, is not subject to the notice and time limitation required by § 15-840. This does not mean, however, that the firefighters' actions could be asserted at any time; their actions are subject to the appropriate statute of limitations.

The law of the state in which a § 1983 action is brought provides the appropriate statute of limitations. The U.S. Supreme Court held in *Wilson v. Garcia*, 471 U.S. 261, 105 S. Ct. 1938, 85 L. Ed. 2d 254 (1985), that the characterization of a § 1983 action shall not vary from case to case for purposes of selecting the applicable statute of limitations. The Court directed that each state must apply only one statute of limitations to all § 1983 actions. The Court in *Wilson* also stated that for purposes of selecting one statute of limitations, § 1983 actions shall be characterized as personal injury actions

because recovery is based upon a finding that a party has suffered injury to his personal rights.

We have not specifically determined which of Nebraska's statutes of limitations applies to § 1983 actions. The U.S. Court of Appeals for the Eighth Circuit considered the issue and held that Neb. Rev. Stat. § 25-207 (Reissue 1988) applies to § 1983 actions. *Bridgeman v. Nebraska State Pen*, 849 F.2d 1076 (8th Cir. 1988); *Epp v. Gunter*, 677 F. Supp. 1415 (D. Neb. 1988). We agree. Section 25-207 requires that actions for an injury to the plaintiff's rights be filed within 4 years from the date on which the action accrued.

The dates on which the firefighters' respective claims accrued for purposes of their § 1983 actions are the same dates on which their claims are deemed to have accrued for purposes of applying § 15-840. As stated above, these dates are not in dispute. With respect to each firefighter's claim for a return of his entire contribution, the claim accrued when such firefighter was terminated and placed on the pension roll. With respect to those firefighters who asserted claims for a return of the deductions made by the City to offset the workers' compensation benefits, their claims separately accrued when each installment became due and the deductions were made.

After applying the 4-year statute of limitations to the dates on which the firefighters' claims accrued, we find that several of the firefighters have viable claims under their § 1983 causes of action. As stated above, we find that the firefighters' § 1983 actions were properly raised for the first time in their appeals to the district court. The statute of limitations applicable to the § 1983 actions was tolled when the firefighters filed their claims with the City. Had the City paid the claims, the firefighters' § 1983 actions would have been extinguished. We therefore find that the statute of limitations was tolled during the period in which their claims were under consideration by the City.

The following firefighters' respective claims under their § 1983 actions are not barred: (1) Bauers' § 1983 action for the return of his contributions; (2) Scharbach's § 1983 action for the return of his contributions; (3) Johnson's § 1983 action for the return of his contributions; (4) Peterson's § 1983 actions for the return of his contributions and for the return of the

amounts deducted from his pension to offset the workers' compensation benefits, but only for those installments that became due within the 4 years immediately preceding the filing of his claim; (5) Bowlin's § 1983 action for the return of the amounts deducted from his pension to offset the workers' compensation benefits, but only for those installments that became due within the 4 years immediately preceding the filing of his claim; and (6) Carmichael's § 1983 actions for the return of his contributions and for the return of the amounts deducted from his pension to offset the workers' compensation benefits, but only as to those installments that became due within the 4 years immediately preceding the filing of his claim.

In summary, as to those causes of action subject to § 15-840, we find that (1) all of the firefighters are barred from asserting their claim for the return of their entire contributions and (2) firefighter Bowlin is not barred from the portion of his action seeking to recover the deductions made from the pension installments he was entitled to within 1 year preceding the filing of his claim with the City.

Additionally, we find that the firefighters' § 1983 actions are not subject to the filing requirements of § 15-840; these actions, however, are subject to the 4-year statute of limitations set forth in § 25-207. The § 1983 actions which are still viable are set forth above.

We therefore affirm in part the decision of the district court. We reverse the decision of the district court as discussed above and remand the cause for further consideration.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

FAHRNBRUCH, J., not participating.

GARY DURAND, APPELLANT, V. WESTERN SURETY COMPANY, APPELLEE.

514 N.W.2d 840

Filed April 15, 1994. No. S-92-1028.

1. **Demurrer: Pleadings: Appeal and Error.** When reviewing an order sustaining a demurrer, an appellate court accepts the truth of facts well pled and the factual and legal inferences which may be reasonably deduced from such facts, but does not accept conclusions of the pleader.
2. **Statutes: Legislature: Intent.** When asked to interpret a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.
3. **Statutes: Intent.** In construing a statute, a court must look at the statutory objective to be accomplished, the problem to be remedied, or the purpose to be served, and then place on the statute a reasonable construction which best achieves the purpose of the statute, rather than a construction defeating the statutory purpose.
4. **Demurrer: Pleadings.** When a demurrer to a petition is sustained, a court must grant the plaintiff leave to amend the petition unless it is clear that no reasonable possibility exists that repleading will correct the defective petition.

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

John P. Grant and Mary T. Boland Steier, of Cannon, Goodman, O'Brien & Grant, P.C., for appellant.

Joseph C. Byam, of Byam & Byam, for appellee.

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

BOSLAUGH, J.

This is an action by the plaintiff, Gary Durand, against the defendant, Western Surety Company, to recover damages under a motor vehicle dealer's bond furnished by the defendant for Daisy Motors, Inc. The trial court sustained the defendant's demurrer to the plaintiff's amended petition on the ground that the petition did not state facts sufficient to constitute a cause of action. The trial court further found that the plaintiff's petition could not be remedied by further amendment and dismissed the plaintiff's cause of action.

The plaintiff has appealed and assigns as error the trial court's (1) sustaining the defendant's demurrer and (2) dismissing the plaintiff's petition without granting the plaintiff leave to amend.

The plaintiff was employed at Daisy Motors, a used-car dealership in Omaha, Nebraska. On February 14, 1989, the plaintiff suffered total and permanent loss of vision in his right eye as a result of an injury received in the course of his employment with Daisy Motors. Because his employer did not have workers' compensation insurance, the plaintiff filed a civil action against his employer and obtained a judgment in the amount of $65,000 on October 2, 1991.

At the time of the plaintiff's injury, Daisy Motors was licensed as a used-car dealer by the State of Nebraska and was required by Neb. Rev. Stat. § 60-1419 (Reissue 1988) to have a motor vehicle dealer's bond in the amount of $25,000. The defendant furnished the statutory bond for Daisy Motors at the time of the plaintiff's injury.

In addition to the above-stated facts, the plaintiff also alleged that his injury was a result of Daisy Motors' failure to provide proper tools at its established place of business. The plaintiff further alleged that his injuries and the damages awarded him in his judgment against Daisy Motors are covered by the dealer's bond issued by the defendant.

In its order sustaining the defendant's demurrer, the trial court found that the plaintiff's personal injury claim arising out of his accident of February 14, 1989, while employed by Daisy Motors, is not covered by the motor vehicle dealer's bond provided for Daisy Motors by the defendant and that Daisy Motors' failure to carry workers' compensation insurance was not a violation of its license.

When reviewing an order sustaining a demurrer, an appellate court accepts the truth of facts well pled and the factual and legal inferences which may be reasonably deduced from such facts, but does not accept conclusions of the pleader. *LaPan v. Myers*, 241 Neb. 790, 491 N.W.2d 46 (1992).

The conditions of the motor vehicle dealer's bond provided by the defendant were set forth in § 60-1419. It stated in pertinent part:

> The bond shall provide (1) that the applicant will faithfully perform all the terms and conditions of such license . . . and (3) that the motor vehicle, motorcycle, motor vehicle auction, or trailer dealer or wholesaler shall well, truly, and faithfully comply with all the provisions of his or her license and the acts of the Legislature relating thereto.

The plaintiff maintains that he stated a violation by Daisy Motors of two provisions of its motor vehicle dealer's license. He first argues that Daisy Motors did not comply with the licensing requirement in Neb. Rev. Stat. § 60-1401.02(25)(c) (Reissue 1988), which stated in relevant part that a dealer must provide

> adequate repair facilities and tools to properly and actually service warranties on motor vehicles, motorcycles, or trailers sold at such place of business and to make other repairs arising out of the conduct of the licensee's business, or in lieu of such repair facilities the licensee may enter into a contract for the provision of such service and file a copy thereof annually with the board and shall furnish to each buyer a written statement as to where such service will be provided as required by section 60-1417.

According to the plaintiff, his amended petition states a cause of action under the motor vehicle dealer's bond because he alleged injury to his eye due to a breach by Daisy Motors of the licensing requirement to provide adequate tools.

When asked to interpret a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense. In construing a statute, a court must look at the statutory objective to be accomplished, the problem to be remedied, or the purpose to be served, and then place on the statute a reasonable construction which best achieves the purpose of the statute, rather than a construction defeating the statutory purpose. *Sarpy County v. City of Springfield*, 241 Neb. 978, 492 N.W.2d 566 (1992).

The section of the motor vehicle dealer's licensing statute requiring the dealer to provide adequate repair facilities and tools has nothing to do with providing safe tools for the dealer's

employees. It is clear from the statute that a motor vehicle dealer in Nebraska cannot just sell motor vehicles. The dealer must also be able to repair the vehicles and service any warranties on the vehicles. The terms of the dealer's license do not require the dealer to provide safe tools for the dealer's employees.

The plain intention of the statute is to ensure that the dealer provides adequate repair facilities for its customers who purchase motor vehicles. If a customer suffers a loss resulting from the dealer's failure to provide adequate repair facilities and tools, he or she would be covered under the bond; however, the bond is not liability insurance for an employee who suffers an injury because of a dealer's lack of adequate tools.

In this case, the plaintiff's assertion that he stated a cause of action under the statutory bond for Daisy Motors' failure to provide adequate tools is without merit. The trial court correctly concluded that the bond does not cover the injury suffered by the plaintiff.

Next, the plaintiff contends that his amended petition stated a cause of action under the motor vehicle dealer's bond by alleging Daisy Motors violated the terms and conditions of its license in failing to comply with the Nebraska Workers' Compensation Act.

Effective September 6, 1991, Neb. Rev. Stat. § 60-1407.01(3) (Cum. Supp. 1990) was amended to provide that a dealer at the time a license is issued or renewed must present evidence of compliance with the insurance requirements of the Nebraska Workers' Compensation Act. See § 60-1407.01(3) (Cum. Supp. 1992). Prior to September 6, 1991, there was no such requirement.

The plaintiff argues that Daisy Motors' failure to carry workers' compensation insurance on February 14, 1989, was a violation of its motor vehicle dealer's license because the Legislature's amendment to § 60-1407.01(3) shows an intention by the Legislature that motor vehicle dealers carry workers' compensation insurance. However, on the date of the plaintiff's injury, Daisy Motors was not required by the terms of its motor vehicle dealer's license to show proof of workers' compensation insurance. Accordingly, Daisy Motor's failure to have workers'

compensation insurance on February 14, 1989, was not a violation of its license, and the plaintiff's petition did not state a cause of action for this reason.

Finally, the plaintiff claims the trial court erred in not allowing him to amend his petition again after sustaining the defendant's demurrer.

When a demurrer to a petition is sustained, a court must grant the plaintiff leave to amend the petition unless it is clear that no reasonable possibility exists that repleading will correct the defective petition. *Concerned Citizens v. Department of Environ. Contr.*, 244 Neb. 152, 505 N.W.2d 654 (1993).

The plaintiff's personal injury claim arising out of his employment is not covered by Daisy Motors' motor vehicle dealer's bond, and Daisy Motors' failure to carry workers' compensation insurance at the time of the plaintiff's injury was not a violation of its motor vehicle dealer's license. It is clear from these facts that no reasonable possibility exists that repleading would enable the plaintiff to state a cause of action against the defendant. The trial court did not abuse its discretion in dismissing the plaintiff's petition without leave to amend.

The judgment of the trial court is affirmed.

AFFIRMED.

WHITE, J., dissenting.

The opinion of the majority concludes that appellant failed to state sufficient facts to support a cause of action and that there is no reasonable possibility that appellant could amend his petition to correct the deficiency. I disagree and dissent.

In his petition, appellant contends that he is entitled to recover on the bond provided by appellee. Appellant alleges that liability on the bond arises from the fact that the dealer, Daisy Motors, Inc., failed to satisfy "all the provisions of [its] license and the acts of the Legislature relating thereto." Neb. Rev. Stat. § 60-1419(3) (Reissue 1988). Specifically, appellant argues that Daisy Motors failed to secure workers' compensation insurance and failed to provide proper tools for the repair of vehicles on the dealer's premises. As to the allegation regarding proper tools, I agree with the majority's conclusion. However, I disagree with the majority's conclusion

regarding workers' compensation because I find that appellant may be able to correct the deficiency.

The language of § 60-1419(3) is not so narrow as to necessarily exclude from coverage by the bond the requirements which other laws place on dealers. According to the language of § 60-1419(3), if a dealer violates his particular license, the dealer has violated the provisions of the bond. Additionally, if the dealer violates other legislative acts related to licensing, the dealer has violated the provisions of the bond. Appellant may be able to amend his petition to state facts sufficient to support a cause of action related to the workers' compensation laws if appellant can demonstrate that the workers' compensation laws are related to the dealer's licensing requirements.

I recognize that at the time appellant was injured, the motor vehicle industry licensing act itself did not require that a dealer comply with the workers' compensation laws. However, the act may not be the only evidence that compliance with the workers' compensation laws is related to a dealer's license. For example, the motor vehicle industry licensing act provides for the formation of a Nebraska Motor Vehicle Industry Licensing Board. The act further provides that the board make rules and regulations related to the implementation of the act and that the board regulate the issuance and revocation of licenses. Neb. Rev. Stat. §§ 60-1402, 60-1403, and 60-1415 (Reissue 1988). The record does not include any of the rules and regulations adopted and implemented by the board, and thus I hesitate to eliminate the possibility that such rules have made compliance with other laws, such as the workers' compensation laws, a condition of attaining or retaining a dealer's license.

Because I find that there is a reasonable possibility that appellant may be able to correct the deficiency in his petition, I respectfully disagree with the holding of the majority's opinion. I would reverse the decision of the district court and direct the district court to grant appellant leave to amend his petition.

LANPHIER, J., joins in this dissent.

TERRI A. MARR, APPELLEE, V. RICHARD D. MARR, JR., APPELLANT.

515 N.W.2d 118

Filed April 22, 1994. No. S-91-804.

1. **Modification of Decree: Child Support: Appeal and Error.** Modification of the amount of child support payments is entrusted to the discretion of the trial court, and although, on appeal, the issue is 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 acting, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right in matters submitted for disposition in a judicial system.
3. **Equity: Courts: Parties: Estoppel.** Whenever a party, who, as actor, seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience, or good faith, or other equitable principle, in his prior conduct, then the doors of the court will be shut against him in limine; the court will refuse to interfere on his behalf, to acknowledge his right, or to award him any remedy.
4. **Modification of Decree: Child Support.** When a party owes past-due child support, the failure to pay must be found to be a willful failure to pay, in spite of an ability to pay, before an application to modify may be dismissed on the basis of unclean hands.

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

Todd E. Frazier, of Raynor, Rensch & Pfeiffer, for appellant.

No appearance for appellee.

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

GRANT, J., Retired.

The parties in this case were married on October 28, 1983. On August 26, 1984, the only child of the marriage was born. On March 28, 1988, a decree of dissolution of the marriage was signed after a hearing of the case on February 1, 1988. The hearing resulted in an agreement as to all issues between the parties. Petitioner Terri A. Marr received $3,000 as a property settlement and her personal property. Respondent Richard D. Marr, Jr., received any interest he had in a partnership called D. Marr Paving Company, the parties' mobile home, and his

personal property. Neither party received alimony.

The wife was granted custody of the minor child of the parties and was authorized to move to the State of Texas. The husband was granted reasonable visitation, and both parties were ordered to share the expenses of transportation of the child to the husband's residence. The husband was ordered to pay $400 child support for February and $425 per month thereafter, beginning March 1, 1988.

On December 6, 1989, the husband signed a petition to modify the decree, alleging, in part, that "the Respondent has suffered a material decrease in income over the past two years sufficient to warrant a reduction of the child support ordered in the Decree entered . . . on the 28th day of March, 1988." The petition to modify was filed July 9, 1990, and on June 4, 1991, a notice of hearing, to be held on June 26, 1991, was filed. A hearing was held on that date. The husband's petition to modify was denied, and he timely appealed. The appeal was submitted to this court.

On appeal, the husband assigns two errors: The actions of the trial court (1) "in not finding that a material change of circumstances had occurred between the parties and in not reducing Appellant's child support obligation" and (2) in "denying a reduction in Appellant's child support obligation based upon the Doctrine of Unclean Hands." We affirm.

The law as to the scope of review of an application to modify child support payments is clear. Modification of the amount of child support payments is entrusted to the discretion of the trial court, and although, on appeal, the issue is reviewed de novo on the record, the decision of the trial court will be affirmed absent an abuse of discretion. *Sabatka v. Sabatka, ante* p. 109, 511 N.W.2d 107 (1994); *Brewer v. Brewer*, 244 Neb. 731, 509 N.W.2d 10 (1993). A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from acting, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right in matters submitted for disposition in a judicial system. *Sabatka, supra*; *Brewer, supra*; *Wulff v. Wulff*, 243 Neb. 616, 500 N.W.2d 845 (1993).

The evidence consists of appellant's testimony, income tax

returns for the years 1984 to 1990, and court records showing child support payments from the time of the temporary support to the modification hearing. The wife did not appear at the hearing, nor did counsel appear for her.

The court records of payments show that, pursuant to the decree, from February 1, 1988, to the end of that year, appellant paid $3,125, out of a total amount due of $4,650. Thus, in 1988, appellant paid $1,525 less than ordered. His income that year was $35,076.

During 1989, appellant made one child support payment of $200, or $4,900 less than ordered. His income that year was $19,771.

During 1990, appellant made two payments totaling $315, or $4,785 less than ordered. His income that year was $9,549.

Appellant testified that in 1991, up to the modification hearing on June 26, 1991, he had made no payments. Court records indicated appellant made one payment of $175. In January 1991, appellant had taken a new job as an operations manager of a tool and die company and was earning $8 per hour, or $508 each 2 weeks. He also had the use of a car.

These totals indicate that a total amount of child support due from February 1, 1988, to June 26, 1991, was $17,400. During that time, appellant paid $3,815, of which $3,125 was paid in the first year. Appellant's delinquency during this period was $13,585. The court record shows that appellant is delinquent in a total amount of $14,185, so apparently appellant was also delinquent in his temporary child support payments.

Appellant testified that he was a self-employed paving contractor. He testified that his 1984, 1985, and 1986 incomes, as shown by income tax returns, were used to arrive at his child support payments. He is in error when he states in his brief that the amount was "imposed" upon him. Brief for appellant at 5. As recited in the dissolution decree, the parties reached an agreement as to the issues in the case.

As to his paving business, appellant testified that the business started to decline in 1988, declined in 1989, "and in '90 finished out the year and . . . ceased to exist." Later, in answer to the trial judge's questions, appellant testified that he had been in the paving business with his father in a partnership and that

his father was still in the business under a different business name. Appellant testified that the business was "as bad or worse than it ever was" and that appellant had not received any share of the assets on account of the business creditors. Nothing further on the paving business is in the record.

Appellant relies on *Voichoskie v. Voichoskie*, 215 Neb. 775, 340 N.W.2d 442 (1983) (*Voichoskie I*), to support his contention that the trial court erred in determining that he did not have "clean hands" and, therefore, was not entitled to equitable relief. In *Voichoskie I*, the trial judge ordered that the husband's January 1983 application to modify child support established in a December 31, 1981, decree be dismissed because the husband's failure to pay delinquent amounts before bringing the application to modify the decree was a failure to do equity.

The equitable principles involved were that "[h]e who seeks equity must do equity" and that a party seeking equitable relief must come into court with "clean hands." *Id.* at 776, 340 N.W.2d at 443-44. In *Voichoskie I*, we went on to say:

> In *Shelby v. Platte Valley Public Power and Irrigation District*, 134 Neb. 354, 369, 278 N.W. 568, 575 (1938), we described the principle as follows: "This court in *Blondel v. Bolander*, 80 Neb. 531, 114 N.W. 574, approved the following rule of law laid down in 1 Pomeroy, Equity Jurisprudence (3d ed.) sec. 397: 'Whenever a party, who, as actor, seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience, or good faith, or other equitable principle, in his prior conduct, then the doors of the court will be shut against him *in limine*; the court will refuse to interfere on his behalf, to acknowledge his right, or to award him any remedy.' "

215 Neb. at 776-77, 340 N.W.2d at 444.

We held in *Voichoskie I* that conduct to form a basis for finding that a party has "unclean hands" must be willful and intentional and that in cases in which a party owes past-due child support, the failure to pay must be found to be a willful failure to pay, in spite of the ability to pay, before an application to modify a decree may be dismissed on the basis of "unclean hands." Since in *Voichoskie I* the application to modify had

been dismissed without a hearing, on the sole basis of a delinquency, we reversed the cause and remanded for further proceedings, stating, "If the evidence shows that the petitioner is able to pay the arrearage or is unable to pay through some intentional conduct on his part, the doctrine of clean hands may be invoked to bar his claim for relief." 215 Neb. at 779, 340 N.W.2d at 445. We adhere to the principles set out in *Voichoskie I.*

After remand, the petition for modification was dismissed after a hearing. The husband again appealed. In *Voichoskie v. Voichoskie*, 219 Neb. 670, 365 N.W.2d 467 (1985) (*Voichoskie II*), we affirmed the dismissal.

The evidence at the hearing after remand, held in June 1984, showed that the husband had been ordered to pay $500 per month child support. In the first 3 months of 1982, the husband had made one child support payment of $200 and two payments of $250 each. In April, he paid $700. Thereafter, the husband's employer was ordered to withhold $550 per month. In September 1982, that employer fired the husband. In October 1982, the husband was employed for 6 weeks at $220 per week. He made no support payments. After that, the husband made two voluntary payments totaling $300. Seven later payments were drawn by the State of Nebraska from the husband's unemployment compensation. In *Voichoskie II*, we referred to our holding in *Voichoskie I* that when a party owes past-due child support, the failure to pay must be found to be a willful failure to pay, in spite of an ability to pay, before an application to modify may be dismissed on the basis of unclean hands. In *Voichoskie II*, we determined that the husband's failure to pay was willful, and we affirmed the dismissal of the application to modify.

The case before us presents an even stronger basis to support the dismissal of appellant's application to modify. The fact that appellant is $14,185 in arrears in his child support payments, in a period between February 1, 1988, and June 26, 1991, is not the primary basis for finding that appellant does not have "clean hands" and was not entitled to relief. The controlling facts are that in 1989, appellant made one payment of $200 to help support his child, when his income was almost $20,000;

that in 1990, he made two payments totaling $315, when his income was $9,549; and in the first 6 months of 1991, when his salary was over $1,000 net per month, he paid $175. Appellant's brief requests that his child support payment be reduced to $222 per month. This means that appellant is capable, by his own admission, of paying such sums, but had made no effort to pay even those amounts. Appellant was employed throughout this time, and his failure to pay child support, in any reasonable amount, was willful.

Had appellant presented a record where he consistently attempted to discharge his duty to support his child, in an amount reflecting a bona fide effort to perform his parental (and court-ordered) duty of support, a different case might be presented.

It is impossible to say, on this record, in our de novo review, that the trial judge abused his discretion in dismissing appellant's application to modify, on the basis of the "unclean hands" doctrine.

In view of this disposition, it is unnecessary to discuss appellant's other assignment of error. The order of the district court is affirmed.

AFFIRMED.

WHITEHEAD OIL COMPANY, A CORPORATION, APPELLEE, V. CITY OF LINCOLN, NEBRASKA, A MUNICIPAL CORPORATION, APPELLANT.

515 N.W.2d 390

Filed April 22, 1994. No. S-92-422.

1. **Municipal Corporations: Appeal and Error.** Neb. Rev. Stat. § 15-1201 (Reissue 1991) applies only where the various bodies controlled thereby act judicially or quasi-judicially.
2. **Licenses and Permits: Equity: Appeal and Error.** Use permit decisions are quasi-judicial in nature and reviewable under the provisions of Neb. Rev. Stat. § 15-1201 (Reissue 1991) as in equity in both the trial and appellate courts.
3. **Equity: Appeal and Error.** In an appeal from an equitable action, the reviewing court reviews the action de novo on the record and reaches a conclusion independent of the factual findings of the lower court; however, where credible

evidence is in conflict on a material issue of fact, the reviewing court considers and may give weight to the circumstance that the trial court heard and observed the witnesses and accepted one version of the facts rather than another.

4. **Municipal Corporations: Ordinances: Zoning: Appeal and Error.** What is the public good as it relates to zoning ordinances affecting the use of property is, primarily, a matter lying within the discretion and determination of the municipal body to which the power and function of zoning is committed, and unless an abuse of this discretion has been clearly shown, it is not the province of the court to interfere.
5. **Ordinances: Zoning: Appeal and Error.** In passing upon the validity of zoning ordinances, an appellate court should give great weight to the determination of local courts especially familiar with local conditions.
6. **Municipal Corporations: Ordinances: Zoning: Licenses and Permits.** A zoning authority may not use its powers to reward its friends or punish its enemies; thus, where a zoning authority is guilty of misconduct or bad faith in its dealings with an applicant for a use permit in accordance with the then existing zoning regulation or arbitrarily and unreasonably adopts a new regulation in order to frustrate the applicant's plans for development rather than to promote the general welfare, the new regulation may not be applied retroactively.
7. **Ordinances: Presumptions: Proof: Due Process.** A legal presumption exists in favor of validity, and unless the contrary appears upon the face of an ordinance, the burden is upon the party attacking it as invalid to show by clear and unequivocal evidence that the regulation imposed by it is so arbitrary, unreasonable, or confiscatory as to amount to depriving such party of property without due process of law.
8. **Zoning.** Whatever the motives, a zoning decision which does not promote the general welfare is arbitrary and unreasonable.

Appeal from the District Court for Lancaster County: BERNARD J. MCGINN, Judge. Affirmed as modified, and cause remanded with direction.

William F. Austin, Lincoln City Attorney, for appellant.

William G. Blake, of Pierson, Fitchett, Hunzeker, Blake & Loftis, for appellee.

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

CAPORALE, J.

I. STATEMENT OF CASE

This is the second appearance of this matter in this court, which arises out of the refusal of the defendant and present appellant, City of Lincoln, to issue a permit entitling the plaintiff and present appellee, Whitehead Oil Company, to use

its property in a particular way. In the first appearance, we, in *Whitehead Oil Co. v. City of Lincoln*, 234 Neb. 527, 451 N.W.2d 702 (1990) (*Whitehead Oil I*), held that the district court had erred in granting the city a summary judgment on Whitehead Oil's challenge to the city's refusal to grant a land-use permit and accordingly remanded the matter for further proceedings. Following those proceedings, the district court reversed the city's decision and remanded the matter to the city, directing that it reconsider Whitehead Oil's use application. The city appealed to the Nebraska Court of Appeals, claiming that the district court erred in so ruling. Under the authority granted by Neb. Rev. Stat. § 24-1106(3) (Cum. Supp. 1992), we removed the matter to this court in order to regulate the caseloads of the appellate courts. We affirm as modified, and remand with direction.

II. SCOPE OF REVIEW

Whitehead Oil's appeal to the district court was taken pursuant to Neb. Rev. Stat. § 15-1201 (Reissue 1991) as an appeal from a final decision or order of the city council of a city of the primary class. Neb. Rev. Stat. § 15-101 (Reissue 1991). According to Neb. Rev. Stat. § 15-1205 (Reissue 1991): "The district court shall hear the appeal as in equity and without a jury and determine anew all questions raised before the city."

In an action seeking injunctive relief from an ordinance vacating a public street, we, without referring to § 15-1205, wrote:

> It is apparent that under these statutory and charter provisions, the city council has the discretionary power to vacate streets and alleys. The exercise of this discretionary power "is not ordinarily subject to judicial review, unless there has been abuse of discretion, fraud, or glaring informality or illegality in proceedings, or absence of jurisdiction." Hanson v. City of Omaha, *supra*. See, also, 11 McQuillin, Municipal Corporations, § 30.187, p. 116 (3d Ed., 1977). In the present case, there was no evidence of fraud, informality or illegality in proceedings, or absence of jurisdiction. Therefore, the issue subject to judicial review is whether the city council so abused its

> discretion that the vacation ordinance can be held to be unreasonable and arbitrary.

Cather & Sons Constr., Inc. v. City of Lincoln, 200 Neb. 510, 519, 264 N.W.2d 413, 419 (1978).

We have also held that an appeal from an order or decision of the human rights commission of a city of the primary class, pursuant to § 15-1201, is to be heard as in equity and, upon further appeal to this court, is to be reviewed as an equity action. *American Stores v. Jordan*, 213 Neb. 213, 328 N.W.2d 756 (1982).

In *Copple v. City of Lincoln*, 210 Neb. 504, 315 N.W.2d 628 (1982), we clarified that § 15-1201 applies only where the various bodies controlled thereby act judicially or quasi-judicially. Were it otherwise, the statute would delegate legislative power to the courts in contravention of Neb. Const. art. II, § 1. Accordingly, we therein held that as the enactment of a zoning ordinance by a city of the primary class is a purely legislative act, such an enactment does not give rise to a direct appeal, the only remedy being by a collateral attack, such as seeking an injunction.

In *Bowman v. City of York*, 240 Neb. 201, 482 N.W.2d 537 (1992), after a review of prior decisions holding that consideration of the validity of a zoning ordinance was an equitable matter, we determined that a challenge of a zoning variance granted by a board of adjustment pursuant to Neb. Rev. Stat. §§ 19-910 and 19-912 (Reissue 1991) is not to be reviewed as an equitable matter. We announced the resulting standard of review as follows:

> The considerations discussed in the foregoing two cases, coupled with the fact that § 19-912 permits an appeal to the district court only on the ground that a board of adjustment's decision is illegal, lead us to conclude that a district court may disturb a decision of such a board only if, as suggested in *Frank v. Russell*, 160 Neb. 354, 70 N.W.2d 306 (1955), and *Mossman v. City of Columbus*, 234 Neb. 78, 449 N.W.2d 214 (1989), the decision was illegal or is not supported by the evidence and is thus arbitrary, unreasonable, or clearly wrong. In deciding whether a board's decision is supported by the evidence,

> the district court shall consider any additional evidence it receives. See, e.g., *Demarest v. Mayor & Council of Bor. of Hillsdale*, 158 N.J. Super. 507, 386 A.2d 875 (1978); *Richman v. Zoning Bd. of Adj.*, 391 Pa. 254, 137 A.2d 280 (1958).
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> . . . .
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> We therefore now hold that an appellate court reviews the decision of the district court and that irrespective of whether the district court took additional evidence, the appellate court is to decide if, in reviewing a decision of a board of adjustment, the district court abused its discretion or made an error of law. Where competent evidence supports the district court's factual findings, the appellate court will not substitute its factual findings for those of the district court. See, *Lambros v. Missoula*, 153 Mont. 20, 452 P.2d 398 (1969); *Estate of Barbagallo v. Zoning Hear. Bd.*, 133 Pa. Commw. 38, 574 A.2d 1171 (1990).

Bowman, 240 Neb. at 210-11, 482 N.W.2d at 544. Accord *Barrett v. City of Bellevue*, 242 Neb. 548, 495 N.W.2d 646 (1993).

Stratbucker Children's Trust v. Zoning Bd. of Appeals, 243 Neb. 68, 497 N.W.2d 671 (1993), adopted the same scope of review for an appeal taken to the zoning board of appeals of a city of the metropolitan class under the provisions of Neb. Rev. Stat. §§ 14-408, 14-413, and 14-414 (Reissue 1991).

However, § 15-1205, which controls the standard of review for appeals from decisions of the various organs of a city of the primary class, does not limit review to illegality, but, instead, provides that the appeal shall be considered as in equity. Decisions concerning the issuance of use permits involve the exercise of discretion in the application of use standards to the specific characteristics of the property in question. Such decisions are therefore quasi-judicial in nature and reviewable under the provisions of § 15-1201 as in equity in both the trial and appellate courts. See *Mossman v. City of Columbus*, 234 Neb. 78, 449 N.W.2d 214 (1989) (board of adjustment exercising discretion acts judicially).

In an appeal from an equitable action, the reviewing court

reviews the action de novo on the record and reaches a conclusion independent of the factual findings of the lower court; however, where credible evidence is in conflict on a material issue of fact, the reviewing court considers and may give weight to the circumstance that the trial court heard and observed the witnesses and accepted one version of the facts rather than another. See, *Rigel Corp. v. Cutchall, ante* p. 118, 511 N.W.2d 519 (1994); *Village of Brady v. Melcher*, 243 Neb. 728, 502 N.W.2d 458 (1993).

III. FACTS

Whitehead Oil owns and operates gasoline service stations and convenience stores which combine the sale of gasoline and general retail merchandise. In 1968, it purchased a .5-acre parcel of land on the north side of Old Cheney Road in Lincoln at about 25th Street. The property was a part of a larger 9.3-acre parcel of land which, at that time, was zoned G-1, a planned commercial district permitting general commercial uses, including retail stores and service stations. We hereafter refer to this piece of land as the larger parcel.

The comprehensive plan then in effect of the Lincoln City-Lancaster County Planning and Zoning Commission, hereafter the commission, envisioned that the larger parcel would be developed as a neighborhood shopping center. The plan was adopted in 1961.

At the time of purchase, Whitehead Oil intended to use its property as a site to sell gasoline at a service station, once the surroundings developed to the extent necessary to support such a business. Not until almost 20 years later did Whitehead Oil conclude that the surroundings had developed sufficiently to support such an operation. As the surroundings developed, a solid row of multifamily dwellings was built along the west side of the larger parcel. The land directly north of the larger parcel is occupied by a church, and there is a row of multifamily dwellings across the street to the north. In the early 1970's, Lincoln Mutual Life Insurance Company built a large office building at the southeast corner of the larger parcel, to the northwest of the intersection of 27th Street and Old Cheney Road.

In 1977, the city and county adopted a new comprehensive plan. The land-use-map part of the plan designated 28 neighborhood centers for local retail commercial uses and designated other larger commercial areas as regional multiuse centers. The neighborhood centers were to contain up to 50,000 square feet of commercial space. Included as one of the stated policies of the 1977 plan was the encouragement of downtown office development by the use of restrictive zoning policies to deter the expansion of office employment centers to other areas of Lincoln.

Although the larger parcel had been designated as a neighborhood shopping center in the 1961 plan, no such designation was noted in the 1977 plan; rather, the larger parcel was designated as a residential area. Although the plan refers to 28 neighborhood shopping areas in addition to those which had already been developed, Douglas Brogden, the city's planning director from 1959 through 1982, was able to identify only 25 so identified in the plan. In Brogden's opinion, nothing had changed to warrant the removal of the larger parcel from retail or neighborhood shopping center uses. On the other hand, Verl Borg, to whom Brogden had delegated the assignment of the neighborhood centers in the 1977 plan and who is still employed by the city, testified that he had specifically considered whether the larger parcel should retain its neighborhood center designation in the 1977 plan, and recommended that it be removed because of the insurance office building which had been built on the corner. In Borg's view, the office building had taken the heart of the area, and there really was not much usable property left for a neighborhood shopping center.

In 1979, a new comprehensive zoning ordinance was prepared to implement the 1977 comprehensive plan. The 1979 zoning code did not contain a G-1 zone, and the larger parcel was rezoned B-2, which was the successor designation for planned neighborhood shopping districts. B-2 districts are substantially the same as the prior G-1 districts and specifically include as permitted uses service stations and stores or shops for the sale of goods at retail. No change of zoning was discussed or proposed for Whitehead Oil's property.

The major difference in the 1979 code was the

implementation of a system employing use permits, which prohibit any construction or even any open land use in B-2 districts, other than farming and the sale of farm produce, prior to the approval of a use permit. The use permit process was adopted as a site-planning tool to integrate permitted uses into an area while eliminating or minimizing adverse impact to the surrounding property according to the standards and guidelines of the zoning code.

Sometime between the 1979 zoning code and 1982, a use permit was issued for construction of a bank to the north of Lincoln Mutual's office building, a use permitted in B-2 districts.

In April 1982, Lincoln Mutual applied for a use permit to allow it to develop and construct an office park on three lots in a portion of the larger parcel lying to the north of Whitehead Oil's property and Lincoln Mutual's office building. This area included all of the larger parcel zoned B-2 which had not been previously developed, except for Whitehead Oil's property. The proposed use permit was for three office buildings with a total of 51,600 square feet of floor space and 172 parking spaces. The use permit was approved after an amendment changing the use to "office/retail park." As a direct result of Lincoln Mutual's use permit to add office space in a B-2 district, which, although not prohibited by the zoning code, was in contravention of the policy of the comprehensive plan, Brogden initiated a petition to amend the zoning ordinance so as to limit office use in B-2 districts to 10 percent of the total approved floor area of each use permit. However, the city did not adopt this proposed amendment. The property affected by Lincoln Mutual's use permit for an office-retail park remains vacant and has not yet been developed.

In 1985, still another comprehensive plan was adopted. The "Generalized Future Urban Land Use" map constituting a part of the plan continued to designate the larger parcel as residential. The 1985 plan retains a policy of limiting the growth of offices outside the downtown area to less than one-half of the new private office growth during the planning period and limiting office growth outside regional and community multiuse centers to business and industrial areas already

approved for such uses. The plan does, however, state: "Additional free standing office parks could be approved if such sites are needed to accommodate unforeseen major new development opportunities."

On October 27, 1986, Whitehead Oil filed its application for a permit to construct and use a convenience store, service station, and self-service carwash on its property. The commission's staff report recognized the request as being for permitted uses in the B-2 district; however, it recommended denial due in general to the requested variances and concern that the design does not minimize the impact to the adjacent residential uses. The requested code variances included the front yard setback of 41 feet as opposed to the required 50 feet, a drive in the side yard 4 feet from the side lot line, and inadequate screening.

On November 7, 1986, Garner Stoll, who had succeeded Brogden as the commission's director, filed a petition to amend the zoning ordinance for B-2 districts so as to prohibit gas pumps and canopies within the 50-foot front yard setback unless specifically approved as a part of the use permit. Stoll requested the amendment due to shortcomings in the zoning text he perceived while reviewing the Whitehead Oil use permit application. The proposed amendment was to the text of the zoning ordinance and not to the underlying zoning of Whitehead Oil's property.

The zoning ordinance amendment and Whitehead Oil's use permit application were referred to the commission for public hearing and recommendation, and both matters were before the commission for hearing on November 19, 1986. There was considerable public opposition to the Whitehead Oil permit. On November 26, Whitehead Oil requested that action on both matters be deferred until the commission's December 17 meeting. The commission deferred consideration of the use permit application, but declined to defer action on the zoning amendment, which it recommended be approved and forwarded to the city council.

Whitehead Oil's representatives met with the commission's staff members several times to discuss revisions required to gain the staff's recommendation of approval. In accordance with

those discussions, Whitehead Oil submitted a revised site plan on December 30, 1986, and its final revised site plan on January 8, 1987. By the revised plan, Whitehead Oil removed the carwash from the lower level of the proposed building and replaced it with office space and changed the setbacks, drives, and other details. On January 9, 1987, the commission staff completed its report, recommending that the application be approved subject to several conditions.

On January 12, 1987, the city council adopted Stoll's proposed zoning amendment for B-2 districts. On January 21, the commission held a public hearing to consider Whitehead Oil's use permit as amended. According to the commission's rules at the time, the application typically would have been voted on at the next commission meeting, which was scheduled for January 28, on which date the commission met to consider Whitehead Oil's application. It was advised that a petition to amend the zoning ordinance had been filed that day by the Southwood Neighborhood Association to change the larger parcel's zoning designation from B-2 to O-3 "in order that no retail activity (including convenience stores) be allowed . . . ." Neither convenience stores nor service stations selling gasoline are permitted in O-3 districts.

After considerable discussion and after being advised by its legal counsel that it could not consider the petition for change of zone until its March meeting, the commission voted to defer action on Whitehead Oil's use permit application until the first meeting in March. This was done to allow the two matters to be considered together. If action had been taken on the use permit by the commission on January 28, 1987, the city council would have held a public hearing on the matter on February 23.

On January 30, 1987, Whitehead Oil appealed the commission's delay of action on its use permit to the city council, requesting that it order the commission to forward its recommendation. The city council considered the appeal at its February 2 meeting and ordered the commission to forward its recommendation. On February 18, the commission complied, recommending that Whitehead Oil's use permit be approved subject to the specific and general conditions contained in the report of its staff, including the installation, at Whitehead Oil's

cost, of a traffic light at 25th Street and Old Cheney Road, if agreeable to the city's traffic engineer.

The commission staff had advised Whitehead Oil that consideration of its use permit before the city council was tentatively scheduled for March 16, 1987. On February 23, the city council voted to hold the hearing on the use permit at an evening meeting to be held Monday, March 30, at 6:30 p.m. However, on March 9, the city council decided to defer the public hearing once again until the April 6 day meeting in order to allow it to consider an O-3 use permit application by Lincoln Mutual for the property it owned in the larger parcel, together with Whitehead Oil's use permit and the neighborhood association's requested zone change.

On March 18, 1987, the commission held a public hearing on the neighborhood association's change of zone request. Area residents and Lincoln Mutual appeared to oppose construction of a convenience store and to favor rezoning the larger parcel to an O-3 district for office use. The commission staff had, by its report and recommendation dated February 20, recommended approval of the change of zone to 0-3 as being in closer conformity with the comprehensive plan and as encouraging development in character with the established land uses in the adjacent area. The commission met on March 25 to make its recommendation to the city council and, after rejecting a motion to approve the staff recommendation, voted 5 to 3 to recommend denial of the change of zone. Although the usual procedure was to docket matters for the city council's agenda after obtaining the commission's recommendation, Stoll had placed the change of zone request on the city council's agenda prior to the meeting at which the commission was scheduled to make its recommendation.

A public hearing before the city council was held on April 6, 1987, to discuss the three pending matters: Whitehead Oil's use permit, Lincoln Mutual's use permit, and the neighborhood association's change of zone request. The staff, Whitehead Oil, and representatives of area residents agreed to a 4-week deferral to allow time to pursue a possible exchange of property between Whitehead Oil and the city to resolve the competing interests. Since the record makes no other reference to this proposed

exchange, it appears the effort was not fruitful.

The public hearing before the city council resumed on May 26, 1987. The neighborhood association presented a unanimous resolution of its board, representing 470 property owners, requesting that the larger parcel be rezoned. Numerous area residents and property owners appeared, spoke in opposition to Whitehead Oil's use permit, and requested that the property be rezoned. The president of an elementary school parent-teacher organization expressed opposition to Whitehead Oil's use permit and support for rezoning, voicing concern for the safety of schoolchildren who would frequent a convenience store and cross Old Cheney Road without the benefit of a protected crosswalk. Lincoln Mutual, which owns a majority of the larger parcel, appeared to request that the larger parcel be rezoned and that its requested use permit be approved to allow it to construct an office park consistent with its prior use permit as approved in 1982, except that the use would be for an office park rather than an office-retail park.

On June 1, 1987, the city council changed the zoning designation of the larger parcel from B-2 to O-3, denied Whitehead Oil's use permit, and approved Lincoln Mutual's use permit for an office park in the new O-3 district.

IV. ANALYSIS

In *Whitehead Oil I*, we cited *City of Omaha v. Glissmann*, 151 Neb. 895, 39 N.W.2d 828 (1949), *appeal dismissed* 339 U.S. 960, 70 S. Ct. 1002, 94 L. Ed. 1370 (1950), *reh'g denied* 340 U.S. 847, 71 S. Ct. 15, 95 L. Ed. 621, for the proposition that property owners may have vested rights in their property such as to preclude zoning changes. Therein, a municipality had issued a permit allowing the establishment of a trailer park subject to approval by its building department. Prior to any action by the building department, a petition to reconsider the granting of the permit was filed by residents in the area. Upon reconsideration, the planning authority submitted its report and proposed an ordinance to rezone the property to a residential district, which would eliminate the trailer park uses. The ordinance was passed by the municipality. The *Glissmann* court held not only that the property owner had no vested rights

precluding amendment of the zone of the property, but also that the municipality had not acted arbitrarily and capriciously in passing the zoning ordinance:

> "What is the public good as it relates to zoning ordinances affecting the use of property is, primarily, a matter lying within the discretion and determination of the municipal body to which the power and function of zoning is committed, and unless an abuse of this discretion has been clearly shown it is not the province of the court to interfere. * * *
>
> "In passing upon the validity of zoning ordinances, an appellate court should give great weight to the determination of local authorities and local courts especially familiar with local conditions."

Glissmann, 151 Neb. at 905-06, 39 N.W.2d at 835.

In applying the *Glissmann* analysis in *Whitehead Oil I*, we wrote:

> [A] landowner has no vested right in the continuity of zoning in a particular area so as to preclude subsequent amendment, and a zoning regulation may be retroactively applied to deny an application for a building permit even though the permit could lawfully have issued at the time of application. . . .
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> Nonetheless, a new zoning ordinance will not have retroactive effect where an applicant has substantially changed position in good-faith reliance upon the existing zoning by causing substantial construction to be made or by incurring substantial expenses related to construction. . . . This substantial reliance exception is basically an application of the rule that a zoning ordinance may not, without providing a reasonable plan for discontinuance, operate retroactively to deprive a property owner of previously vested rights by preventing a use to which the property was put before enactment of the prohibitory ordinance.

234 Neb. at 532-33, 451 N.W.2d at 706.

We also determined that the expenditures made by Whitehead Oil in preparing to obtain the use permit were, as a matter of law, not so substantial as to deprive the city of the

right to exercise its police power, but observed that, nonetheless,

> a zoning authority may not use its powers to reward its friends or punish its enemies; thus, where a zoning authority is guilty of misconduct or bad faith in its dealings with the applicant for a use permit in accordance with the then existing zoning regulation or arbitrarily and unreasonably adopts a new regulation in order to frustrate the applicant's plans for development rather than to promote the general welfare, the new regulation may not be applied retroactively. *Commercial Prop., Inc. v. Peternel*, 418 Pa. 304, 211 A.2d 514 (1965); *Nott v. Wolff*, 18 Ill. 2d 362, 163 N.E.2d 809 (1960); *Sunset View Cemetery Assn. v. Kraintz*, 196 Cal. App. 2d 115, 16 Cal. Rptr. 317 (1961). See, also, *City of Omaha v. Glissmann, supra*; *Willingham v. City of Dearborn*, 359 Mich. 7, 101 N.W.2d 294 (1960).

Whitehead Oil I, 234 Neb. at 534, 451 N.W.2d at 706-07.

The issue of material fact which precluded the issuance of summary judgment is as follows:

> Whether Lincoln, by delaying action on Whitehead Oil's application until after adopting the neighborhood representative's proposal for a change of zoning, acted arbitrarily and unreasonably or in bad faith in order to prevent Whitehead Oil from acquiring a permit to operate a convenience store on its property or, rather, acted reasonably and in good faith to promote the general welfare is a question of material fact, concerning which there is a genuine issue.

Id. at 534, 451 N.W.2d at 707.

The factual record, as summarized in part III above, divides the question into two parts: (1) whether the denial of Whitehead Oil's use permit resulted from an arbitrary and unreasonable change in the zoning designation for the larger parcel, and (2) if so, whether there were other bases upon which the city could properly deny Whitehead Oil the use permit sought.

1. Change in Zoning

We begin our consideration of the first aspect of that

question by recalling that in reviewing the decision of a city council, it is presumed that the council acted "in good faith, with honest motives, and for the purpose of promoting the public good and protecting the public interest." *Day v. City of Beatrice*, 169 Neb. 858, 865, 101 N.W.2d 481, 487 (1960). Accord *Best v. City of Omaha*, 138 Neb. 325, 293 N.W. 116 (1940).

Furthermore, as stated in *McCrea v. Cunningham*, 202 Neb. 638, 648, 277 N.W.2d 52, 58 (1979):

> "A legal presumption exists in favor of validity, and unless the contrary appears upon the face of the ordinance, the burden is upon the party attacking it as invalid to show by clear and unequivocal evidence that the regulation imposed by it is so arbitrary, unreasonable, or confiscatory as to amount to depriving such party of property without due process of law. . . ."

Accord, *Bucholz v. City of Omaha*, 174 Neb. 862, 120 N.W.2d 270 (1963); *Weber v. City of Grand Island*, 165 Neb. 827, 87 N.W.2d 575 (1958); *City of Omaha v. Glissmann*, 151 Neb. 895, 39 N.W.2d 828 (1949), *appeal dismissed* 339 U.S. 960, 70 S. Ct. 1002, 94 L. Ed. 1370 (1950), *reh'g denied* 340 U.S. 847, 71 S. Ct. 15, 95 L. Ed. 621. The presumption is, of course, rebuttable. *In re Estate of Novak*, 235 Neb. 939, 458 N.W.2d 221 (1990).

In *Whitehead Oil I*, several cases from other jurisdictions were relied upon as persuasive authority for the proposition that

> where a zoning authority is guilty of misconduct or bad faith in its dealings with the applicant for a use permit in accordance with the then existing zoning regulation or arbitrarily and unreasonably adopts a new regulation in order to frustrate the applicant's plans for development rather than to promote the general welfare, the new regulation may not be applied retroactively.

234 Neb. at 534, 451 N.W.2d at 706-07.

The decisions on this issue are necessarily driven by the facts of each case, and because of the heavy presumption of validity discussed earlier, there is a plethora of reported decisions affirming the denial of a building or similar permit. See,

generally, Annot., Retroactive Effect of Zoning Regulation, in Absence of Saving Clause, on Pending Application for Building Permit, 50 A.L.R.3d 596 (1973). Obviously, jurisdictions vary in their analytical approaches, some making it more difficult for the property owner to prevail than others. As a result, we, in reviewing the district court's resolution of this case, focus on the cases cited in *Whitehead Oil I* and similar decisions in which denial of the permit sought was held to be arbitrary and capricious.

For example, in April 1963, the applicant in *Commercial Prop., Inc. v. Peternel*, 418 Pa. 304, 211 A.2d 514 (1965), sought approval of a site plan for construction of a shopping center, which site plan was revised after objections were posed at a public hearing. Further revisions were made due to additional objections; however, in June 1963, the appropriate authority denied the plan notwithstanding the revisions which had been made and issued a letter outlining 16 objections to be overcome in order to secure approval. Meanwhile, on July 8, a proposal to rezone the property from commercial to residential was introduced. In late July, the applicant's site plan was approved by the appropriate intermediate authority as being in technical compliance. However, the township refused to issue a grading permit and, because of the pending zoning change, in November denied the applicant's request for a building permit. The change of zone was not enacted until June 1964, long after a mandamus action had been filed by the applicant. The appellate court held that the applicant had met all requirements for the issuance of a building permit and that mandamus was proper. It agreed with the lower court's conclusion that the sole purpose of the zoning change was to prevent the applicant from constructing the planned project, and the zoning change was therefore arbitrary and unreasonable. It wrote that in so deciding, it imputed "no personal vindictiveness to the township officials who apparently were striving to maintain the high character of their bailiwick and to represent the desires of their constituency. But, while their motives may have been of the highest sort, their course of action was ill conceived." *Id.* at 311-12, 211 A.2d at 519.

In *Nott v. Wolff*, 18 Ill. 2d 362, 163 N.E.2d 809 (1960), the

property owner, in October 1956, sought a building permit for construction of a motel in an area zoned to allow such use. In November, a change of zone to preclude the use was introduced, and it was subsequently adopted the following January. The appellate court affirmed the trial court's issuance of a writ of mandamus to compel issuance of the permit and its holding that the change of zone was invalid. Although the appellate court appears to balance the interests at issue between the applicant and adjoining owners, it held that "the enactment of this ordinance was more emotional than necessary" and was therefore arbitrary and unreasonable. *Id.* at 369, 163 N.E.2d at 813.

A building permit was denied in *Willingham v. City of Dearborn*, 359 Mich. 7, 101 N.W.2d 294 (1960), on the basis that the setback was inadequate; however, the relevant ordinances contained no setback requirements. After a writ of mandamus was filed, the city amended the ordinance to include the requirement, then sought to interpose it as an objection. The court affirmed the trial court's refusal to consider the amendment and its issuance of the mandamus.

In much the same fashion, the court in *Sunset View Cemetery Association v. Kraintz*, 196 Cal. App. 2d 115, 16 Cal. Rptr. 317 (1961), invalidated an emergency ordinance enacted 1 day after a writ of mandamus ordering the city to accept the application for a building permit authorizing the construction of a mortuary. The ordinance rezoned the area around the property in question so as to preclude putting the property in question to mortuary or related uses. The appellate court, in so holding, declared:

> Nothing in the record in the instant case indicates that the ordinance formed any part of a zoning plan or that appellant had even contemplated the ordinance before the trial court's first decision; the enactment of the ordinance stemmed from the county's attempt to frustrate respondent's plans. The generality of the language of the ordinance does not conceal its single, realistic purpose: the prohibition of respondent's mortuary. As amicus curiae in behalf of respondent state, "Such an isolation of one party as the object of the Board's legislative action is a

> plain discrimination; one that cannot survive testing under accepted principles of constitutional law.

Id. at 123-24, 16 Cal. Rptr. at 322-23.

Other cases with holdings similar to those discussed above include *Marmah, Inc. v. Greenwich*, 176 Conn. 116, 405 A.2d 63 (1978); *Linda Dev. Corp. v. Plymouth Twp. et al.*, 3 Pa. Commw. 334, 281 A.2d 784 (1971); *Limekiln Golf C., Inc. v. Zoning Bd. of Adj.*, 1 Pa. Commw. 499, 275 A.2d 896 (1971) (reversing local authority's denial of special exception permit and remanding to township for determination on that discretionary matter, due to invalid subsequent zoning ordinance); *Brown v. Terhune*, 125 N.J.L. 618, 18 A.2d 73 (1941), *appeal dismissed* 127 N.J.L. 554, 23 A.2d 575 (1942); and *State ex rel. Humble Oil & Ref. Co. v. Wahner*, 25 Wis. 2d 1, 130 N.W.2d 304 (1964). The common factor in the foregoing cases is the incorporation of zoning changes contemporaneously with the denial of a formerly permitted use.

Here, the larger parcel had been zoned for over two decades so as to permit the use Whitehead Oil sought. Although the neighborhood shopping center designation was not retained for the larger parcel in the 1977 and 1985 comprehensive plans, no effort had been made to reflect that the city anticipated a change in the zoning designation of the parcel. In fact, a substantial portion of the larger parcel was developed for uses consistent with the commercial designation, and except for Whitehead Oil's property, a use permit had been issued for all of the remaining undeveloped area of the larger parcel for use as an office-retail park. As noted in *Pine Hill Concrete Mix Corporation v. Town of Newstead Zoning Board of Appeals*, 161 A.D.2d 1187, 559 N.Y.S.2d 48, 49 (1990), *appeal denied* 77 N.Y.2d 803, 569 N.E.2d 874, 568 N.Y.S.2d 15 (1991), " 'the inclusion of a use in the ordinance is a per se finding that it is in harmony with the neighborhood.' " Although the change of zoning designation encompassed a larger area, the true intent of the change was that only Whitehead Oil's property be affected, and that was the result achieved. Likewise, the simultaneous issuance of a new use permit to Lincoln Mutual for an office park rather than the virtually identical office-retail park shields

the larger parcel, except for that portion which constitutes Whitehead Oil's property.

The fact that the petition for a change of zoning was filed by the protesting neighborhood association on the same day the commission was scheduled to issue a recommendation is not insignificant. Although the neighborhood association's express objective to prevent the construction of a convenience store should not be imputed to the city, the circumstance indicates what drove the public opposition and the city's action, a specific reaction against a previously permitted use.

Even more troubling is the delay of action on Whitehead Oil's application so as to allow the change of zoning request to "catch up" with the use permit such that the two could be considered in conjunction with each other. It is precisely this type of delay which is so common and disapproved in the authorities cited in *Whitehead Oil I*.

The fact that the city reacted to the arguably valid concerns of its citizens in the area does not mean that the decision is valid as being based upon concerns for the general welfare. Nor is the city's denial of the existence of any ill will toward Whitehead Oil of any moment. Whatever the motives, a zoning decision which does not promote the general welfare is arbitrary and unreasonable. *Commercial Prop., Inc. v. Peternel*, 418 Pa. 304, 211 A.2d 514 (1965).

The record convinces us that the change in the zoning designation did not promote a legitimate governmental interest in conformance with the comprehensive plan, but merely thwarted Whitehead Oil's previously permissible planned use. We therefore independently reach the same conclusion as the district court, that the city acted arbitrarily and capriciously in changing the zoning designation of the larger parcel from B-2 to 0-3.

2. Other Bases for Denial

The city argues that in any event, there were a number of bases upon which to deny Whitehead Oil's application for a use permit even under the preexisting G-1 zoning designation, among them the fact that the use was not in full compliance with the requirements of the G-1 zoning ordinance. There are a

number of flaws in this contention.

First, although the city council was not bound to accept the commission's recommendation, the city's spurning of the recommendation without the articulation of a reasonable basis for so doing is suspect and, under the circumstances presented, untenable. The record convinces us that the city council's decision to deny the use permit was driven by its determination to change the zoning designation because of its aversion to having in the area a convenience store, at which, among other items, gasoline would be sold, and not driven by whether Whitehead Oil's application conformed with the relevant regulations. Indeed, the regulations were scarcely discussed in the city council's public hearing.

Second, the deviations from the regulations are primarily a result of the negotiations had and compromises made with the commission's staff. For example, it was at the staff's suggestion that the gas pumps and canopy were moved farther into the front yard setback in order to increase their distance away from a multifamily dwelling.

Third, due to the complex nature of the zoning regulations and numerous other requirements, virtually all of the use and building permits discussed in the record were approved only after conditions were added on the recommendation of city functionaries, or by the city council on final approval. At some point, the myriad requirements become so onerous that no applicant is able to fully comply unless some deviations are granted. The very nature of a multilayer system of regulation such as exists here increases the risk of arbitrary and capricious action resulting in an unreasonable requirement.

The city also urges that as Whitehead Oil knew that a change of zoning had been requested, it could not in good faith have relied on the preexisting G-1 zoning designation. In addition, the city postulates that even if Whitehead Oil had been granted a use permit under the preexisting zoning designation, the time constraints were such that it could not have acted before the new zoning designation became effective, thus preventing Whitehead Oil from acquiring any vested property rights in a use under the earlier designation. Both of these arguments are without merit, for both beg the question of the validity of the

pending request for a change in the zoning designation.

V. JUDGMENT

Accordingly, we affirm the decree of the district court, but modify it to the extent that we direct the district court to remand the matter to the city, ordering it to issue Whitehead Oil the use permit it seeks. Inasmuch as Whitehead Oil has posed no objections to the specific and standard conditions contained in the commission staff's recommendation described in part III above (which conditions begin at page 5 of trial exhibit 14C), nor to the installation at its cost of the traffic light described in said part, the permit shall issue subject to the designated specific and standard conditions. The district court shall also direct the city to decide within 60 days of the district court's decree on the mandate herein whether the city wishes to install a traffic light at 25th Street and Old Cheney Road at Whitehead Oil's cost. The city's failure to so decide within said time period shall relieve Whitehead Oil of any obligation in that regard.

AFFIRMED AS MODIFIED, AND CAUSE REMANDED WITH DIRECTION.

WHITEHEAD OIL COMPANY, A CORPORATION, APPELLEE AND CROSS-APPELLANT, V. CITY OF LINCOLN, NEBRASKA, A MUNICIPAL CORPORATION, APPELLANT AND CROSS-APPELLEE.

515 N.W.2d 401

Filed April 22, 1994. No. S-92-423.

1. **Equity: Jurisdiction.** Where a court of equity has obtained jurisdiction of a cause for any purpose, it will retain it for all, and will proceed to a final determination of the case, adjudicating all matters in issue, thus avoiding unnecessary litigation.
2. **Ordinances: Zoning: Injunction: Equity.** An action to declare a zoning ordinance void and to enjoin its enforcement is equitable in nature.
3. **Actions: Governmental Subdivisions: Property.** Inverse condemnation is a shorthand description for a landowner suit to recover just compensation for a governmental taking of the landowner's property without the benefit of condemnation proceedings.

4. **Actions: Constitutional Law: Property.** A landowner is entitled to bring an action in inverse condemnation as a result of the self-executing character of the takings clauses of the U.S. and Nebraska Constitutions.
5. **Ordinances: Zoning: Property.** Property interests are not created by the U.S. Constitution, they are created and their dimensions are defined by rules or understandings that stem from an independent source such as state law.
6. _____: _____: _____. A land-use regulation or zoning ordinance which is an invalid exercise of police power may result in a taking, notwithstanding that not all economically viable use of the land is denied.
7. _____: _____: _____. A land-use regulation does not cause a taking if it substantially advances legitimate state interests and does not deny an owner economically viable use of his or her land.
8. **Constitutional Law: Property: Damages.** Under Neb. Const. art. I, § 21, recovery may be had for damages to property occasioned by temporary takings.
9. **Constitutional Law: Due Process: Property: Injunction: Damages.** An arbitrary and capricious due process challenge may be either a facial or an as-applied challenge. For a facial challenge, the remedy is the striking of the regulation. In the case of an as-applied challenge, the remedy is an injunction preventing the unconstitutional application of the regulation to plaintiff's property, or damages resulting from the unconstitutional application, or both an injunction and damages.
10. **Ordinances: Zoning: Property: Damages.** In the case of a temporary regulatory taking, the landowner's loss takes the form of an injury to the property's potential for producing income or an expected profit. The landowner's compensable interest, therefore, is the return on the portion of fair market value that is lost as a result of the regulatory restriction.

Appeal from the District Court for Lancaster County: BERNARD J. MCGINN, Judge. Affirmed as modified, and cause remanded with direction.

William F. Austin, Lincoln City Attorney, for appellant.

William G. Blake, of Pierson, Fitchett, Hunzeker, Blake & Loftis, for appellee.

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

CAPORALE, J.

I. STATEMENT OF CASE

This is the third appearance in this court of this longrunning controversy between Whitehead Oil Company, the plaintiff-appellee in this action, and the City of Lincoln, the defendant-appellant herein. In *Whitehead Oil Co. v. City of Lincoln*, 234 Neb. 527, 451 N.W.2d 702 (1990) (*Whitehead Oil*

I), we held that the district court had erred in granting the city a summary judgment on Whitehead Oil's challenge to the city's refusal to grant the former a use permit. Today, in *Whitehead Oil Co. v. City of Lincoln, ante* p. 660, 515 N.W.2d 390 (1994) (*Whitehead Oil II*), we affirmed the district court's subsequent ruling that the city's refusal to grant Whitehead Oil a use permit was arbitrary and capricious, and modified the district court's remand of the matter to the city for reconsideration, directing that the district court instead order the issuance of such a permit, subject to specified conditions.

In this action, the district court enjoined the city from enforcing a zoning ordinance and awarded Whitehead Oil damages in the amount of $762.50 per month from June 1, 1987 (the approximate date on which the city denied issuance of the use permit) to April 1, 1992 (the approximate date of the district court's decree herein), plus an attorney fee. The city appealed to the Nebraska Court of Appeals, assigning errors which may be summarized as claiming that the district court mistakenly (1) ruled the zoning ordinance in question was the result of arbitrary and capricious action and is thus unreasonable and unenforceable, (2) ruled that there had been a taking of Whitehead Oil's property, (3) ruled that the city had violated Whitehead Oil's civil rights, and (4) awarded Whitehead Oil damages. Whitehead Oil cross-appealed, claiming that the district court's award of damages is inadequate. We, pursuant to Neb. Rev. Stat. § 24-1106(3) (Cum. Supp. 1992), removed the case to this court in order to regulate the caseloads of the appellate courts and now affirm the decree of the district court, as modified in part V of this opinion, and remand with direction.

II. SCOPE OF REVIEW

We begin our study of the scope of review by recalling that where a court of equity has obtained jurisdiction of a cause for any purpose, it will retain it for all, and will proceed to a final determination of the case, adjudicating all matters in issue, thus avoiding unnecessary litigation. *Armbruster v. Stanton-Pilger Drainage Dist.*, 165 Neb. 459, 86 N.W.2d 56 (1957). Accord, *Global Credit Servs. v. AMISUB*, 244 Neb. 681, 508 N.W.2d

836 (1993); *Travelers Indemnity Co. v. Heim*, 223 Neb. 75, 388 N.W.2d 106 (1986); *Trump, Inc. v. Sapp Bros. Ford Center, Inc.*, 210 Neb. 824, 317 N.W.2d 372 (1982). An action to declare a zoning ordinance void and to enjoin its enforcement is equitable in nature. *Giger v. City of Omaha*, 232 Neb. 676, 442 N.W.2d 182 (1989); *Sasich v. City of Omaha*, 216 Neb. 864, 347 N.W.2d 93 (1984). That some of the causes presented require us to apply federal substantive law is not significant, for we are free to apply our own procedural rules. *Anderson v. HMO Nebraska*, 244 Neb. 237, 505 N.W.2d 700 (1993).

Thus, while this case presents legal causes as well as the aforedescribed equity cause, we apply the equity standard of review to the entire matter. As that standard is set forth in *Whitehead Oil II*, we do not restate it here.

III. ANALYSIS OF CITY'S APPEAL

Inasmuch as the relevant facts are set forth in *Whitehead Oil II*, we proceed directly to our analysis of the city's appeal.

1. UNREASONABLENESS OF ZONING ORDINANCE

Our holding in *Whitehead Oil II* resolves adversely to the city its claim in the first summarized assignment of error that the district court erred in finding the zoning ordinance under which the city denied Whitehead Oil a use permit is unreasonable.

Accordingly, nothing further need be said in that regard, except to note that the district court properly enjoined the city from enforcing the ordinance.

2. TAKING OF PROPERTY

In the second summarized assignment of error, the city claims the district court erred in finding that Whitehead Oil's property was temporarily taken.

The Fifth Amendment to the U.S. Constitution provides: "[N]or shall private property be taken for public use, without just compensation." The 5th Amendment is made applicable to the states through the 14th Amendment. *First Lutheran Church v. Los Angeles County*, 482 U.S. 304, 107 S. Ct. 2378, 96 L. Ed. 2d 250 (1987); *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978), *reh'g denied* 439 U.S. 883, 99 S. Ct. 226, 58 L. Ed. 2d 198.

In addition, Neb. Const. art. I, § 21, provides that the "property of no person shall be taken or damaged for public use without just compensation therefor."

Whitehead Oil seeks damages in inverse condemnation under both the U.S. and Nebraska Constitutions. More specifically, it seeks the fair rental value of its property as a site for a convenience store of the type described in *Whitehead Oil II* from the date its use permit should have been issued.

Inverse condemnation is a shorthand description for a landowner suit to recover just compensation for a governmental taking of the landowner's property without the benefit of condemnation proceedings. *Agins v. Tiburon*, 447 U.S. 255, 100 S. Ct. 2138, 65 L. Ed. 2d 106 (1980); *Western Fertilizer v. City of Alliance*, 244 Neb. 95, 504 N.W.2d 808 (1993); *Dishman v. Nebraska Pub. Power Dist.*, 240 Neb. 452, 482 N.W.2d 580 (1992). A landowner is entitled to bring an action in inverse condemnation as a result of the self-executing character of the takings clauses of the U.S. and Nebraska Constitutions. *First Lutheran Church v. Los Angeles County, supra*; *Western Fertilizer v. City of Alliance, supra*; *Dishman v. Nebraska Pub. Power Dist., supra.*

(a) Under Federal Constitution

The city attacks on two grounds the district court's finding that there has been a taking under the federal Constitution. First, it urges that Whitehead Oil is in no position to raise the issue because it has not exhausted its administrative remedies. Second, the city contends that as Whitehead Oil's property could always have been put to some viable economic use, there was no taking.

(i) Administrative Remedies

The city cites *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 106 S. Ct. 2561, 91 L. Ed. 2d 285 (1986), *reh'g denied* 478 U.S. 1035, 107 S. Ct. 22, 92 L. Ed. 2d 773; *Williamson Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985); *Lake Nacimiento Ranch Co. v. San Luis Obispo Cty.*, 841 F.2d 872 (9th Cir. 1987), *cert. denied* 488 U.S. 827, 109 S. Ct. 79, 102 L. Ed. 2d 55 (1988), and several other cases for the proposition that damages

for a temporary taking may not be considered in the absence of a final decision regarding application of the offending regulation to the property in question and exhaustion of other administrative remedies. The city then argues that we should not reach Whitehead Oil's takings claim because the city has taken no final action against Whitehead Oil under the current O-3 zoning designation. That argument simply ignores the fact that the city has indeed taken final action; it has denied Whitehead Oil's application for a use permit.

The city's contention that in any event Whitehead Oil should be required to seek a variance from the city's board of zoning appeals so as to determine whether the city would permit the construction Whitehead Oil seeks, notwithstanding the zoning restriction against such a use, fails for two reasons. First, the city's past actions in denying the permit in question establish that such a request would be futile. One is not required to perform a futile act. *Eide v. Sarasota County*, 908 F.2d 716 (11th Cir. 1990), *cert. denied* 498 U.S. 1120, 111 S. Ct. 1073, 112 L. Ed. 2d 1179 (1991); *Herrington v. Sonoma County*, 834 F.2d 1488 (9th Cir. 1987), *opinion amended and reh'g denied* 857 F.2d 567 (9th Cir. 1988), *cert. denied* 489 U.S. 1090, 109 S. Ct. 1557, 103 L. Ed. 2d 860 (1989).

Second, the city's board of zoning appeals does not have the power to grant a variance for an unauthorized use. Lincoln Mun. Code § 27.75.040(b) (1987), under the authority granted it by Neb. Rev. Stat. § 15-1106 (Reissue 1991), created a board of zoning appeals with the power

> [t]o hear and decide upon petitions for variances and, subject to such standards, principles, and procedures provided in this title, to vary the strict application of the height, area, parking, density, or sign requirements to the extent necessary to permit the owner a reasonable use of the land in those specified instances where there are peculiar, exceptional, and unusual circumstances in connection with a specific parcel of land, which circumstances are not generally found within the locality or neighborhood concerned.

Thus, the board is empowered to grant variances only as to height, area, parking, density, or sign requirements. These

concepts were clarified in *Alumni Control Board v. City of Lincoln*, 179 Neb. 194, 195-96, 137 N.W.2d 800, 802 (1965), which stated:

> Use variances are customarily concerned with "hardship" while area variances are customarily concerned with "practical difficulty." A use variance is one which permits a use other than that prescribed by the zoning ordinance in a particular district. An area variance has no relationship to a change of use. It is primarily a grant to erect, alter, or use a structure for a permitted use in a manner other than that prescribed by the restrictions of the zoning ordinance. Area variances are principally involved in this case.

While the O-3 zoning district permits consideration of "permitted special uses" in addition to the specifically designated uses, Lincoln Mun. Code § 27.27.030 (1987), none of the categories of special uses encompass the sale of gasoline or goods such as would take place in the convenience store Whitehead Oil contemplates. Thus, Whitehead Oil had no further administrative procedure available to seek a variance.

(ii) Nature of Property Interest

As the city properly observes, "[p]roperty interests are not created by the Constitution, 'they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . .' " *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 538, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985) (quoting *Board of Regents v. Roth*, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972)). Indeed, in considering the property rights involved in taking claims, the U.S. Supreme Court has referred to the limits imposed by the controlling state law. *Lucas v. South Carolina Coastal Council*, ____ U.S. ____, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992).

Citing *Whitehead Oil I*; *City of Omaha v. Glissmann*, 151 Neb. 895, 39 N.W.2d 828 (1949), *appeal dismissed* 339 U.S. 960, 70 S. Ct. 1002, 94 L. Ed. 1370 (1950), *reh'g denied* 340 U.S. 847, 71 S. Ct. 15, 95 L. Ed. 621; and *Goodwin v. City of Kansas City*, 244 Kan. 28, 766 P.2d 177 (1988), the city argues

that Whitehead Oil can have no vested property right which could be taken, for a landowner has no vested right in a particular zoning designation. Therefore, according to the city, a subsequent change in zoning may be applied retroactively so as to deny a land-use permit which would have been granted at the time the permit was originally sought. However, as pointed out in *Whitehead Oil II*, that argument begs the question of the validity of the subsequent change in zone.

Relying on *First Lutheran Church v. Los Angeles County*, 482 U.S. 304, 107 S. Ct. 2378, 96 L. Ed. 2d 250 (1987), the city next argues that under the U.S. Constitution, compensation for a temporary taking can only be had when all the economically viable uses have been foreclosed. The *First Lutheran Church* Court, in holding that a landowner may sue for damages when property is "taken" by government regulation, even if the taking is only temporary and the regulation later invalidated, wrote:

> We merely hold that where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective.
>
> . . . We limit our holding to the facts presented, and of course do not deal with the quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like which are not before us.

482 U.S. at 321. Similarly, in *Lucas v. South Carolina Coastal Council, supra*, the Court held that even a facially valid regulation forbidding a harmful use not previously prohibited gives rise to compensation if the regulation denies all economically beneficial use of the land. Such a regulation results in a " 'total taking,' " and the owner is entitled to compensation unless the forbidden use was not a reasonable property right under the laws of the state. 112 S. Ct. at 2901.

However, undue focus on these cases ignores the line of cases which recognizes relief is possible from regulatory takings which do not deprive the owner of all economic use of the property.

This problem was addressed in *Lucas*, which explained that although the test for a facial challenge to a taking requires a showing of the denial of all economically viable use of the land, when challenging a regulation "as applied," which is the situation here, a landowner may be entitled to compensation based upon the factors discussed in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978), *reh'g denied* 439 U.S. 883, 99 S. Ct. 226, 58 L. Ed. 2d 198. *Penn Central Transp. Co.* recognized that determining whether a taking has occurred involves essentially ad hoc factual inquiries, but that the Court's decisions have identified several factors which have particular significance. These factors are the economic impact of the regulation on the claimant; particularly, the extent to which the regulation has interfered with distinct investment-backed expectations; and the character of the governmental action. A taking may more readily be found when the interference can be characterized as a physical invasion by government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.

The U.S. Supreme Court has long recognized that a land-use regulation or zoning ordinance which is an invalid exercise of police power may result in a taking, although not all economically viable use of the land is denied:

> Under *Euclid* [*v. Ambler Co.*, 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 303 (1926)], a property owner can challenge a zoning restriction if the measure is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *Id.*, at 395. If the substantive result of the referendum is arbitrary and capricious, bearing no relation to the police power, then the fact that the voters of Eastlake wish it so would not save the restriction.

Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668, 676, 96 S. Ct. 2358, 49 L. Ed. 2d 132 (1976) (quoting *Euclid v. Ambler Co.*, 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 303 (1926)). Accord, *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987); *Agins v. Tiburon*, 447 U.S. 255, 100 S. Ct. 2138, 65 L. Ed. 2d 106 (1980); *Penn Central Transp.*

Co. v. New York City, supra.

Some decisions have either postulated or inferred that a regulation which goes so far that it has the same effect as a taking by eminent domain as an invalid exercise of the police power is perhaps better phrased or analyzed as a substantive due process claim. *Williamson Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985); *Eide v. Sarasota County*, 908 F.2d 716 (11th Cir. 1990), *cert. denied* 498 U.S. 1120, 111 S. Ct. 1073, 112 L. Ed. 2d 1179 (1991); *Wheeler v. City of Pleasant Grove*, 833 F.2d 267 (11th Cir. 1987), *reh'g denied* 844 F.2d 794 (11th Cir. 1988).

Whatever uncertainty may have existed has been erased by *Nollan v. California Coastal Comm'n, supra*, which was decided in 1987. Although the *Nollan* Court held that the requirement of an easement across beachfront property as a condition to obtaining a development permit represented a permanent physical occupation of a portion of the land requiring compensation, it also wrote that the regulation was not reasonably necessary to substantially advance a legitimate state interest. The *Nollan* Court announced the following standard: "[L]and-use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land.' " 483 U.S. at 834. The *Nollan* Court, it must be noted, formulates a disjunctive test under which a taking results if either element is not met. In addition, the test requires that the regulation substantially advanced the legitimate state interest sought to be achieved, not that the state could rationally have decided that the measure adopted might achieve the state's objective.

Our determination in *Whitehead Oil II*, that in changing the applicable zoning designation the city acted not in furtherance of a legitimate state interest but arbitrarily and capriciously so as to deny Whitehead Oil a use permit, compels our agreement with the district court's ruling that Whitehead Oil's property has been subjected to a taking under the federal Constitution.

(b) Under State Constitution

The language of the Nebraska constitutional provision is obviously broader than the federal constitutional provision, for

it compensates damage to property as well as the taking of it. Accordingly, recovery has been allowed for damages occasioned by temporary takings. E.g., *Slusarski v. County of Platte*, 226 Neb. 889, 416 N.W.2d 213 (1987) (allegations that counties caused property damage by flooding stated inverse condemnation action); *Wood v. Farwell Irr. Dist.*, 217 Neb. 511, 349 N.W.2d 633 (1984) (reversed summary judgment in favor of irrigation district causing damage by seepage of water); *Armbruster v. Stanton-Pilger Drainage Dist.*, 165 Neb. 459, 86 N.W.2d 56 (1957) (statutory notice not required to maintain action for damages caused by flooding).

We therefore conclude that there has been a taking under the Nebraska Constitution separate and apart from the taking arising under the federal Constitution.

3. Civil Rights

In the third summarized assignment of error, the city asserts the district court erred in finding that the city violated Whitehead Oil's civil rights.

In relevant part, 42 U.S.C. § 1983 (1988) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Municipalities are included among those persons to whom the statute applies. *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). Nor is there any question that a corporation is a person within the meaning of the Equal Protection and Due Process Clauses of the 14th Amendment to the U.S. Constitution. *Fulton Market Cold Storage Co. v. Cullerton*, 582 F.2d 1071 (7th Cir. 1978), *cert. denied* 439 U.S. 1121, 99 S. Ct. 1033, 59 L. Ed. 2d 82 (1979), *disapproved on other grounds, Fair Assessment in Real Estate Assn. v. McNary*, 454 U.S. 100, 102 S. Ct. 177, 70 L. Ed. 2d 271 (1981).

Although the states have concurrent jurisdiction to entertain § 1983 actions, as a result of the Supremacy Clause found in U.S. Const. art. VI, federal law is controlling and preempts any conflicting state law in determining these claims. *Felder v. Casey*, 487 U.S. 131, 108 S. Ct. 2302, 101 L. Ed. 2d 123 (1988); *Maine v. Thiboutot*, 448 U.S. 1, 100 S. Ct. 2502, 65 L. Ed. 2d 555 (1980).

A violation of one's civil rights may give rise to an award of attorney fees and damages which are not limited to the just compensation for the taking itself. *Eide v. Sarasota County*, 908 F.2d 716 (11th Cir. 1990), *cert. denied* 498 U.S. 1120, 111 S. Ct. 1073, 112 L. Ed. 2d 1179 (1991). Although, as developed below in subpart 4 of this part III, Whitehead Oil proves no damages in excess of those arising from the temporary taking of its property, it did seek, and the district court awarded it, an attorney fee. 42 U.S.C. § 1988 (1988) provides that a court may, in its discretion, allow a reasonable attorney fee to one successfully maintaining an action to enforce a provision of § 1983. It has been held that a prevailing party under § 1983 is entitled to attorney fees unless special circumstances would render such an award unjust. *Hensley v. Eckerhart*, 461 U.S. 424, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983). See *Maine v. Thiboutot, supra*. We thus consider the city's claim that no violation of Whitehead Oil's civil rights occurred.

The court enumerated in *Eide v. Sarasota County, supra*, four recognized challenges to a zoning regulation by a landowner, including a claim that

> the regulation is arbitrary and capricious, does not bear a substantial relation to the public health, safety, morals, or general welfare, and is therefore an invalid exercise of the police power. *See Nectow v. City of Cambridge*, 277 U.S. 183, 236, 48 S.Ct. 447, 448, 72 L.Ed.842 (1928); *Greenbriar v. City of Alabaster*, 881 F.2d 1570, 1577 (11th Cir.1989); *Stansberry v. Holmes*, 613 F.2d 1285, 1289 (5th Cir.), *cert. denied*, 449 U.S. 886, 101 S.Ct. 240, 66 L.Ed.2d 112 (1980); *but see Shelton v. City of College Station*, 780 F.2d 475, 482 (5th Cir.1986) (en banc) (zoning is quasi-legislative action, and, therefore, zoning decisions need only have conceivable rational basis), *cert. denied*,

> 477 U.S. 905, 106 S.Ct. 3276, 91 L.Ed.2d 566, 479 U.S. 822, 107 S.Ct. 89, 93 L.Ed.2d 41 (1986). We will refer to such a claim as an "arbitrary and capricious due process" claim. This claim is different from a due process takings claim. To prove the latter, a landowner must establish that the regulation goes "too far," destroying the value of the property to such an extent that it has the same effect as a taking by eminent domain. To prove an arbitrary and capricious due process claim, a plaintiff need only prove that the government has acted arbitrarily and capriciously. Such a challenge may be either a facial or an as applied challenge. *Pennell v. City of San Jose*, 485 U.S. 1, 10-12, 108 S.Ct. 849, 857, 99 L.Ed.2d 1 (1988); *Weissman v. Fruchtman*, 700 F.Supp. 746, 752-53 (S.D.N.Y. 1988). For a facial challenge, the remedy is the striking down of the regulation. *Weissman*, 700 F.Supp. at 753. In the case of an as applied challenge, the remedy is an injunction preventing the unconstitutional application of the regulation to plaintiff's property and/or damages resulting from the unconstitutional application.

908 F.2d at 721-22.

Whitehead Oil in essence argues, among other things, that the city's actions violated Whitehead Oil's "arbitrary and capricious due process rights" as described in *Eide*.

It is important to note that the *Eide* decision and other authorities require a ripeness analysis for such a due process claim similar to that which is required for an as-applied takings challenge. *Herrington v. Sonoma County*, 834 F.2d 1488 (9th Cir. 1987), *opinion amended and reh'g denied* 857 F.2d 567 (9th Cir. 1988), *cert. denied* 489 U.S. 1090, 109 S. Ct. 1557, 103 L. Ed. 2d 860 (1989). But see *Smithfield Concerned Citizens v. Town of Smithfield*, 907 F.2d 239 (1st Cir. 1990) (holding that facial substantive due process claim which attacks zoning ordinance in its entirety and not as applied is not bound by same ripeness requirements; in reaching merits, the court held that because change of zone was consistent with comprehensive plan, attack must fail).

Because, as previously discussed in subpart 2(a)(i) of this part III, Whitehead Oil has met the ripeness standard for an

as-applied takings claim, there is no question that the standard has been met for this purpose as well. See *Eide v. Sarasota County, supra*.

The city contends, however, that in determining whether its actions were arbitrary and capricious and thus violated Whitehead Oil's due process rights, we should follow the Eighth Circuit's holding that such due process claims in zoning cases should be viewed with disfavor, and "[w]hether government action is arbitrary or capricious within the meaning of the Constitution turns on whether it is so 'egregious' and 'irrational' that the action exceeds standards of inadvertence and mere errors of law." *Condor Corp. v. City of St. Paul*, 912 F.2d 215, 220 (8th Cir. 1990). Accord, *Lemke v. Cass County, Neb.*, 846 F.2d 469 (8th Cir. 1987); *Chesterfield Dev. v. City of Chesterfield*, 963 F.2d 1102 (8th Cir. 1992).

Without necessarily adopting this arguably higher standard than other federal cases cited in our analysis employ, we apply the standard here and conclude that the city, in delaying its action on Whitehead Oil's use permit application until it could change the zoning designation such as to preclude issuance of the permit, did not act in furtherance of the police power in conformance with its comprehensive planning and zoning plan. Rather, its conduct was arbitrary and capricious such as to constitute an egregious and irrational act which exceeded a mere error of law or inadvertence.

Having reached that conclusion, we need not consider whether the city violated Whitehead Oil's civil rights in other respects as well.

That brings us back to the matter of the attorney fee. We have upheld an award of attorney fees when a plaintiff in a § 1983 action prevailed on a pendant state claim based on a common nucleus of operative facts with a substantial federal claim. *Robinson v. City of Omaha*, 242 Neb. 408, 495 N.W.2d 281 (1993). Such being the situation here, the district court did not abuse its discretion in awarding Whitehead Oil an attorney fee.

4. Damages

In the fourth and final summarized assignment of error, the

city contends the district court erred in awarding Whitehead Oil damages.

The appropriate measure of damages for the type of takings at issue herein has been best described as follows:

> In the case of a temporary regulatory taking, the landowner's loss takes the form of an injury to the property's potential for producing income or an expected profit. *See generally* 7 P. Rohan, Zoning and Land Use Controls § 52A.03[2] (1986 & Supp.1987). The landowner's compensable interest, therefore, is the return on the portion of fair market value that is lost as a result of the regulatory restriction. Accordingly, the landowner should be awarded the market rate return computed over the period of the temporary taking on the difference between the property's fair market value without the regulatory restriction and its fair market value with the restriction. *See Nemmers v. City of Dubuque*, 764 F.2d 502, 505 (8th Cir.1985). Under this approach, the landowner recovers what he lost. To award any affected party additional compensation for lost profits or increased costs of development would be to award double recovery: the relevant fair market values by definition reflect a market estimation of future profits and development costs with respect to the particular property at issue.

Wheeler v. City of Pleasant Grove, 833 F.2d 267, 271 (11th Cir. 1987), *reh'g denied* 844 F.2d 794 (11th Cir. 1988). Accord *Nemmers v. City of Dubuque*, 764 F.2d 502 (8th Cir. 1985).

The changed regulation at issue denied Whitehead Oil its request to use its property as it formerly was permitted to do. The property, however, could still be developed for office uses. Whitehead Oil's expert witness testified that the fair market lease value of the property for retail use, if zoned B-2, would be $18,000 per year, and the fair market lease value for office use, zoned O-3, was $6,500 per year. He further opined that the damages as a result of the change of use would be the difference in the fair market lease values for the two uses, amounting to $11,500 per year.

This expert was also of the opinion that under the former B-2

zoning designation, the fair market value of the Whitehead Oil property was $183,500 for retail use. Based upon a 10-percent rate of return, the annual fair market lease value would be approximately $18,000. However, under the changed O-3 zoning designation, office development was the highest and best use, making the fair market value $91,700. However, in his view, the pending litigation regarding the appropriate zoning for the property warranted an additional deduction to $68,700.

Citing *Clearwater Corp. v. City of Lincoln*, 202 Neb. 796, 277 N.W.2d 236 (1979), the city first argues that because this expert did not possess facts enabling him to express a reasonably accurate opinion, his testimony should have been stricken, as the city moved. More specifically, the city contends that the five sales on which the witness relied in forming the basis of his opinions took place in areas zoned differently than the changed zoning designation applicable to Whitehead Oil's property. According to the city, one of the sales actually had a different zoning designation than the expert believed it had.

However, while the expert acknowledged that the zoning designation of a particular piece of property was an important factor in determining its value, he testified that when calculating the fair market value of Whitehead Oil's property, he made adjustments to each of the sales as he considered were necessary because of the relative advantages or disadvantages of the particular zoning designations. More importantly, all of the sales he used were in zoning districts which allowed commercial and retail uses, including convenience stores.

We have held:

> The requirement of similarity of compared tracts does not mean that they must be identical, but, rather, that they bear a resemblance to each other. . . . The determination of the similarity of tracts for purposes of deciding the admissibility of sales of such tracts in order to show market value of the tract taken or damaged is to be left largely to the discretion of the trial court.

Thacker v. State, 193 Neb. 817, 823-24, 229 N.W.2d 197, 202 (1975). Accord *Clearwater Corp. v. City of Lincoln*, 207 Neb. 750, 301 N.W.2d 328 (1981) (on appeal after remand from the *Clearwater Corp.* decision cited earlier herein). The expert had

an adequate basis for his opinions.

The city also argues that the expert's consideration of the fact that litigation was pending makes his valuation testimony inadmissible. We agree that there can be no pending litigation deduction as such; this element is part consideration that the use of the property has been limited to office applications. A further pending litigation deduction would in essence allow a double recovery to Whitehead Oil.

However, it is apparent that the city suffered no prejudice as a result of this error on the part of the expert, for the district court too rejected his testimony in this regard. Its award of damages of $762.50 per month equates to a $9,150 reduction in the annual lease value or a $91,500 reduction in the fair market value of the property. This is the approximate difference between the expert's estimated fair market value of $183,000 to $183,500 for retail use in a B-2 zone and the $91,700 value for office use in the O-3 zone.

The city also quarrels with the district court's receipt of damages testimony from Whitehead Oil's president and another of its officers; however, it is clear from the damages awarded that the district court did not rely on that testimony. Moreover, we, in our de novo review, ignore that testimony without determining whether the evidence should have been received. See *Nixon v. Harkins*, 220 Neb. 286, 369 N.W.2d 625 (1985) (on de novo review, appellate court ignores evidence improperly admitted over objection).

IV. ANALYSIS OF WHITEHEAD OIL'S CROSS-APPEAL

In its cross-appeal, Whitehead Oil contends that the damages awarded by the district court are inadequate, for it has not been able to put its land to any viable economic use. In its words:

> [I]t cannot be expected that any person would put the property to an office use during this litigation, unless they were willing to forever surrender their right to put the property to a retail use. It cannot be expected that a person would build an office building with the idea of demolishing or remodeling the building upon final success in the litigation. Likewise, nobody can be expected to pay

rent for the land for offices during this litigation. Brief for appellee at 50.

It is true that it would be impractical to develop the property for office uses and then destroy it or modify it for use as a convenience store which sells, among other things, gasoline. However, Whitehead Oil made the business decision that it was better to wait upon the resolution of this controversy to develop the property as a convenience store rather than put it to office uses. Under the circumstances, all Whitehead Oil is entitled to receive is compensation for the diminution in the value of its property due to the changed zoning regulation; that is, the difference in the value under the B-2 zoning designation allowing retail use and the O-3 zoning designation disallowing such uses.

V. JUDGMENT

We independently reach the conclusion that Whitehead Oil has sustained and continues to sustain damages equal to the diminished rental value of its property from the date of the city's refusal to permit use of the land as contemplated by the B-2 zoning designation. This amounts to $762.50 per month. As such damages will continue until the permit is issued, we affirm the decree of the district court, but modify it such that damages shall accrue to the date the city issues the permit Whitehead Oil seeks. As so modified, we affirm the decree of the district court and remand the cause with the direction that it enter a decree in accordance with this opinion.

AFFIRMED AS MODIFIED, AND CAUSE REMANDED WITH DIRECTION.

PHYLLIS MCDERMOTT, APPELLANT, V. PLATTE COUNTY AGRICULTURAL SOCIETY AND NEBRASKA PORK INDUSTRY EXPOSITION, INC., APPELLEES.

515 N.W.2d 121

Filed April 22, 1994. No. S-92-467.

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 the admissibility of evidence.
2. **Jury Instructions: Proof: Appeal and Error.** In an appeal based on the claim of an erroneous jury 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. **Negligence: Evidence: Trial.** Before the issue of assumption of risk may be submitted to the jury, the evidence must show that the plaintiff knew of the danger, understood the danger, and voluntarily exposed himself or herself to the danger which proximately caused the plaintiff's injury.
4. **Jury Instructions.** Notwithstanding absence of a request for a specific instruction, a trial court must instruct a jury on material or relevant issues presented by the pleadings and supported by the evidence.

Appeal from the District Court for Platte County: JOHN C. WHITEHEAD, Judge. Reversed and remanded for a new trial.

James L. Haszard, of McHenry & Flowers, for appellant.

Michael A. England and Stephen L. Ahl, of Wolfe, Anderson, Hurd, Luers & Ahl, for appellee Platte County Agricultural Society.

Gail S. Perry, of Baylor, Evnen, Curtiss, Grimit & Witt, for appellee Nebraska Pork Industry Exposition, Inc.

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

WRIGHT, J.

Phyllis McDermott sued the Platte County Agricultural Society (Ag Society) and the Nebraska Pork Industry Exposition, Inc. (Pork Exposition), for damages as a result of a personal injury which occurred when McDermott slipped and fell on ice and snow in the parking lot of Ag Park, which is owned by the Ag Society. McDermott appeals a jury verdict

rendered in favor of both defendants.

SCOPE OF REVIEW

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 the admissibility of evidence. *Kudlacek v. Fiat S.p.A.*, 244 Neb. 822, 509 N.W.2d 603 (1994).

In an appeal based on the claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant. *Kopecky v. National Farms, Inc.*, 244 Neb. 846, 510 N.W.2d 41 (1994).

ASSIGNMENTS OF ERROR

McDermott assigns as error the trial court's sustaining of the Ag Society's motion in limine, its refusal to give McDermott's proposed jury instruction regarding assumption of risk, its giving of jury instructions objected to by McDermott, and its overruling her motion for new trial.

FACTS

On February 10, 1988, McDermott drove from Lincoln to Columbus to visit the Pork Exposition, where her husband was an exhibitor. As McDermott got close to Columbus, the road conditions deteriorated. The temperature in Columbus was 10 to 12 degrees below zero, and the winds were strong.

When she arrived in Columbus, McDermott stopped for gas and observed that the sidewalks and streets were covered with patches of ice and snow. She then drove to Ag Park; parked in the lot adjacent to the exhibition hall, six or seven rows of cars away from the building; and proceeded to walk across the lot. The parking lot was covered with patches of ice and snow, and McDermott did not recall seeing any spots of bare pavement. Three people walking ahead of McDermott tried to open the door to the exposition building closest to where McDermott had parked. Those three people found that the door was locked and proceeded on the sidewalk to another door at the opposite end of the building. When she saw the people headed toward

the other door and before she reached the sidewalk, McDermott changed direction and also headed for the other door. She stepped back out of the way to allow two approaching trucks to pass and then stepped forward again, onto snow which concealed ice on the pavement. McDermott slipped and fell, breaking her ankle. She stated that she saw no bare pavement on either side of the spot where she fell.

On the morning of the accident, Frank Zuroski, Ag Park grounds superintendent, arrived shortly before 7 o'clock. Zuroski spread approximately 50 pounds of salt on the sidewalk on the north and west sides of the building and scattered sand on top of the salt. No sand or salt was spread on the parking lot before McDermott's accident. Zuroski stated that the city of Columbus would plow the parking lot if requested after first plowing the streets, hospital grounds, and school grounds, although the city usually plowed Ag Park automatically. He also stated that the city would have plowed the parking lot if it was an emergency. Zuroski had not called the city before the accident. Although Zuroski called the city for assistance after the accident, he stated that he did not know if sanding the parking lot would have helped the traction before the accident because it was too windy.

ANALYSIS

McDermott claims that she should have been allowed to present evidence of the subsequent remedial measures of sanding and salting the parking lot to show that the measures were feasible and to impeach Zuroski's testimony. The admission of evidence is controlled by the rules of evidence and not by judicial discretion, except in those instances under the evidence rules when judicial discretion is a factor involved in the admissibility of evidence. *Kudlacek v. Fiat S.p.A.*, 244 Neb. 822, 509 N.W.2d 603 (1994).

Neb. Rev. Stat. § 27-407 (Reissue 1989) provides in part:

> When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the

> exclusion of evidence of subsequent measures when offered for another purpose, such as . . . feasibility of precautionary measures, if controverted, or impeachment.

Thus, the evidence that the parking lot was sanded and salted would be admissible if feasibility was controverted or if the evidence was offered for purposes of impeachment.

In this case, it is not disputed that sand and salt could have been placed on the parking lot prior to the accident. Zuroski testified that he applied salt to the sidewalks early in the morning. He said the wind blew away much of the sand placed on the sidewalks, although the sand that remained helped improve traction.

The question is whether Zuroski's claim that sanding in the parking lot would not have improved traction because it was too windy allows McDermott to introduce into evidence testimony concerning the subsequent sanding and salting of the parking lot because feasibility was controverted.

In *Kurz v. Dinklage Feed Yard, Inc.*, 205 Neb. 125, 286 N.W.2d 257 (1979), the court held that § 27-407 permits evidence of subsequent measures to show precautionary measures if the feasibility is controverted. Feasibility, as used under § 27-407, means more than capable of being done. It includes effectiveness and practicality. *Kurz v. Dinklage Feed Yard, Inc., supra.* In *Kurz*, the evidence showed that the fences which were erected at the defendant's feedlot were adequate to contain the cattle under normal conditions, but during a heavy snowstorm, snow would drift around the fences and permit the cattle to escape over the top. Evidence showed that this condition should have been anticipated and could have been avoided by the construction of higher fences and the erection of windbreaks and snow fences. The defendant's manager testified that snow fences would not have been effective to prevent the escape of cattle and that snow fences were dangerous and impractical. The court held that evidence that the defendant erected snow fences after the snowstorm was admissible as tending to show that the testimony of the defendant's manager was untrue and that snow fences were feasible as a precautionary measure.

In this case, the fact which determines the admissibility of the subsequent sanding and salting by the city is whether the feasibility of such actions was controverted. McDermott's offer of proof stated that Zuroski would testify that he called the city immediately after McDermott's fall, that city workers arrived 10 to 15 minutes later and applied sand and salt to the parking lot, and that such application improved the traction. McDermott also contends that Zuroski's testimony implied that the city would not have sanded the lot prior to her fall unless it was an emergency. She argues that the excluded evidence would have impeached Zuroski's testimony that spreading sand would not have helped traction and that the city would not have responded to his call to sand the lot unless it was an emergency. McDermott points out that the jury could have found that the defendants were not negligent because they could not have sanded the lot prior to McDermott's fall or because the sand would have been ineffective. She contends that the excluded evidence contradicts both of those defenses and that, therefore, the failure to allow such evidence was prejudicial.

The defendants rely upon *Wollenhaupt v. Andersen Fire Equip. Co.*, 232 Neb. 275, 440 N.W.2d 447 (1989). *Wollenhaupt*, although setting forth the reasoning for the inadmissibility of subsequent remedial measures, is not on point. In *Wollenhaupt*, no evidence was offered concerning any subsequent conduct by the defendant which could be found to be a remedial measure or a subsequent precaution. Wollenhaupt was injured when a machine used in the printing process caught fire. He was standing to the side of the machine, which used a highly flammable substance, when the fire began. An automatic fire protection system did not automatically operate, although a fire several months earlier had been extinguished by the automatic system and no one had been injured. The district court refused to admit evidence relating to another fire which occurred after Wollenhaupt was injured. Wollenhaupt and his employer's offer of proof was intended to show that the automatic system had not been altered between the last two fires. We held that because no modification or added safety measures were taken between the last two fires, the use of § 27-407 to exclude evidence of the subsequent fire was

error. *Wollenhaupt* is not applicable to the facts here because subsequent measures were taken.

Zuroski's testimony placed the subsequent remedial measures in issue. The feasibility of sanding and salting the parking lot became controverted as a result of the following exchange:

> Q. Would it have been feasible to put sand and gravel on the parking lot that morning prior to the time that Mrs. McDermott fell on the lot?
>
> . . . .
>
> A. I don't think it would have done any good right at the present.
>
> . . . .
>
> A. Because it was too windy to hold the salt down . . . the sand was even blowing.

The defendants misconstrue the term "feasibility." Feasibility is not determined by whether the sand and salt could have been placed on the parking lot. The fact that it was possible to sand and salt the parking lot was not controverted. The controversy was whether the sand and salt would have been of any benefit. See *Kurz v. Dinklage Feed Yard, Inc.*, 205 Neb. 125, 286 N.W.2d 257 (1979). The determination of feasibility includes a consideration of whether an action would have been effective and practical. *Id.*

Evidence of the subsequent application of sand and salt was admissible to show that the measure was effective and that the city would have assisted even in the absence of an emergency. The trial court erred in failing to allow the testimony concerning the subsequent sanding and salting of the lot.

McDermott also claims that the jury was incorrectly instructed on assumption of risk because the jury was not instructed that the defendants' conduct in placing her in such a position was an issue that the jury could consider. McDermott argues that the instruction as given allowed the jury no choice but to find the claim was barred because McDermott assumed the risk. The court instructed the jury that the defendants had the burden to prove: "1. That the plaintiff knew of and understood the danger; 2. That the plaintiff voluntarily exposed herself to that danger; and 3. That the plaintiff's injury

occurred as a result of her exposure to that danger." McDermott's motion for a directed verdict on assumption of risk was overruled, and she objected to any instruction on assumption of risk.

Before the issue of assumption of risk may be submitted to the jury, the evidence must show that the plaintiff knew of the danger, understood the danger, and voluntarily exposed himself or herself to the danger which proximately caused the plaintiff's injury. *Grote v. Meyers Land & Cattle Co.*, 240 Neb. 959, 485 N.W.2d 748 (1992). Assumption of risk is predicated upon the plaintiff's voluntary exposure to the known danger caused by the defendant's negligence. *Sikyta v. Arrow Stage Lines*, 238 Neb. 289, 470 N.W.2d 724 (1991).

One assumes the risk when one knows of the danger and voluntarily acquiesces in it. See W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 32 (5th ed. 1984). "[E]xcept where he expressly so agrees, a plaintiff does not assume a risk of harm arising from the defendant's conduct unless he then knows of the existence of the risk and appreciates its unreasonable character, or the danger involved, including the magnitude thereof, and voluntarily accepts the risk." *Jensen v. Hawkins Constr. Co.*, 193 Neb. 220, 226, 226 N.W.2d 346, 350-51 (1975).

McDermott knew of the danger created by the ice and snow covering the parking lot. She exposed herself to the danger which proximately caused her injury. She exited her car, proceeded to walk across an icy parking lot, and ultimately slipped and fell.

In each case we must apply a subjective standard based upon the particular facts and circumstances of the event. " 'The standard to be applied is a subjective one, of what the particular plaintiff in fact sees, knows, understands and appreciates. In this it differs from the objective standard which is applied to contributory negligence.' " *Makovicka v. Lukes*, 182 Neb. 168, 171, 153 N.W.2d 733, 735 (1967), quoting Restatement (Second) of Torts § 496 D, comment *c.* (1965).

> "(1) A plaintiff does not assume a risk of harm unless he voluntarily accepts the risk. (2) The plaintiff's acceptance of a risk is not voluntary if the defendant's tortious

> conduct has left him no reasonable alternative course of conduct in order to (a) avert harm to himself or another, or (b) exercise or protect a right or privilege of which the defendant has no right to deprive him."

Makovicka, 182 Neb. at 170-71, 153 N.W.2d at 735, quoting the Restatement, *supra*, § 496 E. "If the person against whom the doctrine is applied is deprived of a choice in the matter, the risk is not assumed, although it may be encountered." *Schwab v. Allou Corp.*, 177 Neb. 342, 352, 128 N.W.2d 835, 841 (1964).

McDermott argues that the court should have given the following instruction: "A plaintiff does not assume a risk of harm unless he or she voluntarily accepts the risk. A plaintiff's acceptance of a risk is not voluntary if the defendant's conduct has left plaintiff no reasonable alternative course of conduct in order to avert harm to plaintiff."

In *Carnes v. Weesner*, 229 Neb. 641, 428 N.W.2d 493 (1988), we held that it was not prejudicial error to give an instruction like the one McDermott requested. Carnes, who had taken her 12-year-old daughter to the orthodontist for a monthly appointment, fell on the ice and snow in the dental office parking lot. Carnes noticed when she arrived that the lot was icy and slippery, and she warned her daughter to be careful. When she returned to the car following the appointment, she slipped and injured herself. The defendants objected to an instruction similar to that requested by McDermott. We found that the trial court did not abuse its discretion in giving the instruction. Carnes had undergone substantial inconvenience and financial expense to go to the orthodontic office. We held that it was not prejudicial error to instruct the jury to consider whether the defendants' conduct had left the plaintiff with a reasonable course of conduct alternative to returning to her car and that the jury was properly instructed on the issue of assumption of risk. We did not hold that the court was required to give such an instruction.

Here, the trial court refused to give McDermott's instruction because it found that the evidence did not support the instruction. McDermott argues that based on the evidence, the jury should have been instructed to consider whether the defendants left her with a reasonable alternative course of

conduct when she arrived at Ag Park and found the parking lot covered with ice and snow.

We find that McDermott's proposed instruction relating to assumption of risk should have been given and that it was prejudicial error to refuse to give it. In an appeal based on the claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant. *Kopecky v. National Farms, Inc.*, 244 Neb. 846, 510 N.W.2d 41 (1994). "Notwithstanding absence of a request for a specific instruction, a trial court must instruct a jury on material or relevant issues presented by the pleadings and supported by the evidence." *Anderson v. Union Pacific RR. Co.*, 229 Neb. 321, 333, 426 N.W.2d 518, 525 (1988). The doctrine of assumption of risk applies only when the danger is known and the risk therefrom is appreciated and voluntarily accepted. *Bray v. Kate, Inc.*, 235 Neb. 315, 454 N.W.2d 698 (1990).

Whether McDermott's actions were voluntary is a material issue of fact presented by the pleadings and the evidence, and the court should have so instructed the jury. Whether the defendants' conduct left McDermott with a reasonable alternative course of conduct was a question of fact that was presented by the evidence. It may be that McDermott, upon finding the parking lot covered with ice and snow, should have returned to Lincoln or, upon seeing that the first door was locked, should have proceeded directly to the sidewalk. It may be that she was left with no reasonable alternative because the parking lot had not been sanded or salted. Whether there existed a reasonable and adequate alternative course of conduct depends upon all relevant factors that would affect the decision of a reasonable person under the circumstances.

Under the facts in this case, McDermott's requested instruction should have been given to permit the jury to determine whether McDermott voluntarily accepted the danger by exiting her car and walking on the snow-covered and icy parking lot toward the building. In Nebraska, winter snow and ice are a fact of life, and one does not automatically assume the risk by walking across a snow- or ice-covered parking lot.

McDermott was denied the substantial right of having the jury decide whether she voluntarily assumed the risk. As a result, she was denied her right to a fair trial on her negligence claim.

The record shows that McDermott objected to the last paragraph of instruction No. 21 because it had already been stated and therefore received additional emphasis. Instruction No. 21 states in part: "Remember, throughout your deliberations you must not engage in any speculation, guess, or conjecture and you must not award any damages by way of punishment or through sympathy." Instruction No. 22 repeated the same elements. Since the jury found against McDermott on the issue of liability, the jury did not have to consider instructions Nos. 21 and 22, and therefore, we do not address this assignment of error except to note that a jury does not need to be told more than once that an award of damages cannot be speculative.

For the reasons set forth in this opinion, we reverse the judgment and remand the cause for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

MARK MURPHY, APPELLANT, V. CITY OF LINCOLN, NEBRASKA, APPELLEE.

515 N.W.2d 413

Filed April 22, 1994. No. S-92-949.

1. **Contracts.** In construing contracts, a court as a matter of law must first determine whether the contract is ambiguous.
2. **Judgments: Appeal and Error.** Regarding a question of law, a reviewing court has an obligation to reach its conclusion independent from the conclusion reached by the court below.
3. **Contracts: Words and Phrases.** An instrument is ambiguous if a word, phrase, or provision in the instrument has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings.
4. **Contracts.** A determination as to whether ambiguity exists in a contract is to be made on an objective basis, not by the subjective contentions of the parties; thus, the fact that the parties to a document have or suggest opposing

interpretations of the document does not necessarily, or by itself, compel the conclusion that the document is ambiguous.

5. _____. The terms of a contract are to be accorded their plain and ordinary meaning as ordinary, average, or reasonable persons would understand them.
6. _____. A contract written in clear and unambiguous language is not subject to interpretation or construction and must be enforced according to its terms.

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

Jane E. Burke for appellant.

William F. Austin, Lincoln City Attorney, and Don W. Taute for appellee.

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

CAPORALE, J.

In this contract action, the plaintiff-appellant, Mark Murphy, seeks to recover overtime pay from the defendant-appellee, City of Lincoln, Nebraska, under the terms of the applicable collective bargaining agreement. The district court affirmed the denial of the grievance Murphy filed with the City of Lincoln Personnel Board. He then appealed to the Nebraska Court of Appeals, asserting that the district court erred in, among other things, determining that the agreement was ambiguous and thus was subject to interpretation. We removed the matter to this court in order to regulate the caseloads of the appellate courts. Murphy's aforesaid claim of error having merit, we reverse the judgment of the district court and remand the cause with direction.

Murphy is a full-time regular employee of the city's emergency communications center. So far as is relevant to our purposes, there are two types of regular city employees under the agreement: exempt and nonexempt. Exempt employees do not receive overtime pay. Nonexempt employees who work in excess of 40 hours per workweek, which extends from Thursday through the following Wednesday, do receive overtime pay and are further divided into shift and nonshift workers. A nonshift employee typically works 8 hours per day on an 8 a.m. to 5 p.m.

schedule and does not normally work on Saturdays, Sundays, and specified legal, that is, paid, holidays. In contrast, a shift employee's hours are scheduled in 8-hour shifts, including Saturdays, Sundays, and paid holidays, so that departments which are required to operate around the clock each and every day may be properly staffed. Murphy is a nonexempt shift employee who, during the week in question, worked 40 hours consisting of five 8-hour days, Thursday, May 23, through Monday, May 27, 1991. Being Memorial Day, Monday was a paid holiday under the agreement.

In his grievance, Murphy asserted that under the agreement, he was entitled to overtime pay for the 8 hours he worked on the Memorial Day holiday.

The pertinent provision of the agreement in question reads:

> Work performed by non-exempt employees in excess of forty (40) hours per work week (Thursday through the following Wednesday) shall be compensated at the rate of one and one-half (1 1/2) times the hourly rate of the employee. Overtime shall be paid only for those hours actually worked. Any payment for time not worked (i.e., paid leave time) shall not count toward the forty (40) hour work week for overtime purposes, except legal holiday pay, which will count toward hours worked in determining overtime.

Murphy contends that the foregoing language is "clear and precise," brief for appellant at 21, and applies to all nonexempt employees, shift and nonshift alike. On the other hand, the city argues that the provision in question is ambiguous, urging that the language was intended to apply only to nonshift workers.

In construing contracts, a court as a matter of law must first determine whether the contract is ambiguous. *Plambeck v. Union Pacific RR. Co.*, 244 Neb. 780, 509 N.W.2d 17 (1993); *Metropolitan Life Ins. Co. v. Beaty*, 242 Neb. 169, 493 N.W.2d 627 (1993); *Professional Serv. Indus. v. J.P. Construction*, 241 Neb. 862, 491 N.W.2d 351 (1992); *Husen v. Husen*, 241 Neb. 10, 487 N.W.2d 269 (1992). Regarding a question of law, a reviewing court has an obligation to reach its conclusion independent from the conclusion reached by the court below. *Plambeck, supra*; *Gables CVF v. Bahr, Vermeer & Haecker*

Architect, 244 Neb. 346, 506 N.W.2d 706 (1993); *Home Fed. Sav. & Loan v. McDermott & Miller*, 243 Neb. 136, 497 N.W.2d 678 (1993); *Metropolitan Life Ins. Co., supra*; *Professional Serv. Indus., supra*; *Husen, supra*.

An instrument is ambiguous if a word, phrase, or provision in the instrument has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings. *Plambeck, supra*; *Metropolitan Life Ins. Co., supra*; *Husen, supra*. See, *Lone Oak Farm Corp. v. Riverside Fertilizer*, 229 Neb. 548, 428 N.W.2d 175 (1988) (contract is ambiguous when, considered as a whole, it is capable of being understood in more senses than one); *National Farmers Union Serv. Corp. v. Edwards*, 220 Neb. 231, 369 N.W.2d 76 (1985) (document is ambiguous if, after application of pertinent rules for construction, there is uncertainty concerning which of two or more reasonable meanings represents intention of parties). A determination as to whether ambiguity exists in a contract is to be made on an objective basis, not by the subjective contentions of the parties; thus, the fact that the parties to a document have or suggest opposing interpretations of the document does not necessarily, or by itself, compel the conclusion that the document is ambiguous. *Metropolitan Life Ins. Co., supra*; *Bedrosky v. Hiner*, 230 Neb. 200, 430 N.W.2d 535 (1988); *Lueder Constr. Co. v. Lincoln Electric Sys.*, 228 Neb. 707, 424 N.W.2d 126 (1988). We have said, in the context of a decree:

> [T]he fact is that neither what the parties thought the judge meant nor what the judge thought he or she meant, after time for appeal has passed, is of any relevance. What the decree, as it became final, means as a matter of law as determined from the four corners of the decree is what is relevant.

Neujahr v. Neujahr, 223 Neb. 722, 728, 393 N.W.2d 47, 50-51 (1986).

The terms of a contract are to be accorded their plain and ordinary meaning as ordinary, average, or reasonable persons would understand them. *Elson v. Pool*, 235 Neb. 469, 455 N.W.2d 783 (1990); *Crowley v. McCoy*, 234 Neb. 88, 449 N.W.2d 221 (1989); *Bedrosky, supra*.

Those rules make untenable the city's contention that the quoted language is ambiguous. There is nothing in the language which even remotely distinguishes between shift and nonshift employees.

During the workweek in question, Murphy actually worked a total of 40 hours. The time report reflects that for those 40 hours, the city paid Murphy at regular pay for a total of 48 hours: the 40 hours he worked, plus an additional 8 hours attributed to the holiday which fell during the week.

While the last two sentences of the pertinent provision may be awkwardly written, they nonetheless unambiguously declare that while overtime is to be paid only for time actually worked, so that paid leave time does not count toward the 40-hour workweek, holiday pay does count toward the "hours worked in determining overtime." Consequently, Murphy is entitled to regular pay for the 40 hours he worked, including the 8 hours he worked on the holiday. The additional 8 hours were earned not because he worked, but because he was entitled to holiday pay.

A contract written in clear and unambiguous language is not subject to interpretation or construction and must be enforced according to its terms. *Elson, supra*; *Bedrosky, supra*. See, *Delicious Foods Co. v. Millard Warehouse*, 244 Neb. 449, 507 N.W.2d 631 (1993) (if language used in document is unambiguous, intent of parties must be gathered from contents of document alone); *Professional Serv. Indus. v. J.P. Construction*, 241 Neb. 862, 491 N.W.2d 351 (1992) (where contract is unambiguous, look to contents of contract and not to party's understanding or belief). We must also keep in mind that there is a strong presumption that a written instrument correctly expresses the intention of the parties to it. *Artex, Inc. v. Omaha Edible Oils, Inc.*, 231 Neb. 281, 436 N.W.2d 146 (1989); *Bedrosky, supra*.

By the terms of the agreement, the 8 holiday pay hours count toward the number of hours used to determine whether overtime is to be paid. Since Murphy accumulated credit for a total of 48 hours to be counted toward overtime during the workweek in question, the holiday pay hours are to be compensated at the overtime rate.

This may not be the bargain the city intended to strike, but it

is bound by the agreement it made, not the agreement it thought or hoped it had made. *Husen v. Husen*, 241 Neb. 10, 487 N.W.2d 269 (1992) (although one may be dissatisfied with bargain, it is not for court to rewrite contract).

Accordingly, we reverse the judgment of the district court and remand with the direction that the district court remand the cause to the personnel board with the direction that it act upon Murphy's grievance in accordance with this opinion.

REVERSED AND REMANDED WITH DIRECTION.

DOUBLE K, INC., A NEBRASKA CORPORATION, DOING BUSINESS AS KING'S BALLROOM, APPELLANT, V. SCOTTSDALE INSURANCE COMPANY, AN ARIZONA CORPORATION, APPELLEE.

515 N.W.2d 416

Filed April 22, 1994. No. S-92-1005.

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. 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.
2. **Principal and Agent: Proof.** The burden is upon the party alleging the existence of an agency relationship to prove that the agent's authority and the agent's acts, for which liability against the principal is sought, are within the scope of the agent's authority.
3. **Principal and Agent: Words and Phrases.** Apparent or ostensible authority is the power which enables a person to affect the legal relationships of another with third persons, professedly as agent for the other, from and in accordance with the other's manifestations to such third persons.
4. **Principal and Agent: Liability.** The apparent authority or agency for which a principal may be liable must be traceable to the principal and cannot be established by the acts, declaration, or conduct of the agent.
5. **Summary Judgment: Proof.** The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment

as a matter of law if the evidence presented for summary judgment remains uncontroverted.

6. _____: _____. After a party moving for summary judgment has shown facts entitling it to judgment as a matter of law, the opposing party has the burden to present evidence showing an issue of material fact which prevents a judgment as a matter of law for the moving party.

Appeal from the District Court for Madison County: ROBERT B. ENSZ, Judge. Affirmed.

Mark A. Johnson, of The Law Offices of Mark A. Johnson, and Scott Freese, of Hutton, Freese & Einspahr, P.C., for appellant.

Daniel D. Jewell, of Jewell, Gatz, Collins, Fitzgerald & DeLay, for appellee.

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

WRIGHT, J.

Double K, Inc., doing business as King's Ballroom (Double K), sued Scottsdale Insurance Company (Scottsdale) seeking recovery for a fire loss suffered April 3, 1986. Double K alleged that its multiperil insurance contract had been extended for an additional year by a binder issued by an independent agent who was the apparent or ostensible agent of Scottsdale at the time the binder was issued. Summary judgment was granted for Scottsdale, and Double K appeals.

SCOPE 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. 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. *Hawkins Constr. Co. v. Reiman Corp., ante* p. 131, 511 N.W.2d 113 (1994); *Dugan v. Jensen*, 244 Neb. 937, 510 N.W.2d 313 (1994).

FACTS

In June 1984, Double K purchased from Scottsdale a fire and casualty insurance policy covering the personal property inside King's Ballroom. The policy was purchased through Roger Hanson, a licensed insurance agent, and through the Scribner Insurance Agency (Scribner). The policy was to provide coverage in the amount of $76,000 and was to run from June 6, 1984, to June 6, 1985.

On June 6, 1985, Hanson issued to Double K an insurance binder which purportedly extended the coverage on the policy. Double K alleged that the binder was signed by Hanson as an agent and authorized representative of Scottsdale. Double K also alleged that when it received the binder, the premium was not stated thereon and was not paid because Hanson had told Double K that a refund due from another insurance policy would be applied to the renewal premium on the personal property policy.

In December 1985, Hanson sold all interest in his business to Sirek Agency, Inc., doing business as Town & Country Agency (Town & Country). Town & Country held a resident agent's license and was licensed to place insurance upon risks located in Nebraska through nonadmitted insurance companies acting as a surplus-lines agent.

On April 3, 1986, fire destroyed Double K's personal property, resulting in a loss exceeding $76,000. Town & Country notified Scottsdale, which disclaimed any liability and claimed that Hanson had no authority to issue the binder on Scottsdale's behalf. As a result, Double K sued to recover on the policy.

Double K alleged that Scottsdale, a nonadmitted insurance company, did business in Nebraska through its general agent, Diversified X/S Underwriters (Diversified). Double K further alleged that after Hanson sold all his interest in the insurance business to Town & Country, Double K was told by Town & Country that the agency had a binder.

Double K alleged that Hanson had authority as an agent in fact of Scottsdale to issue the binder by virtue of the following: (1) Double K paid its premium by and through Hanson; (2) Scottsdale failed to notify Double K that Hanson was not its agent or agent in fact; (3) by Double K's directing all

communication by and between Scottsdale and Double K through Hanson, Double K was led to believe by Double K's acts that Hanson was an agent of Scottsdale; and (4) by Scottsdale's failure to personally notify Double K of the cancellation of the policy, Double K was further led to believe it had coverage obtained through Hanson. Double K alleged that Hanson had implied and apparent authority to issue the binder on behalf of Scottsdale and that Scottsdale was estopped to deny otherwise.

The district court found that Hanson was at no time advised by anyone that he could issue a binder, that Hanson did not issue the binder, and that Hanson was not an agent of Scottsdale, nor was there any apparent authority on behalf of Hanson to act as an agent for Scottsdale. The court found that Hanson, not Scottsdale, led Marvin Konopasek, Double K's founder, to believe that Hanson had authority to act for Scottsdale. The court concluded that Hanson's apparent authority was not traceable to Scottsdale, and there was no evidence that any of Hanson's acts concerning the issuance of the written binder were traceable to Scottsdale.

ASSIGNMENT OF ERROR

Double K alleges the district court erred in sustaining Scottsdale's motion for summary judgment.

ANALYSIS

Because this is an appeal from an award of summary judgment, we are required to view the evidence in a light most favorable to Double K and give it the benefit of all reasonable inferences deducible from the evidence. See *Hawkins Constr. Co. v. Reiman Corp., ante* p. 131, 511 N.W.2d 113 (1994). Double K claims that Scottsdale and its agents allowed Double K to believe that Hanson was an agent for Scottsdale and that, therefore, the binder issued by Hanson was effective to provide coverage for the loss from the fire.

Double K must prove that Hanson had authority to provide the binder. The burden is upon the party alleging the existence of the agency relationship to prove that the "agent's authority and the agent's acts, for which liability against the principal is sought, are within the scope of the agent's authority." *Wolfson*

Car Leasing Co., Inc. v. Weberg, 200 Neb. 420, 426, 264 N.W.2d 178, 182 (1978). See, also, *Western Fertilizer v. BRG*, 228 Neb. 776, 424 N.W.2d 588 (1988).

Double K purchased the multiperil policy for the period of June 6, 1984, to June 6, 1985. Hanson had previously handled Double K's renewal and financing of premiums for a similar policy carried through the Mission Insurance Companies, which policy had been canceled during its term for underwriting reasons. In 1984, Hanson asked Scribner to obtain this type of policy for Double K. Scribner contacted Diversified, a brokerage firm which placed hard-to-write insurance and represented companies which were not licensed to do business in Nebraska. Diversified found the policy available through Scottsdale, which was not admitted to sell insurance in Nebraska. Scribner received a quote from Diversified and asked that the coverage be bound effective June 6, 1984. Diversified requested a completed application, which was received from Scribner on June 21, 1984.

Scribner received the original policy and an agent's copy which showed the agent's name as Diversified. Scribner forwarded the bill and policy to Hanson, who delivered the policy to Konopasek. Hanson then arranged for financing of the premium, which amounted to $3,791.30.

In February 1985, Hanson sold the casualty portion of his insurance business to Town & Country, but the sale did not include the policy covering King's Ballroom, which policy was still owned by Scribner. Subsequently, Hanson received a renewal form from Scribner which asked for a breakdown of the sales at the ballroom. Konopasek verbally provided that information to Hanson, who transferred it to a request form which he returned to Scribner. Hanson stated that he assumed Scribner would send the form to Diversified, which would then forward it to Scottsdale.

Scribner received a letter dated April 17, 1985, from Diversified regarding the renewal of the policy. Scribner sent the application to Hanson, advising him that a completed application was needed to obtain a quote for the premium for renewal of the policy. When Scribner did not receive the completed application from Hanson, it sent a second notice

asking for the completed application before June 6, 1985. No response was received from Hanson. Scribner then received a letter from Diversified stating that the coverage had expired, its file had been closed, and an audit was scheduled to follow. Scribner wrote to Hanson, stating that because it assumed that Hanson had written the policy with another company, the Scribner file was being closed.

Hanson then issued the binder in question effective June 6, 1985. The binder was signed by Hanson, but was not dated. Hanson stated that he provided a copy of the binder to Konopasek, but a copy was never sent to Scribner.

Hanson never received a policy subsequent to the 1984-85 policy, and he had no further communication with Scribner about the policy. Hanson stated he never had any oral or written communication with Scottsdale or Diversified about renewing the policy for 1985-86.

Hanson testified that he had no agency or brokerage agreement with Scottsdale or Diversified, and although he had an agreement with Scribner, he had no copy of it. Scribner had a written agreement with Hanson to pay him a percentage of the commission for any business written by Hanson, who was treated as an independent agent and was not considered an employee of Scribner's. Hanson admitted that there was no valid binder issued on the policy, nor was there a certificate of insurance issued to Double K for the coverage in question.

Scribner never received a completed renewal application from Hanson, a binder for the renewal policy, or a premium for the renewal year. Scribner did not apply for a renewal through Diversified, did not have any direct contact with Scottsdale, and did not receive a notice of cancellation on the policy from Diversified or Scottsdale. Konopasek, who owned only the personal property in the ballroom, testified that he had little direct contact with Hanson and that he did not know if he had seen the policy. He believed that he had seen the June 6, 1985, binder when Hanson gave it to him. Konopasek stated that Double K did not pay a premium for 1985-86 because it never received a premium notice or a policy. Scottsdale had not notified Double K that the insurance had lapsed, and Konopasek believed the policy was good because a copy of the

binder should have gone to Scottsdale. He did not remember with whom he filed the fire claim. Konopasek stated he was under the impression and belief that Hanson, through Scribner, had a grant of authority from Scottsdale to bind the insurance coverage.

The associate vice president in charge of Scottsdale's general commercial property department explained that Scottsdale operates through managing general agencies. Scottsdale gives the general agencies written binding authority via contracts to issue policies in states where it is not admitted. In Nebraska, Diversified is an authorized agent of Scottsdale. Neither Scribner nor Hanson was licensed as a general agent for Scottsdale in Nebraska. Scottsdale had no records to show that the policy was renewed after June 1985. Only Diversified had the authority to issue a binder, and it did not have the authority to appoint Hanson to issue the binder.

On April 17, 1985, when Diversified sent Scribner an application form for renewal of the policy in question, Diversified stated that if it did not hear from Scribner, the coverage would expire and Diversified would close its file. The same letter was sent on May 16. On June 6, Diversified sent Scribner a copy of the April 17 letter which included the May 16 reminder and a note saying that the file had been closed and an audit would follow. In the audit, which was ordered on August 15, the auditor reported that Konopasek stated he had dropped the policy as of June 1, 1985. The auditor stated that he attempted to complete the audit, but Konopasek told the auditor that Double K had dropped the policy and that he would not provide any further information because he no longer had the policy. The auditor returned the worksheet as an incomplete audit.

In March 1986, Diversified received an application from Town & Country asking for a policy for Double K. On April 1, Diversified notified Town & Country that it was declining to offer a quote because Diversified had previously written insurance for Double K and the owner had been uncooperative in providing audit information. On April 8, Diversified received a note from Town & Country referring to a binder dated June 6, 1985, and Diversified notified Town & Country

that it had no knowledge of the binder, which was not authorized by Diversified or Scottsdale, and that the policy had expired June 6, 1985, and had not been renewed.

The record contains certificates from Nebraska's Department of Insurance which state that neither Scribner nor Hanson ever held a surplus-lines license and that Arnold Gebers, an employee of Scribner, and Hanson were not licensed as surplus-lines agents. Hanson was not licensed to sell insurance for Scottsdale or Diversified.

Summary judgment in this case is proper if the evidence shows no genuine issue of material fact as to whether Hanson had authority or apparent authority to issue the binder which Double K alleges led it to believe it was covered. There is no material issue of fact as to whether Hanson had actual authority from Scottsdale to issue the binder. Hanson stated he had no agency agreement with Scottsdale or Diversified and admitted that no valid binder was issued on the policy and that a certificate of insurance was not issued to Double K.

We address whether Hanson had any apparent authority to issue the binder. In *Corman v. Musselman*, 232 Neb. 159, 167, 439 N.W.2d 781, 787 (1989), we held:

> Apparent or ostensible authority is the power which enables a person to affect the legal relationships of another with third persons, professedly as agent for the other, from and in accordance with the other's manifestations to such third persons. A party who has knowingly permitted others to treat one as her or his agent is estopped to deny the agency. . . . Apparent authority is such authority as the agent seems to have by reason of the authority she or he actually has. A principal is bound by, and liable for, the acts which an agent does within her or his actual or apparent authority.

(Citation omitted.)

The evidence shows that Hanson had no apparent or ostensible authority to issue the binder or to lead Double K to believe that the policy had been renewed. Apparent or ostensible authority "may be conferred if the alleged principal affirmatively, intentionally, or by lack of ordinary care causes third persons to act upon the apparent authority." *Id.* The

alleged principal in this case, Scottsdale, took no affirmative or intentional action to cause Double K to act upon Hanson's alleged authority. "[T]he apparent authority or agency for which a principal may be liable must be traceable to the principal and cannot be established by the acts, declaration, or conduct of the agent." *Id.* Double K has failed to establish that Hanson's actions could be traced to Scottsdale.

Double K's witnesses stated that they never received a copy of the renewal policy, nor did Double K pay a premium for the policy. "The continuance of the insurer's obligation is conditional upon the payment of premiums, so that no recovery can be had upon a lapsed policy, the contractual relation between the parties having ceased." *Struve Enter. v. Travelers Ins. Co.*, 243 Neb. 516, 520, 500 N.W.2d 580, 584 (1993). Accord *Baker v. St. Paul Fire & Marine Ins. Co.*, 240 Neb. 14, 480 N.W.2d 192 (1992). "The burden is on an insured to keep a policy in force by the payment of premiums, rather than on the insurer to exert every effort to prevent the insured from allowing a policy to lapse through a failure to make premium payments." *Struve Enter.*, 243 Neb. at 520, 500 N.W.2d at 584.

Hanson was an independent insurance agent licensed to write insurance for several agencies, but Scottsdale was not one of those agencies. The evidence here supports a finding that Hanson was acting as an insurance broker. He served as a middleman between Double K and Scottsdale, was not employed by any specific company, and placed insurance with a company selected by himself. In *Moore v. Hartford Fire Ins. Co.*, 240 Neb. 195, 200-01, 481 N.W.2d 196, 200 (1992), we held:

> [A]n insurance salesman who solicits business for more than one company, with no power to bind a specific insurer without its permission, and who is asked by the client to procure coverage from whomever possible at the lowest price, is not the agent of the insurer selected, even if he uses application forms or advertising decals with that insurer's name. *Motors Ins. Co. v. Bud's Boat Rental, Inc.*, 917 F.2d 199 (5th Cir. 1990) (applying Louisiana law).

. . . .

> . . . [A]s a matter of law, the failure of an independent insurance broker to provide coverage requested by a client is not imputable to the insurer issuing the policy.

It is undisputed that Double K paid no premium, no renewal policy was issued, and no certificate of insurance was issued. Konopasek told an auditor that he had dropped the policy in June 1985. The actions of Hanson in attempting to bind Scottsdale to provide coverage are not imputable to Scottsdale. No evidence shows that Hanson had any actual or apparent authority to act, and there exists no material question of fact on this issue. The trial court properly granted summary judgment for Scottsdale.

Double K attempts to argue that Scottsdale should be estopped from denying coverage because its actions led Double K to believe that it had insurance. In order for Double K to establish a ground of recovery based on equitable estoppel, it must first establish the existence of the elements of estoppel. See *Perry v. Esch*, 240 Neb. 289, 481 N.W.2d 431 (1992). The first element Double K must establish is that Scottsdale engaged in conduct which amounted to a false representation or concealment of material facts or at least was calculated to convey the impression that the facts were otherwise than or inconsistent with those which Scottsdale now attempts to assert. There is no evidence that Scottsdale or any of its agents had actual contact with any representative of Double K. No evidence indicates that Scottsdale took any actions which were intended to convey to Double K that there was a valid binder issued for insurance. Since Double K cannot establish the first essential element of estoppel, we need not consider whether any other elements of estoppel are present. Each element of equitable estoppel must be proved by clear and convincing evidence. *Commerce Sav. Scottsbluff v. F.H. Schafer Elev.*, 231 Neb. 288, 436 N.W.2d 151 (1989).

The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law if the evidence presented for summary judgment remains uncontroverted.

Howard v. State Farm Mut. Auto. Ins. Co., 242 Neb. 624, 496 N.W.2d 862 (1993). After the moving party has shown facts entitling it to judgment as a matter of law, the opposing party has the burden to present evidence showing an issue of material fact which prevents a judgment as a matter of law for the moving party. *Healy v. Langdon, ante* p. 1, 511 N.W.2d 498 (1994). Double K has not met this burden, and we find that the trial court was correct in granting summary judgment to Scottsdale on the issues of agency and estoppel.

The decision of the trial court is affirmed.

AFFIRMED.

WHITE, J., participating on briefs.

DARREL STEENBLOCK, APPELLEE, V. ELKHORN TOWNSHIP BOARD ET AL., APPELLANTS.

515 N.W.2d 128

Filed April 22, 1994. No. S-92-1080.

1. **Summary Judgment: Appeal and Error.** In reviewing a motion for summary judgment, an appellate court reviews the evidence in a light most favorable to the party opposing the motion and gives that party the benefit of all reasonable inferences deducible from the evidence.
2. **Public Meetings: Notice: Time.** Each public body is required to give reasonable advance notice of the time and place of a meeting and to provide an agenda of the subjects to be considered at the meeting.

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

John W. Iliff, of Gross & Welch, P.C., for appellants.

Avis R. Andrews for appellee.

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

WRIGHT, J.

Darrel Steenblock sued to declare void the action taken by the Elkhorn Township Board (Board) on November 3, 1991,

which action terminated his employment. Steenblock alleged that the Board and its members violated the provisions of the Nebraska public meetings laws, Neb. Rev. Stat. §§ 84-1408 to 84-1414 (Reissue 1987 & Cum. Supp. 1990). The district court granted summary judgment in favor of Steenblock, and the Board and its members appeal.

SCOPE OF REVIEW

In reviewing a motion for summary judgment, an appellate court reviews the evidence in a light most favorable to the party opposing the motion and gives that party the benefit of all reasonable inferences deducible from the evidence. *Kopecky v. National Farms, Inc.*, 244 Neb. 846, 510 N.W.2d 41 (1994).

ASSIGNMENTS OF ERROR

The Board and its members assign as error the court's sustaining Steenblock's motion for summary judgment and overruling their motion for summary judgment; the court's finding that a January 23, 1992, meeting did not cure the November 3, 1991, violation, if any, of the public meetings laws; the court's finding that the meeting of November 3, 1991, was in violation of the public meetings laws and was not an emergency action; and the court's ordering the defendants to pay attorney fees and costs.

FACTS

The Board was made up of three members: Larry Sund, chairman; Warren Schultz, treasurer; and Linda Bechtel, clerk. At the first meeting held in 1991, the Board passed a resolution which placed Sund in charge of the township's road grader operator. Steenblock was employed by the Board as a road grader operator, but he had no employment contract and was not hired for a definite term.

Between January 9 and November 3, 1991, Sund met regularly with Steenblock to discuss Steenblock's road-grading procedures and specific instructions regarding his job. In September, Steenblock was given a written document entitled "Current Pay Policy." The document stated that Steenblock would be paid on an hourly basis and would receive no paid vacation or weather days. He was allowed to set his own

schedule as long as the work was completed.

The Board evaluated Steenblock's hours and performance and noted in the October 17 minutes that it was not pleased with his performance. Problems noted by Sund included the following: The equipment was not adequately maintained; oil samples were not taken at proper times; belts on the grader were not adjusted, which caused belt damage and problems with the alternator; the grader engine compartment door was left open, which allowed rain to enter; door latches were not lubricated; batteries were not maintained; the grader was not kept clean; and the chains did not fit the grader, were left on the ground, and were not put into storage.

In late October 1991, a snowstorm struck the Elkhorn area. When some township roads had not been cleared and some residents were not able to leave their houses, Sund instructed Steenblock to put chains and the "V plow" on the grader to remove the snow. Steenblock did not follow these instructions, and the grader became stuck in the snow. Schultz came upon Steenblock and the grader and helped pull out the grader. At about the same time, Sund arrived and fired Steenblock. After Schultz told Sund that he did not believe Sund had the authority to fire Steenblock, Sund called an "emergency" meeting of the Board for that evening. Notice of the meeting was given by telephone to Bechtel and Schultz. The Board members, Sund's wife, and Schultz' wife were the only people who attended and participated in the meeting.

Sund stated that the emergency upon which he based the meeting was the snowstorm. The snow had not been removed from the roads, and two people could not get out of their residences. Sund presented a written review of Steenblock's performance and moved to give Steenblock 2 weeks' notice of termination for the following reasons: Steenblock did not follow direct orders, did not maintain the grader properly, did not use proper equipment for the job, charged excessive hours for several jobs, used township equipment for personal use, was not responsive to township needs, and did not reside in the township.

The Board passed the motion to terminate. Steenblock was mailed a letter of termination stating the above reasons. The

last paragraph of the letter stated: "The next township meeting is November 14, 1991 at 8:00 PM at Larry Sund's home. If you need to discuss any of this, you can address the township board then." Steenblock attended the November 14 meeting, where his performance was discussed by the Board and the minutes of the November 3 meeting were read and approved. Steenblock continued to operate the road grader until November 18. The Board hired a replacement on January 23, 1992.

At its monthly meeting on December 12, 1991, which was open to the public, the Board again discussed Steenblock's termination. A motion to reinstate Steenblock was defeated for lack of a second.

Steenblock's dismissal was placed on the agenda for the January 23, 1992, board meeting. Bechtel stated that the agenda was published in the Fremont Tribune newspaper for 10 days before the meeting. On January 30, 1992, Steenblock commenced suit, requesting that the November 3, 1991, meeting be declared void because it violated Nebraska's public meetings laws.

ANALYSIS

Section 84-1408 provides:

> It is hereby declared to be the policy of this state that the formation of public policy is public business and may not be conducted in secret.
>
> Every meeting of a public body shall be open to the public in order that citizens may exercise their democratic privilege of attending and speaking at meetings of public bodies, except as otherwise provided by the Constitution of the State of Nebraska, federal statutes, and sections 79-327, 84-1408 to 84-1414, and 85-104.

A township is a political subdivision. See, *State ex rel. School Dist. of Scottsbluff v. Ellis*, 168 Neb. 166, 95 N.W.2d 538 (1959); Neb. Rev. Stat. §§ 13-702(2) (Reissue 1991), 84-1103(9) (Reissue 1987), and 84-1202(4) (Cum. Supp. 1992). As a political subdivision of the State of Nebraska, the Board is subject to the provisions of the public meetings laws. § 84-1409(1)(a).

"The Nebraska Public Meetings Laws are a statutory

commitment to openness in government. . . . 'The basic argument for open meetings is that public knowledge of the considerations upon which governmental action is based is essential to the democratic process. . . .' " *Grein v. Board of Education*, 216 Neb. 158, 163-64, 343 N.W.2d 718, 722 (1984). Each public body is required to give reasonable advance notice of the time and place of the meeting and to provide an agenda of the subjects to be considered at the meeting.

The Board contends that an emergency existed on November 3, 1991, and that the meeting complied with the requirements of § 84-1411(3). The Board points out that the roads had not been cleared of snow and that residents were not able to leave their houses. The Board claims these circumstances called for immediate actions which were of pressing necessity. We disagree. The reasons given by Sund at the November 3 meeting for terminating Steenblock's employment did not include failure to remove snow. The minutes of the meeting indicate the meeting was held to review Steenblock's performance.

An emergency has been defined as " '[a]ny event or occasional combination of circumstances which calls for immediate action or remedy; pressing necessity; exigency; a sudden or unexpected happening; an unforeseen occurrence or condition.' " *Colfax County v. Butler County*, 83 Neb. 803, 810, 120 N.W. 444, 447 (1909). The Board's giving Steenblock 2 weeks' notice establishes that the meeting was not an event that called for immediate action, nor was it an unforeseen occurrence or condition, since the reasons given for termination were based upon past performance by Steenblock.

We find that the meeting of November 3, 1991, was void and unlawful and failed to comply with the requirements of the public meetings laws. The meeting was held in closed session, no member of the public was allowed to attend, and the meeting was held without reasonable advance notice for the purpose of firing Steenblock, which action did not constitute an emergency.

"When it is necessary to hold an emergency meeting without reasonable advance public notice, the nature of the emergency shall be stated in the minutes and any formal action taken in such meeting shall pertain only to the emergency." § 84-1411(3).

The reason given for the meeting in the minutes was to discuss the general performance of Steenblock, rather than an emergency. The letter of termination sent to Steenblock following the November 3 board meeting gave him 2 weeks to continue to operate the road grader. We find that the facts as presented do not show as a matter of law that an emergency existed.

We next consider the court's specific finding that the January 23, 1992, board meeting failed to cure the November 3, 1991, violation of the public meetings laws. In his petition, Steenblock requested the court to declare the November 3 action of the Board void in violation of the public meetings laws. In their answer, the defendants alleged that Steenblock's termination was ratified at a subsequent town meeting or meetings and that Steenblock was present at subsequent meetings which ratified his termination. Both Steenblock and the defendants filed motions for summary judgment. On November 6, 1992, the court sustained Steenblock's motion for summary judgment. By order dated November 16, 1992, the court awarded attorney fees to Steenblock's attorney in the amount of $1,300 and ordered the defendants to pay costs in the amount of $366.74.

We point out that the court did not decide the validity of any actions taken by the Board on January 23, 1992, regarding Steenblock's termination. The court decided only that the January 23, 1992, meeting did not validate the actions taken at the November 3, 1991, meeting. That meeting is void. We affirm that finding and the award of attorney fees and costs pursuant to § 84-1414(3). See *Tracy Corp. II v. Nebraska Pub. Serv. Comm.*, 218 Neb. 900, 360 N.W.2d 485 (1984). We do not decide whether the meeting of January 23, 1992, complied with the public meetings laws. The issue was not raised by Steenblock's petition and was therefore not before the district court on the motion for summary judgment. It is the facts well pleaded, not the theory of recovery or legal conclusions, which state a cause of action. *McCurry v. School Dist. of Valley*, 242 Neb. 504, 496 N.W.2d 433 (1993). Pleadings " 'frame the issues upon which a cause is to be tried and advise the adversary as to what he must meet.' " *Christianson v. Educational Serv. Unit*

No. 16, 243 Neb. 553, 558, 501 N.W.2d 281, 286 (1993).

The judgment of the district court is affirmed. We award Steenblock attorney fees in the amount of $675 for this appeal.

AFFIRMED.

WHITE, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V. RICHARD L. KEARNS, APPELLANT.

514 N.W.2d 844

Filed April 22, 1994. No. S-93-143.

1. **Constitutional Law: Speedy Trial: Appeal and Error.** An appellate court does not review questions concerning a defendant's constitutional right to a speedy trial when those questions were not raised in the trial court or the appellate court.
2. **Speedy Trial.** Every person indicted or informed against for any offense shall be brought to trial within 6 months. Neb. Rev. Stat. § 29-1207(1) (Reissue 1989).
3. **Criminal Law: Theft.** A series of separate acts, each of which was a theft, does not constitute one criminal act or a continuing offense of theft.
4. **Speedy Trial: Time.** Under Neb. Rev. Stat. § 29-1207(4) (Reissue 1989), certain periods shall be excluded in computing the time for trial.
5. **Speedy Trial: Waiver.** Failure of the defendant to move for discharge prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to speedy trial. Neb. Rev. Stat. § 29-1209 (Reissue 1989).

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

Kirk E. Naylor, Jr., for appellant.

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

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

GRANT, J., Retired.

After a trial to the court, following defendant Richard L. Kearns' waiver of a jury, defendant was convicted on three counts of theft by deception, in violation of Neb. Rev. Stat.

§ 28-512 (Reissue 1989), or theft, in violation of Neb. Rev. Stat. § 28-511(1) (Reissue 1989). The trial court found that "the defendant did commit the alleged theft under either theory alleged." The court also found that under count I, the amount taken was $460,000; under count II, $24,508.36; and under count III, $35,000.

Each offense charged was a Class III felony, with a possible maximum penalty of 20 years' imprisonment, a fine of $25,000, or both. Defendant was sentenced to 4 years' probation on each count, to be served concurrently, subject to conditions including restitution of the amounts set out above. Defendant timely appealed to the Nebraska Court of Appeals. Pursuant to Neb. Rev. Stat. § 24-1106(3) (Cum. Supp. 1992), we removed the appeal to this court to regulate the caseloads of this court and the Court of Appeals.

In his appeal, defendant assigns a single error, contending that the trial court erred "in overruling appellant's Motion to Dismiss, and for absolute discharge, filed pursuant to the provisions of NEB.REV.STAT. §29-1205, et seq. (Reissue 1989)." We affirm the judgments of conviction and the sentences imposed.

The record before us shows the following history. On August 6, 1990, the State filed an information, in one count, against defendant. This information charged that defendant, on February 17, 1989, obtained property of other persons by deception. On August 29, 1990, defendant was arraigned and pled not guilty. The court's docket entry of February 21, 1991, states: "Def[endan]t waives speedy trial from 11-21-90 to 3-4-91. Findings on the record. Waiver accepted." On March 4, a similar entry showed that defendant waived speedy trial to March 12. On March 12, defendant withdrew his plea of not guilty and entered a plea of nolo contendere. The plea was accepted by the court, and defendant was found guilty. A presentence investigation was requested, and sentencing was set for April 29. After continuance, on May 6 defendant was sentenced to 2 to 5 years' imprisonment, with the sentence to commence on June 3.

On May 16, 1991, defendant filed a motion for arrest of judgment, on the stated grounds that "the information does

not allege an essential element of the criminal offense of theft by deception or in the alternative theft in that the Information fails to include the terms 'intent to deprive' or 'intentially' [sic] in its averments thereby failing to charge a criminal act." On May 24, the trial court entered its order sustaining the motion and vacating the judgment of conviction and the sentence. The court also, pursuant to Neb. Rev. Stat. § 29-2106 (Reissue 1989), found that there was sufficient evidence to believe defendant was guilty of an offense and ordered defendant to appear before the court on May 30 to enter into an appropriate recognizance.

On May 30, 1991, the State filed an amended information, in three counts. Count I set out the same facts as in the original information, that is, that defendant had obtained, by deception, property of others on February 17, 1989, but added allegations that defendant acted intentionally. Count II alleged that defendant had also obtained property of others, by deception, on April 20, 1989. Count III alleged a similar theft on August 4, 1989.

On June 5, 1991, defendant's counsel was permitted to withdraw, and present counsel entered his appearance. Defendant then requested a preliminary hearing, which was held on July 24. On August 2, the court found there was probable cause to believe that crimes had been committed and that defendant had committed those crimes. Defendant then moved for a continuance of his arraignment.

On August 14, 1991, defendant entered a plea of not guilty, reserving his plea in abatement filed the same day. This plea was set for hearing before another judge, who later recused himself, and then heard before the trial judge who imposed the sentence appealed from herein. The plea in abatement was heard, briefs from the parties were ordered, and on January 21, 1992, defendant's plea in abatement was overruled.

On January 29, 1992, defendant was arraigned before the initial trial judge and pled not guilty. The court granted discovery "to [the] extent allow[e]d by statute" within 30 days, and ordered that depositions could be taken by defendant "within 45 days thereafter." On January 28, defendant had filed a motion to take depositions.

On March 19, 1992, the court's docket entries show that defendant waived speedy trial "for period from 3-19-92 to 6-1-92. Findings on the record. Waiver accepted."

On May 27, 1992, defendant filed a "Motion For Recusal" of the original trial judge for the reason that defendant was going to waive a jury trial and that at the sentencing in May 1991, the trial judge had said in part: " 'I also don't feel your wife realizes that, but I can understand that. In her letter she says that, 'Dick was borrowing the money from the trust.' Well, you weren't borrowing the money from this trust. You stole the money. . . .' " Remarks at defendant's later sentencing indicate that the trust was for the benefit of defendant's wife and her sisters. On May 28, 1992, the original trial judge recused himself. On the same day, defendant waived "speedy trial from 6-1-92." Findings were made, and that waiver was accepted.

At 8:51 a.m. on September 24, 1992, defendant filed a "Motion to Dismiss." This motion asked that the court dismiss the charges against defendant and grant him "an absolute discharge from the offenses charged herein, for the reason that plaintiff has failed to provide to defendant a speedy trial as required by the provisions of §29-1207 et seq. (Reissue 1989)." This motion was set for hearing, by defendant's notice, on September 24 at 9 a.m.

Also on September 24, the bench trial on the three felony counts against defendant began. The State adduced evidence; defendant adduced evidence and rested. The next day, the State rested without adducing rebuttal evidence.

By agreement of the parties, defendant's motion to dismiss and for discharge was submitted on briefs along with briefs on the trial, and a briefing schedule was established.

On December 10, 1992, in the presence of defendant and counsel for both parties, the court overruled defendant's motion to dismiss and, as stated above, found defendant guilty of each of the three counts. On January 15, 1993, defendant was sentenced to probation with conditions as set out above.

In consideration of the legal problem before us, we first note that defendant has not raised the question of his constitutional right, under either the U.S. or Nebraska Constitutions, to a speedy trial and presents only the question of defendant's rights

under this state's speedy trial statutes, Neb. Rev. Stat. §§ 29-1207 to 29-1209 (Reissue 1989). We do not review questions concerning a defendant's constitutional right to a speedy trial when those questions were not raised in the trial court or this court. See *State v. Oldfield*, 236 Neb. 433, 461 N.W.2d 554 (1990).

Section 29-1207(1) provides: "Every person indicted or informed against for any offense shall be brought to trial within six months, and such time shall be computed as provided in this section."

Section 29-1207(4) provides in part:

> The following periods shall be excluded in computing the time for trial:
>
> (a) . . . [T]he time from filing until final disposition of pretrial motions of the defendant, including motions to suppress evidence, motions to quash the indictment or information, demurrers and pleas in abatement . . . [.]
>
> (b) The period of delay resulting from a continuance granted at the request or with the consent of the defendant or his counsel. . . .

We then note that defendant posits, erroneously, what he contends is an "important issue" in this case, when he states in his brief:

> [I]t is clear that appellant was not brought to trial within six months, barring excludable periods, from the date of the filing of the original Information in this matter. More than two hundred days had passed, absent excludable periods, from the filing of that Information until the date appellant filed his Motion to Dismiss and trial commenced.
>
> An important issue in this case is whether, for purposes of compliance with the Nebraska Speedy Trial Act, the time periods which ran following the filing of the original Information in this case, and prior to the filing of appellant's Motion for an Arrest of Judgment, should be combined with the time periods which ran from the filing of the amended Information until the filing of appellant's Motion to Dismiss, in calculating whether he was brought to trial within the time period required by law. In this

> regard it should again be emphasized that the charge contained in the original Information, although technically deficient, is the same charge contained in count I of the amended Information.

Brief for appellant at 6-7.

With respect to counts II and III, there is no need to consider any elapsed time in connection with count I. In counts II and III, the State has set out allegations of a crime different in amount and committed at times after the crime described in count I. Counts II and III are separate crimes, and consideration of a speedy trial in connection with those crimes is separate from any consideration of count I. See *State v. Schaaf*, 234 Neb. 144, 449 N.W.2d 762 (1989), where we held that a series of separate acts, each of which was a theft, did not constitute one criminal act or a continuing offense of theft. Defendant, in this case, makes no contention to the contrary.

Considering only counts II and III, the record shows that the amended information charging those two crimes was filed on May 30, 1991. Trial was held on September 24, 1992, some 15 months 25 days later. This period of time, if no periods were statutorily excluded, obviously exceeds the 6-month, speedy trial time set out in § 29-1207(1). As stated above, § 29-1207(4), however, sets out the periods of time which "shall be excluded in computing the time for trial." Those periods of exclusion exceed the times mentioned in defendant's brief. The times to be excluded in calculating the "speedy trial" time for counts II and III, as shown by the record before us, are the following:

1. Defendant's motion for continuance from August 2 to 14, 1991—12 days.

2. Defendant's plea in abatement, filed August 14, 1991, until disposition of plea on January 21, 1992—5 months 7 days.

3. On January 29, 1992, defendant's motion to take depositions (filed January 28) was granted and 45 days allowed—1 month 15 days.

4. Defendant's specific waiver of trial from March 19, 1992, to June 1, 1992—2 months 11 days.

5. Defendant's specific waiver of trial after June 1, 1992, calculated up to trial on September 24, 1992—3 months 24 days.

These periods, when accumulated, show that 13 months 9 days was the total time to be statutorily excluded. (We note that defendant, in his brief, did not consider the waiver from June 1, 1992, to the trial date; the requested continuance from August 2 to 14, 1991; or the time defendant requested to take depositions.) Defendant, then, for the purposes of calculating his statutory speedy trial rights in connection with counts II and III, was tried 2 months 16 days after the amended information was filed.

Defendant's appeal, insofar as counts II and III are concerned, is totally without merit and really presents not a legal problem, but an arithmetical problem. Defendant's judgments of conviction and sentences on counts II and III are affirmed.

A different situation is presented as to count I. Defendant alleges that the time running, for speedy trial purposes, against count I must consist of the time running from the filing of the original one-count information plus the time running from the filing of count I of the three-count amended information. The State contends that the time, for the purposes of Nebraska's speedy trial statutes, "ceased at the end of the first proceeding and began to run anew once the correct information was filed." Brief for appellee at 8.

The question as to whether the time elapsed from the filing of the original information must be "tacked" or added to the time elapsed from the filing of the amended information need not be answered in this case. Section 29-1209 provides that "[f]ailure of the defendant to move for discharge prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to speedy trial." In this case, the original information was filed on August 6, 1990, and defendant pled nolo contendere on March 12, 1991, after having waived periods of time as set out above. During that time, defendant did not file a motion for discharge and, indeed, did not file such a motion until September 24, 1992. Defendant waived his right to a speedy trial in connection with the original information. " '[U]nder the provisions of section 29-1209 [Reissue 1989], it is incumbent upon defendant and his counsel to file a timely motion for discharge in order to avoid the waiver provided for

by that statute.' " *State v. Gibbs*, 238 Neb. 268, 275-76, 470 N.W.2d 558, 564 (1991), quoting *State v. Hert*, 192 Neb. 751, 224 N.W.2d 188 (1974). See, also, *State v. Kitt*, 232 Neb. 237, 440 N.W.2d 234 (1989); *State v. McNitt*, 216 Neb. 837, 346 N.W.2d 259 (1984).

Defendant has waived his right to a speedy trial in connection with the original information. Even though that information was technically deficient, defendant cannot refuse to avail himself of statutory remedies, or avoid statutory duties, and then contend that time has passed for the purposes of speedy trial considerations.

Defendant's judgments of conviction and sentences are affirmed.

AFFIRMED.

WHITE, J., not participating.

NICOLE MOORE, BY AND THROUGH HER NEXT FRIEND, EULISH MOORE, AND EULISH MOORE, INDIVIDUALLY, APPELLANTS AND CROSS-APPELLEES, V. STATE OF NEBRASKA ET AL., APPELLEES AND CROSS-APPELLANTS.

515 N.W.2d 423

Filed April 28, 1994. No. S-91-593.

1. **Tort Claims Act: Appeal and Error.** The trial court's findings of fact in a proceeding under the State Tort Claims Act, § 81-8,209 et seq. (Reissue 1987 & Cum. Supp. 1990), will not be set aside unless such findings are clearly incorrect.
2. **Trial: Witnesses.** In a bench trial of a law action, the court, as the trier of fact, is the sole judge of the credibility of the witnesses and the weight to be given their testimony.
3. **Judgments: Appeal and Error.** In reviewing a judgment awarded in a bench trial, an appellate court does not reweigh the evidence but considers the judgment in the light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.
4. **Negligence: Proof.** In order to succeed in an action based on negligence, a plaintiff must establish the defendant's duty not to injure the plaintiff, a breach of that duty, proximate causation, and damages. These four essential elements are matters to be determined by the trier of fact.

5. **Negligence: Proximate Cause: Words and Phrases.** The proximate cause of an injury is that cause which, in a natural and continuous sequence, without any efficient, intervening cause, produces the injury, and without which the injury would not have occurred.
6. **Negligence: Proximate Cause.** The defendant's conduct is a cause of the event if the event would not have occurred but for that conduct; conversely, the defendant's conduct is not a cause of the event if the event would have occurred without it.
7. **Rules of Evidence: Words and Phrases.** Evidence is relevant if it has any tendency to make the existence of any fact of consequence to the determination of the action more probable or less probable than it would be without the evidence, or the evidence tends to establish a fact from which the existence or nonexistence of a fact in issue can be directly inferred.
8. **Negligence: Proximate Cause: Proof.** In order to prevail on the theory of assumption of risk, the defendant has the burden to establish that the plaintiff (1) knew of the danger, (2) understood the danger, and (3) voluntarily exposed himself or herself to the danger that proximately caused the damage.
9. **Negligence.** A plaintiff is contributorily negligent if (1) he or she fails to protect himself or herself from injury, (2) his or her conduct concurs and cooperates with the defendant's actionable negligence, and (3) his or her conduct contributes to his or her injuries as a proximate cause. Whether contributory negligence is present in a particular case is a question for the trier of fact.

Appeal from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Affirmed.

Van A. Schroeder, of Bertolini, Schroeder & Blount, for appellants.

Don Stenberg, Attorney General, and Royce N. Harper for appellees.

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

BOSLAUGH, J.

This is an action by Nicole Moore and Eulish Moore for damages against the State of Nebraska, the Nebraska Department of Social Services (DSS), and DSS Director Kermit R. McMurry, under the State Tort Claims Act, Neb. Rev. Stat. § 81-8,209 et seq. (Reissue 1987 & Cum. Supp. 1990). The plaintiffs' second amended petition sought recovery for their injuries arising out of the negligent placement of a foster child in their home.

Following a trial before the court, judgment was entered in

favor of the plaintiffs on May 2, 1991. The trial court found that there had been a failure on the part of the defendants to follow their regulations regarding advising foster parents and that the defendants failed to advise Eulish Moore and his wife of the foster child's criminal record in the juvenile court and his chemical abuse problems when they knew or should have known that those things existed.

The trial court awarded Nicole $10,500 for her mental pain and suffering. Eulish was awarded $600 for expenses of Nicole's therapy, $1,960 for future expenses for therapy for Nicole and himself, and $500 for his own mental pain and suffering.

The plaintiffs have appealed the judgment of the trial court, and the defendants have cross-appealed.

> The trial court's findings of fact in a proceeding under the State Tort Claims Act, § 81-8,209 et seq., will not be set aside unless such findings are clearly incorrect. *Koncaba v. Scotts Bluff County*, 237 Neb. 37, 464 N.W.2d 764 (1991).
>
> In a bench trial of a law action, the court, as the trier of fact, is the sole judge of the credibility of the witnesses and the weight to be given their testimony. *Zeller v. County of Howard*, 227 Neb. 667, 419 N.W.2d 654 (1988). In reviewing a judgment awarded in a bench trial, an appellate court does not reweigh the evidence but considers the judgment in the light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence. *Id.*

Haselhorst v. State, 240 Neb. 891, 893, 485 N.W.2d 180, 184 (1992).

When viewed in the light most favorable to the plaintiffs, the record shows the following facts:

Nicole is the daughter of Eulish and Kathleen Moore. On July 30, 1985, Nicole was 7 years old.

On July 30, 1985, Clarence Moore, Jr., (no relation to Eulish and Kathleen) faced charges in the Sarpy County Separate Juvenile Court for a felony burglary. Clarence, who was 15 years old, had previously been incarcerated at the Youth Development Center-Kearney and had just been paroled in the

spring of 1985.

Clarence's younger brother and sister were in foster care in Sarpy County, and their caseworker was Palistene Gray. Gray was contacted by Clarence's father, Clarence Moore, Sr., because he was concerned about what was happening to Clarence. Gray agreed to attend the proceeding in the juvenile court the morning of July 30, 1985, and Clarence was placed in the custody of DSS while Gray was at the hearing.

Kathleen Moore and Gray had become acquaintances because they worked in the same building. They had lunch together after Clarence had been placed in the custody of DSS. Gray explained to Kathleen that she was having trouble finding a foster home for Clarence and asked if Kathleen and her husband would be interested in taking him as a temporary placement.

Kathleen and Eulish had never been foster parents and were not licensed as such. Kathleen told Gray that she would ask her husband and let her know later. Eulish told Kathleen he wanted to talk with Gray before he would agree to take Clarence into their home.

When Kathleen and Eulish arrived home from their jobs on the evening of July 30, 1985, Gray was waiting in their home for them and had Clarence with her. After visiting with Gray and Clarence for about an hour, Kathleen and Eulish agreed to take Clarence.

Although Gray had access to information which indicated that Clarence had previous law violations and convictions in Douglas County Separate Juvenile Court for which he had been committed to the Youth Development Center-Kearney, she did not inform the Moores. Gray also did not tell them that at the time of his placement in their home, Clarence was on parole from the Youth Development Center and that he was facing charges in the Sarpy County Separate Juvenile Court for felony burglary.

The Moores were told Clarence was a "good kid" who was involved with the wrong crowd and needed parental guidance. Kathleen testified that if they had been informed of Clarence's criminal record, they would not have accepted him into their home.

While DSS did a criminal record check on Eulish and Kathleen, it did not investigate Clarence's background. If DSS had checked Clarence's records, it would have discovered that along with his record for criminal activity, Clarence had a history of alcohol and drug usage, and that he had exhibited inappropriate sexual behavior while undergoing evaluation at the Youth Development Center-Geneva, as well as during the period of time he was paroled from Kearney and living in the home of his father and siblings.

Clarence spent only three nights in the Moores' home. During this time, he sexually assaulted Nicole. The assaults occurred on three occasions and involved contact with no penetration of the victim. There was no physical injury to the victim, although the plaintiff claims that an examination by a physician disclosed some perineal irritation.

On August 2, 1985, Clarence left the Moores' home to spend the weekend with his father. The next contact the Moores had with him was a call from the Bellevue Police Department on August 4, 1985. The police asked if the Moores would be willing to accept the release of Clarence into their care following his arrest on new criminal charges. The Moores refused.

In January 1986, Nicole revealed to her parents that she had been sexually assaulted by Clarence. Nicole gave a statement to the Bellevue police and was examined by a physician. Clarence later pled guilty to three counts of third degree sexual assault.

The Moores sought the services of a therapist, Nancy Thompson, for emotional problems they observed in Nicole, including bed-wetting, clinging behavior, nightmares, emotional outbursts at school, being afraid of the dark, and sleeping with her parents. After Nicole completed her counseling, she joined a youth group at her church to address issues of self-image.

On December 16, 1989, Nicole was evaluated by Dr. Stephen Skulsky. At trial, he testified that Nicole had suffered a mild posttraumatic stress disorder and that she could be susceptible to "flash-backs" during times of stress, such as developmental and life-change experiences. On a scale of 1 to 10, Dr. Skulsky rated the assaults at about 2 to 3. Skulsky testified additional therapy of about 24 sessions would be beneficial to assist Nicole

in working through her problems associated with the sexual assaults and that future therapy might be necessary if Nicole faced very strong stresses.

At the time of trial, Nicole was an honor roll student and was involved in age-appropriate activities. She had good relationships with her family and friends.

Dr. Klaus Hartmann evaluated Nicole for the defendants. It was his opinion that Nicole had benefited from the therapy and support provided by her parents after the incident and that the victim was not suffering from posttraumatic stress.

Eulish testified that he suffered feelings of inadequacy for failing to protect his family. He became depressed and withdrawn from his family. At the time of trial, Eulish was seeing Dr. Larry Kimperman, of the Veterans' Administration Veterans' Outreach in Omaha, on a weekly basis. He expected to continue his therapy for about a year.

On cross-appeal, the defendants assign as error the trial court's (1) finding that there had been a failure on the part of the defendants to follow regulations in failing to advise the Moores of Clarence's background, (2) not admitting certain testimony by their psychiatrist, (3) finding that the sexual assaults were proximately caused by negligence of DSS, and (4) finding that there was no assumption of risk or contributory negligence on the part of Eulish.

Regarding their first assignment of error, the defendants argue that placing Clarence in the Moores' home was not negligent because it was an emergency placement. The defendants contend that there was no other placement available for Clarence and that Gray did not know anything about Clarence's criminal history.

> In order to succeed in an action based on negligence, a plaintiff must establish the defendant's duty not to injure the plaintiff, a breach of that duty, proximate causation, and damages. *Zeller v. County of Howard*, 227 Neb. 667, 419 N.W.2d 654 (1988). These four essential elements are matters to be determined by the trier of fact. *Id.*

Haselhorst v. State, 240 Neb. 891, 897, 485 N.W.2d 180, 186 (1992).

Viewing the evidence in the light most favorable to the

plaintiffs, we find that the record supports the trial court's finding of negligence on the part of DSS.

DSS regulations require its staff to provide information, such as the foster child's criminal records, psychological problems, and chemical usage, to the foster family. DSS regulations also require

> [l]ocal or area office staff [to] perform the following intake activities for all wards the unit serves, regardless of where the child is placed:
>
> . . . .
>
> 5. Secure all available information such as social history, school, medical, and psychological reports from all available sources;
>
> 6. Obtain a medical and social history on the child as soon as possible;
>
> . . . .
>
> 9. Establish a case record containing . . . c. Social history and summary . . . g. Other applicable information such as . . . (2) Psychological or psychiatric records; (3) School records; . . . (5) Reports from other agencies that worked with the family and/or child . . . .

(Emphasis omitted.)

A "Child Abuse and Neglect Referral" on Clarence, dated June 3, 1985, was in the office of DSS on July 30, 1985, but Gray did not know about it. It contained information from Lutheran Family Social Services concerning Clarence, indicating that Clarence's father was schizophrenic and that Clarence was just back from "Kearney boys home" and was running around until late at night.

Gloria Gehrt of Lutheran Family Social Services provided the information for the referral. If Gray had contacted Gehrt on July 30, 1985, Gehrt would have been able to inform her that Clarence had demonstrated behavioral problems including chemical and alcohol usage. Gehrt was also aware that Clarence had made a hole in the wall of a shower to observe his younger sister while she bathed.

If Gray had checked the Douglas County Separate Juvenile Court records, she would have discovered an evaluation had been performed on Clarence at the Geneva training center. It

was documented through testing and interviews at Geneva that Clarence had been involved in an extensive amount of stealing and that he had been abusing chemicals for at least 9 months prior to August 3, 1984. The report further indicated that Clarence had made obscene gestures to female residents, which was characterized as "sexually inappropriate behavior." Clarence's parole officer, Melvin Washington, also had access to this information, as well as to additional reports from the Youth Development Center-Kearney; however, he was not contacted by Gray on July 30, 1985.

The trial court found that since the referral form on Clarence was in the DSS office on July 30, 1985, Gray had time available to discover information on him that should have been given to the Moores. The trial court further found that Gray could have made a phone call to determine other pertinent information regarding Clarence.

The defendants also assign as error the trial court's finding that their negligence proximately caused the plaintiffs' injuries. The defendants assert that even if Gray had obtained the information about Clarence's criminal background, her failure to disclose it to the Moores was not the proximate cause of the plaintiffs' injuries because based on the information available to her, Gray could not reasonably foresee that Clarence would go into the Moores' home and violate a child.

> We have said that the proximate cause of an injury is that cause which, in a natural and continuous sequence, without any efficient, intervening cause, produces the injury, and without which the injury would not have occurred. *Zeller v. County of Howard, supra*; *Hegarty v. Campbell Soup Co.*, 214 Neb. 716, 335 N.W.2d 758 (1983).
>
> The defendant's conduct is a cause of the event if the event would not have occurred but for that conduct; conversely, the defendant's conduct is not a cause of the event if the event would have occurred without it. *Greening v. School Dist. of Millard*, 223 Neb. 729, 393 N.W.2d 51 (1986).

Haselhorst v. State, 240 Neb. 891, 899, 485 N.W.2d 180, 187 (1992).

The trial court found that Gray did not have and should not have had knowledge of any unusual propensity by Clarence to commit sexual offenses; however, it concluded that did not defeat the plaintiffs' right to recover because Kathleen testified that if they had been informed about Clarence's criminal record, they would not have taken him into their home. The record supports the trial court's finding.

Next, the defendants contend that the trial court erred in excluding testimony from their expert witness, Dr. Hartmann, as to his opinion concerning whether a juvenile who had been involved in theft as part of a chemical abuse problem would be a higher risk as a possible sexual perpetrator as compared to the general population within the juvenile system. The trial court sustained the plaintiffs' objection as to relevance.

Evidence is relevant if it has any tendency to make the existence of any fact of consequence to the determination of the action more probable or less probable than it would be without the evidence, or the evidence tends to establish a fact from which the existence or nonexistence of a fact in issue can be directly inferred. *Drew v. Walkup*, 240 Neb. 946, 486 N.W.2d 187 (1992).

The fact that a juvenile who had been involved in theft as part of a chemical abuse problem would not be a higher risk as a possible sexual perpetrator as compared to the general population within the juvenile system does not make it more or less probable that the defendants' failure to inform the Moores of Clarence's criminal history proximately caused injury to the plaintiffs. The offered testimony of Dr. Hartmann was properly excluded as irrelevant.

The defendants' last assignment of error pertains to the trial court's finding that there was no assumption of risk or contributory negligence on the part of Eulish. The defendants argue that by accepting a 15-year-old male foster child into his home, Eulish assumed the risk of Clarence's sexual assault on Eulish's 7-year-old daughter.

In order to prevail on the theory of assumption of risk, the defendant has the burden to establish that the plaintiff (1) knew of the danger, (2) understood the danger, and (3) voluntarily exposed himself or herself to the danger that proximately

caused the damage. *Haselhorst, supra.*

The Moores had never been foster parents, nor had they ever been licensed as such. The only knowledge or ability to obtain knowledge of Clarence's criminal behavior lay with DSS. Kathleen testified that Clarence would not have been accepted in their home if they had been informed about his criminal behavior.

The trial court correctly rejected the defense of assumption of the risk.

The defendants also contend that Eulish was contributorily negligent in failing to provide adult supervision of his children and Clarence while he and his wife were at work.

> A plaintiff is contributorily negligent if "(1) he or she fails to protect himself or herself from injury, (2) his or her conduct concurs and cooperates with the defendant's actionable negligence, and (3) his or her conduct contributes to his or her injuries as a proximate cause." *Horst v. Johnson*, 237 Neb. 155, 161, 465 N.W.2d 461, 465 (1991). Whether contributory negligence is present in a particular case is a question for the trier of fact. *Center State Bank v. Dana, Larson, Roubal & Assoc.*, 226 Neb. 408, 411 N.W.2d 635 (1987).

Haselhorst, 240 Neb. at 902, 485 N.W.2d at 189.

While the Moores were at work, they left their 15-year-old son in charge. They also had a neighbor who was available if the children needed her.

DSS was aware that both of the Moores worked during the day and that their children were left home. DSS did not suggest that while Clarence was in the home, adult supervision was necessary.

Viewing the evidence in a light most favorable to the plaintiffs, we find that the record supports the court's finding that Eulish was not contributorily negligent.

The plaintiffs assign as error the trial court's (1) failure to award $400 in special damages for Dr. Skulsky's evaluation of Nicole and Eulish; (2) allowing testimony by Dr. Hartmann concerning Nicole's ability to finish high school and college, her chances to become employed, and her ability to date; (3) inadequate award for general damages to Eulish; and (4)

inadequate award for general damages for Nicole.

The trial court found that Dr. Skulsky's $400 fee was strictly for an evaluation and not for any therapy. The plaintiffs argue the trial court erred in its finding because Dr. Skulsky made recommendations for therapy based on his evaluation, but the plaintiffs were unable to follow through on his recommendations because of their finances.

The cost of medical or expert reports made in preparation of litigation is not a recoverable expense unless provided by statute or as a uniform course of procedure. *Southwest Trinity Constr. v. St. Paul Fire & Marine*, 243 Neb. 55, 497 N.W.2d 366 (1993). See, also, *Gross v. Johnson*, 174 Neb. 273, 117 N.W.2d 534 (1962). The trial court found that Skulsky's evaluation was made in preparation of the trial of this matter, and that finding is not clearly wrong.

During direct examination, the defendants' expert, Dr. Hartmann, was asked whether in his opinion Nicole would be able to finish high school, study in college, become employed, and date. Over the plaintiffs' objections as to foundation and relevance, Dr. Hartmann was permitted to answer and testified that in his opinion, Nicole is likely to meet those demands and do well in them.

The plaintiffs contend that the trial court erred in allowing Dr. Hartmann's testimony over their objections.

Dr. Hartmann is a child and adolescent psychiatrist. He made an independent examination of Nicole which included an interview with Eulish to get background information. Dr. Hartmann asked Nicole questions regarding her family life, schoolwork, and social life.

There was sufficient foundation for Dr. Hartmann to render an opinion concerning Nicole, and Nicole's ability to finish high school, study in college, become employed, and date is relevant to the issue of her recovery from the sexual assaults. The trial court did not err in permitting Dr. Hartmann to give his opinion on that subject.

Next, the plaintiffs complain that the amount of damages awarded to Eulish for his mental pain and suffering is inadequate.

The trial court awarded Eulish $500 for his mental pain and

suffering following his discovery of the assaults on his daughter. On the basis of the record in this case, we cannot say that the trial court's award is clearly inadequate.

Finally, the plaintiffs argue that the trial court erred in awarding an inadequate amount for Nicole's emotional distress.

The trial court awarded Nicole $10,500 for the emotional distress she suffered as a result of the defendants' negligence. In making this award, the trial court found that Nicole had made a good recovery and that she will do better in the future. The record supports the trial court's findings and award.

The judgment of the trial court is affirmed in all respects.

AFFIRMED.

WHITE, J., participating on briefs.

SHANAHAN, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. LAWRENCE ATWATER, APPELLANT.

515 N.W.2d 431

Filed April 28, 1994. No. S-92-113.

1. **Motions for New Trial: Appeal and Error.** A motion for new trial on the basis of newly discovered evidence is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed.
2. **Motions for New Trial: Evidence.** Newly discovered evidence must actually be newly discovered, and it may not be evidence which could have been discovered and produced at trial with reasonable diligence.
3. **Criminal Law: Motions for New Trial: Evidence: Proof.** A criminal defendant who seeks a new trial on the basis of newly discovered evidence must show that if the evidence had been admitted at the former trial, it would probably have produced a substantially different result.
4. **Verdicts: Juries: Appeal and Error.** The verdict of the jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.

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

Brent M. Bloom for appellant.

Don Stenberg, Attorney General, and Marilyn B. Hutchinson for appellee.

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

WRIGHT, J.

Lawrence Atwater was charged with and convicted of two counts of robbery and two counts of use of a firearm to commit a felony in 1982. A direct appeal was taken to the Nebraska Supreme Court. The judgment was affirmed after a motion was granted allowing court-appointed defense counsel to withdraw on the grounds that the appeal was frivolous.

In 1992, Atwater's motion for postconviction relief was granted by the district court, which reinstated Atwater's direct appeal to this court. Atwater appeals from the denial of his postconviction request for a new trial based on newly discovered evidence.

SCOPE OF REVIEW

A motion for new trial on the basis of newly discovered evidence is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed. *State v. Hirsch, ante* p. 31, 511 N.W.2d 69 (1994); *State v. Boppre*, 243 Neb. 908, 503 N.W.2d 526 (1993).

FACTS

We first outline a chronology of the events involved in this case:

April 15, 1982—A jury finds Atwater guilty of two counts of robbery and two counts of use of a firearm to commit a felony.

May 14, 1982—Atwater is sentenced, and the district court overrules Atwater's first motion for new trial.

May 20, 1982—Atwater files a notice of appeal to the Nebraska Supreme Court.

September 7, 1982—Atwater files a second motion for new trial in the district court, alleging newly discovered evidence.

January 21, 1983—The district court denies Atwater's

motion for new trial, finding that the new evidence would probably not be admissible and, if admitted, would not affect the outcome of the case.

January 24, 1983—Atwater files a third motion for new trial, alleging error in the district court's denial of the motion for new trial based on newly discovered evidence. The record contains no ruling on that motion.

February 17, 1983—Atwater's counsel files a supplemental notice of appeal to the Supreme Court.

March 11, 1983—Atwater's counsel files a motion to withdraw on the basis that the direct appeal is wholly frivolous.

May 25, 1983—The motion to withdraw is granted, and the judgment is affirmed by this court. See *State v. Atwater*, 214 Neb. xvii (case No. 82-371, May 25, 1983).

April 10, 1989—Atwater files a postconviction motion to vacate or set aside the sentence. In an amended motion for postconviction relief, Atwater alleges two grounds which resulted in an infringement of his constitutional rights: prosecutorial misconduct and ineffective assistance of counsel. Atwater claims that the prosecuting attorney did not comply with pretrial discovery and that the prosecutor failed to provide defense counsel with information prior to trial which would have supported Atwater's defense that his brother, Alonzo Atwater, committed the robberies. (A police report had been filed which stated that the revolver taken in the robbery of the security guard was subsequently found near a location where Atwater's brother was arrested.) The amended motion further asserts that Atwater was denied effective assistance of counsel, as guaranteed by the 6th and 14th Amendments to the U.S. Constitution, because counsel was allowed to withdraw based upon his assertion that Atwater's appeal was frivolous. Atwater requests that his conviction be set aside and that he be granted a new trial.

January 21, 1992—The district court reinstates Atwater's direct appeal to this court. The court finds from the record of the proceedings that Atwater's court-appointed counsel on his initial appeal failed to comply with the requirements of *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967), *reh'g denied* 388 U.S. 924, 87 S. Ct. 2094, 18 L. Ed. 2d

1377, in that counsel did not fully develop and argue potential issues which could result in a reversal.

ASSIGNMENTS OF ERROR

Atwater assigns as error that the district court abused its discretion in failing to grant a new trial at the time of the original motion for new trial and that the district court abused its discretion in failing to grant a new trial based upon his motion for postconviction relief.

ANALYSIS

Atwater's motion for new trial filed on September 7, 1982, was based upon several grounds, but only the claim of newly discovered evidence is considered. A motion for new trial must be filed within 10 days after the verdict unless the motion is based upon newly discovered evidence. Neb. Rev. Stat. § 29-2103 (Reissue 1989). Since the jury verdict was entered on April 15, 1982, Atwater's motion was not timely except on the basis of newly discovered evidence.

Before trial, Atwater filed a motion for discovery which requested the court to order the State to produce any and all evidence or facts favorable to Atwater and all police reports.

During the trial, the security guard who was working at the McDonald's restaurant which was robbed testified that Atwater took the guard's watch, wallet, and revolver during the robberies. The guard testified that his wallet had been returned to him, but he did not mention the revolver. Following Atwater's conviction and sentencing, the State disclosed that the revolver had been recovered before the trial began. The revolver was found nearby when Atwater's brother was arrested a short time after the robberies.

At the November 22, 1982, hearing on the second motion for new trial, defense counsel submitted two juror affidavits which stated:

> Had this new evidence been available, the defense could have shown that Alonzo had not only possession of a gun similar to the hold-up gun, but also, three weeks later, had possession of the same gun that was stolen during the robbery from the McDonald's security guard.
>
> If this new evidence is true, it would have raised a strong

> doubt and would change my verdict to not guilty in the case of Lawrence Atwater.

Exhibit 1 was also introduced, which showed that the Omaha Police Division notified the security guard's employer that the revolver could be recovered from the police after March 26, 1982. A supplementary report included in exhibit 1 indicated that it had been determined the revolver was the same gun as that taken from a security guard during a robbery.

At the September 25, 1991, hearing on the application for postconviction relief, evidence was introduced which showed that prior to Atwater's 1982 trial, the prosecutor was uncertain as to the location of the revolver involved in the robberies. The evidence also showed that defense counsel was not aware of the evidence involving the location of the revolver and the possible possession of the revolver by Atwater's brother until 5 months after the trial. Evidence as to police procedures relating to a weapon seized in this type of incident showed that the revolver should have been retained until the disposition of the case and that a report of the seizure of the revolver should have been given to the prosecutor within 24 hours.

Atwater asserts that the failure of the State to disclose exculpatory information following an order for discovery was a denial of due process and a violation of state law. He argues that the district court therefore abused its discretion by not granting him a new trial. Atwater claims that the State has a constitutional duty to disclose exculpatory information and that the evidence involving the revolver was material to his defense.

Neb. Rev. Stat. § 29-2101 (Reissue 1989) provides:

> A new trial, after a verdict of conviction, may be granted, on the application of the defendant, for any of the following reasons affecting materially his substantial rights: . . . (5) newly discovered evidence material for the defendant which he could not with reasonable diligence have discovered and produced at the trial.

Newly discovered evidence must actually be newly discovered, and it may not be evidence which could have been discovered and produced at trial with reasonable diligence. *State v. Boppre*, 243 Neb. 908, 503 N.W.2d 526 (1993).

The granting of a motion for new trial depends on the facts and circumstances of each case. Here, the court stated in its order denying the second motion for new trial:

> The evidence submitted on behalf of the defendant is evidence that the Court finds could have been discovered with reasonable diligence at the time of trial and that the newly-discovered evidence is not sufficient to justify vacating the judgment verdict of the jury or to indicate to this Court that the verdict of a jury would be different than originally found. The evidence submitted was from a close relative, being the defendant's brother, who cooperated completely with the defendant during the course of the trial and could fairly be explained by the State to the jury.
>
> There is a strong question with regard to the admissibility of the newly-discovered evidence since the evidence with regard to when the gun was discovered in the possession or constructive possession of defendant's brother was remote in time from the date of the commission of the crime charged against defendant and it is not unusual that the fruits of a crime can be found in the possession of people other than those charged with the crime where a substantial period of time intervenes.
>
> It is the Court's opinion that in any subsequent trial that evidence concerning the gun would not properly be admissible.

Our standard of review is whether the district court abused its discretion in denying Atwater's second motion for new trial. See *State v. Hirsch, ante* p. 31, 511 N.W.2d 69 (1994). Judicial abuse of discretion means that the reasons or rulings of the trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in the matter submitted for disposition. *State v. Trackwell*, 244 Neb. 925, 509 N.W.2d 638 (1994).

At a hearing on November 22, 1982, Atwater's counsel stated that she had received a copy of the police report about a week earlier. The court found that the evidence submitted on behalf of Atwater could have been discovered with reasonable diligence at the time of the trial. Atwater has failed to

demonstrate that the court's finding is wrong.

We next determine whether the failure of the State to disclose the information regarding the revolver was a denial of due process. In *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), the Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Thus, whether the prosecutor deliberately withheld the information or negligently failed to provide the information to defense counsel is immaterial.

In *United States v. Agurs*, 427 U.S. 97, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976), the Court held that the prosecutor has a duty to disclose evidence material to the guilt or punishment of the defendant even if no requests are made for the evidence. At the same time, the Court held that the prosecution does not have a duty to provide defense counsel with unlimited disclosure of all information known by the prosecutors, but if the subject matter is material or if a substantial basis for claiming it is material exists, it is reasonable to require the prosecutor to furnish the information. The duty of disclosure is not measured by the actions of the prosecutor, but is based upon the character of the evidence. The U.S. Constitution does not demand discovery of all information which might influence the jury. The mere possibility that an item of undisclosed information might have aided the defense or might have affected the outcome of the trial does not establish materiality of the evidence in a constitutional sense. *Id.*

In Nebraska, a criminal defendant who seeks a new trial on the basis of newly discovered evidence must show that if the evidence had been admitted at the former trial, it would probably have produced a substantially different result. *State v. Boppre*, 243 Neb. 908, 503 N.W.2d 526 (1993). However, under *Agurs*, when the evidence has been withheld by the prosecutor, the proper standard is that a constitutional error has been committed if the omitted evidence creates a reasonable doubt of guilt that otherwise did not exist. The *Agurs* Court stated that the defendant should not have to satisfy the severe burden of demonstrating that newly discovered evidence would probably

have resulted in acquittal.

The *Agurs* standard is used when the newly discovered evidence was available to the prosecution and is not evidence that was discovered from a neutral source after the trial. For this reason, the defendant's burden is less than a demonstration that the evidence would probably result in an acquittal. Thus, Atwater would be entitled to a new trial if the evidence involving the revolver would have created a reasonable doubt that Atwater committed the robberies. However, "[i]f there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial." *Agurs*, 427 U.S. at 112-13.

Atwater contends that the evidence of the revolver's being found in close proximity to his brother was sufficient, according to the affidavits of at least two of the jurors, to create a reasonable doubt that Atwater committed the robberies at the McDonald's restaurant.

The robberies for which Atwater was convicted occurred on January 7, 1982, at the McDonald's restaurant at 2410 Cuming Street in Omaha. During the robberies, in addition to cash, a gun was taken from the security guard, Theodore P. McQuatters. Atwater's second request for a new trial was based on his claim that he learned after the trial that McQuatters' gun had been recovered from a location near where Atwater's brother was arrested on February 16, 1982. Atwater claims that the police knew about the recovery of the revolver but failed to inform his attorney and that if the jury had been informed about the revolver's recovery, the outcome of the trial would have been different because the jury would have believed it was Atwater's brother who committed the robberies.

We consider such evidence to determine whether it would have created a reasonable doubt with regard to Atwater's guilt where such doubt did not previously exist. Several weeks passed between the time of the robberies and the time the gun was located. The discovery of the revolver in close proximity to Atwater's brother did not create a reasonable doubt as to Atwater's guilt. Atwater's brother testified at the trial, and the jury had the opportunity to consider the possibility that he was the guilty party.

The evidence presented at the trial showed that each employee who was asked to identify the robber was able to identify Atwater as the perpetrator. Carol Barr, a cook at McDonald's, had taken out the trash as the restaurant was closing. As she returned to the restaurant, a man began walking beside her and asked her who was inside the restaurant. She told him it was the crew, the managers, and a security guard. The man asked her if the security guard was black or white and asked her about the restaurant's safe. The man told Barr to act as if she was busy, and after they walked back into the restaurant, the man took out a gun and told Barr to get one of the managers to come to the back room.

As Barr proceeded to call a manager, she was met by Eric Howard, a cook, who was coming to check on Barr because she had been gone for 15 minutes. Howard saw Barr through a window as she tried to indicate to him that he should call for help. He looked through the window and saw a man with a cap over his head, who then came through the door. The man pushed Howard against a door, stuck a gun to Howard's head, and said, " 'Don't say anything.' " One of the managers, Ronald Parker, also went to check on Barr. As Parker headed toward the back of the restaurant, Barr appeared with a man behind her who was holding a gun. The man told everyone to move to the front of the restaurant and told the managers to give him the restaurant's money.

Rose Mary Stennis, a cashier, said she saw the other manager, Charlotte Moore, run to the front as she said, " 'Don't shoot, take everything, just don't hurt nobody.' " Stennis turned around and saw a man coming toward the front with a gun. The man went through the counters toward the front and said he wanted all the money. Parker and Moore collected the money in the cash register drawers in McDonald's sacks and retrieved the money from the safe. The man then went to the security guard, stuck the gun in his side, and removed his gun, his wallet, and his watch. The man told the other employees to empty their pockets, and he put the security guard's wallet in the sack with the money and said, " 'Nobody move, don't nobody move.' "

All the employees were able to describe the robber. Barr described him as wearing a dark blue ski mask with white trim,

a brown leather jacket, and work gloves. Barr stated that the robber had large eyes which were bloodshot and that he had a full mustache. McQuatters said the robber was a black male wearing gloves and a mask, but McQuatters could see the robber's eyes, which were large and protruded a bit. McQuatters told police that the robber was wearing a blue ski mask and a brown knee-length leather jacket covered by a blue jacket and that the robber had a heavy mustache, dark complexion, and "bulgy-type" eyes. Cynthia McCroy, a supervisor, stated that the robber wore a ski mask, but that she remembered his eyes because they were large "bug eyes" and his lips because they were wider than normal. Howard said the robber had a large nose, thick lips, and large, nervous eyes. Stennis said the robber had a bushy mustache and "buggy" eyes. Moore described him as having big eyes and a heavy mustache.

Within 2 days of the robberies, the employees were shown a mug book containing more than 200 photographs, and Barr, Parker, Howard, Stennis, and Moore all identified the perpetrator, who was later identified as Atwater. From a lineup on January 9, 1982, at police headquarters, Barr, Parker, McCroy, Stennis, and Moore all identified Atwater as the robber.

Officer Richard Swircinski, who supervised the lineup, stated that Atwater's brother had the same physical description as Atwater and that both had mustaches, but Atwater's brother was not placed in the lineup because he was not a suspect in the robberies. Prior to trial, a hearing was held in which Atwater took part in an additional lineup that also included his brother and two other individuals chosen by Atwater. Barr, Parker, Howard, and Stennis all identified Atwater as the robber. At trial, Barr, McQuatters, McCroy, Howard, Stennis, Parker, and Moore all identified Atwater as the robber.

At trial, Atwater's brother was called as a defense witness. Atwater's brother said he had been arrested the same night as Atwater, but he was not placed in a lineup. He invoked the Fifth Amendment when he was asked whether he had a gun with him when he was driving around with Atwater, whether he committed the robberies, whether he had been shot in a

robbery, whether Atwater committed the robberies, whether he helped with the robberies, whether he split the proceeds with Atwater, whether he was in possession of a weapon used in a robbery, or whether he was outside the McDonald's during the robberies.

Atwater is entitled to a new trial only if the newly discovered evidence would create a reasonable doubt where no reasonable doubt existed previously. Based on the extensive identification evidence, no reasonable doubt as to Atwater's guilt existed previously, and the newly discovered evidence did not create a reasonable doubt. The identification evidence was more than sufficient to convict Atwater. Where there is no reasonable doubt about guilt based on the evidence presented at the original trial, there is no justification for a new trial. *United States v. Agurs*, 427 U.S. 97, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976). The fact that the revolver taken during the robberies was found weeks later in close proximity to Atwater's brother does not create a reasonable doubt as to Atwater's guilt where none existed previously. The evidence is more than sufficient to support the jury's verdict, and we decline to find that Atwater is entitled to a new trial.

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. Parks, ante* p. 205, 511 N.W.2d 774 (1994).

The decision of the district court is affirmed.

AFFIRMED.

JAROSLAV BRTEK, ALSO KNOWN AS JERRY BRTEK, AND LILLIAN L. BRTEK, APPELLANTS, V. LAD L. CIHAL AND MARTHA B. CIHAL, APPELLEES.

515 N.W.2d 628

Filed April 28, 1994. No. S-92-164.

1. **Actions: Trusts: Equity.** Actions to declare a resulting or constructive trust are in equity.
2. **Equity: Appeal and Error.** 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.

3. **Deeds: Proof.** It is essential to the validity of a deed that there be a delivery, and the burden of proof rests upon the party asserting delivery to establish it by a preponderance of the evidence.
4. **Deeds: Intent.** To constitute a valid delivery of a deed, there must be an intent on the part of the grantor that the deed shall operate as a muniment of title to take effect presently.
5. **Deeds.** The essential fact to render delivery effective always is that the deed itself has left the control of the grantor, who has reserved no right to recall it, and it has passed to the grantee.
6. **Deeds: Intent.** Whether a deed or other instrument conveying an interest in property has been delivered is largely a question of intent to be determined by facts and circumstances of the particular case.
7. **Deeds.** Recordation of a deed generally presumes delivery.
8. **Deeds: Intent.** Whether or not a deed has been delivered is a mixed question of law and fact. The element which controls the resolution of that question is the intention of the parties, especially the intention of the grantor. The vital inquiry is whether the grantor intended a complete transfer—whether the grantor parted with dominion over the instrument with the intention of relinquishing all dominion over it and of making it presently operative as a conveyance of the title to the land.
9. _____: _____. It is not necessary, to effectuate delivery, that a deed actually be handed over to the grantee or to another person for the grantee. There may be a delivery notwithstanding that the deed remains in the custody of the grantor. If a valid delivery takes place, it is not rendered ineffectual by the act of the grantee in giving the deed into the custody of the grantor for safekeeping. It is all a question of the intention of the parties, which may be manifested by words or acts or both.
10. _____: _____. If a deed, although acknowledged, is not recorded and is in the grantor's possession at the time of his death, those circumstances, unless explained, are deemed conclusive that the parties did not intend a complete transfer.
11. **Deeds: Presumptions.** There is a presumption of nondelivery if the evidence shows that a deed was in the grantor's possession at the time of his death and was not then recorded. Such a showing places upon the grantees the burden of going forward with the evidence, more accurately, the burden of persuasion, to rebut the presumption of nondelivery.
12. **Deeds: Intent: Proof.** The burden of proof rests upon the party asserting delivery to establish it by a preponderance of the evidence, and to constitute a valid delivery of a deed there must be an intent on the part of the grantor that the deed shall operate as evidence of title to take effect presently.
13. **Deeds: Presumptions: Proof.** When a deed is found in the grantee's possession during the lifetime of the grantor, this is prima facie evidence of delivery, and the

burden of proof is upon the one who disputes this presumption.

14. **Decedents' Estates.** Where an ancestor dies intestate, his lands descend instantly to his heirs. It does not require settlement of his estate or a probate order declaring heirship to vest his title.
15. **Equity: Jurisdiction.** Where a court of equity has obtained jurisdiction of a cause for any purpose, it will retain it for all, and will proceed to a final determination of the case, adjudicating all matters in issue, thus avoiding unnecessary litigation.
16. **Trusts: Property: Title: Equity.** A constructive trust is imposed when one has acquired legal title to property under such circumstances that he or she may not in good conscience retain the beneficial interest in the property. In such a situation, equity converts the legal titleholder into a trustee holding the title for the benefit of those entitled to the ownership thereof.
17. _____: _____: _____: _____. A constructive trust is a relationship, with respect to property, subjecting the person who holds title to the property to an equitable duty to convey it to another on the grounds that his acquisition or retention of the property would constitute unjust enrichment.
18. _____: _____: _____: _____. Generally, a court, sitting in equity, will not impose a constructive trust and constitute an individual as a trustee of the legal title for property unless it be shown, by clear and convincing evidence, that the individual, as a potential constructive trustee, had obtained title to property by fraud, misrepresentation, or an abuse of an influential or confidential relationship and that, under the circumstances, such individual should not, according to the rules of equity and good conscience, hold and enjoy the property so obtained.
19. **Trusts: Proof.** A party seeking the remedy of a constructive trust has the burden to establish the factual foundation, by evidence which is clear and convincing, required for a constructive trust.
20. **Trusts: Conveyances: Intent.** A court will impose a resulting trust when the circumstances surrounding a conveyance make it clear that the parties intended such a result.
21. **Trusts: Conveyances: Presumptions: Intent: Words and Phrases.** A resulting trust is one raised by implication of law and presumed always to have been contemplated by the parties, the intention as to which is to be found in the nature of their transaction, but not expressed in deed or instrument of conveyance.
22. **Trusts: Property: Consideration.** Where a transfer of property is made to one person and the whole or a part of the purchase price is paid by another, a resulting trust arises in favor of the person by whom such payment is made. The rationale for this rule is that individuals seldom give consideration to receive nothing.
23. **Trusts: Proof.** The burden is upon the one claiming the existence of a resulting trust to establish the facts upon which it is based by clear and convincing evidence.
24. **Evidence: Words and Phrases.** Clear and convincing evidence means and is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved.

25. **Actions: Title: Mortgages: Foreclosure: Time.** An action for the recovery of the title or possession of lands, tenements, or hereditaments, or for the foreclosure of mortgages thereon, can only be brought within 10 years after the cause of action shall have accrued. Neb. Rev. Stat. § 25-202 (Reissue 1989).
26. **Actions: Contracts: Time.** An action upon a contract not in writing can only be brought within 4 years. Neb. Rev. Stat. § 25-206 (Reissue 1989).
27. _____: _____: _____. A cause of action in contract accrues at the time of the breach or failure to do the thing agreed to.

Appeal from the District Court for Saunders County: WILLIAM H. NORTON, Judge. Affirmed in part, and in part reversed.

George H. Moyer, Jr., of Moyer, Moyer, Egley, Fullner & Warnemunde, for appellants.

Charles H. Wagner, of Edstrom, Bromm, Lindahl, Wagner & Miller, and George E. Svoboda, of Sidner, Svoboda, Schilke, Thomsen, Holtorf & Boggy, for appellees.

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

HASTINGS, C.J.

This is an action by Jaroslav Brtek, also known as Jerry Brtek, and Lillian L. Brtek against Jerry's sister and her husband, Martha and Lad Cihal. By their fourth amended petition, the Brteks sought to impose a constructive or a resulting trust upon two farms, the Urbanek place and the Pedersen place, to which the Cihals held the record title. Additionally, they asked that a certain deed, which was dated April 30, 1960, conveying the Urbanek place from Joe Brtek, a deceased brother, to Joe himself and Martha Cihal, be canceled. The Cihals, in their answer, denied the Brteks' claims and counterclaimed, asking that a deed conveying certain other property not involved in this appeal from Agnes Brtek, the mother of Jerry and Martha, to Jerry be set aside because of an alleged failure of Jerry to comply with certain conditions therein.

Following a bench trial, the court entered judgment, finding that the Brteks had failed to establish a resulting or constructive trust by clear and convincing evidence and had failed to prove their allegations as to the requested deed cancellation, and that

the Cihals had failed to prove the allegations of their counterclaim. Although it is difficult to trace the titles from the language of the decree because it refers to descriptions in the pleadings which do not match, it appears that titles to the Urbanek and Pedersen places were confirmed in the Cihals, and title to the home place in the Brteks. The Brteks have appealed, but the Cihals have not appealed the dismissal of their counterclaim. The Brteks assign eight errors, which may be summarized to allege that the decree of the trial court was contrary to law and was not sustained by the evidence, and that their case was wrongfully dismissed.

Although throughout this opinion we will refer to the various properties by name, we set forth the legal description of each:

Home place—The South Half of the Southeast Quarter (S1/2 SE1/4) of Section Eight (8) and the Northeast Quarter of the Northeast Quarter (NE1/4 NE1/4) of Section Seventeen (17), Township Sixteen (16) North, Range Five (5) East of the 6th P.M., Saunders County, Nebraska.

Urbanek place—The South Half of the Northwest Quarter (S1/2 NW1/4) and the South Half of the Northeast Quarter (S1/2 NE1/4) of Section Seven (7), Township Sixteen (16) North, Range Five (5) East of the 6th P.M., Saunders County, Nebraska.

Pedersen place—The South Half of the Northeast Quarter (S1/2 NE1/4) and the North Half of the Southeast Quarter (N1/2 SE1/4) of Section Eight (8), Township Sixteen (16) North, Range Five (5) East of the 6th P.M., Saunders County, Nebraska.

Texel place—The East Half of the Northeast Quarter (E1/2 NE1/4) and the East Half of the Southeast Quarter (E1/2 SE1/4) of Section Three (3), Township Fifteen (15) North, Range Six (6) East of the 6th P.M., Saunders County, Nebraska.

Actions to declare a resulting or constructive trust are in equity. *Kuhlman v. Cargile*, 200 Neb. 150, 262 N.W.2d 454 (1978).

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. *Richdale Dev. Co. v. McNeil Co.*, 244 Neb. 694, 508 N.W.2d 853 (1993); *K N Energy, Inc. v. Cities of Broken Bow et al.*, 244 Neb. 113, 505 N.W.2d 102 (1993).

This is an unfortunate situation in which the domineering matriarch of this family, Agnes, who was born in Czechoslovakia and barely spoke, wrote, or read the English language, attempted to control the affairs of her three adult children by requiring them to convey, cross-convey, and reconvey certain real estate which was a part of a family operation. As a result, she turned sister against brother and successfully upset the titles to two parcels of real estate in Saunders County.

It must be understood at the outset that all of the business of this family unit was carried on in the Czech or Bohemian language, and much was lost or distorted in the parties' translation of those activities into English.

Upon the death of Vaclav Brtek in 1949, sons Jerry and Joe, daughter Martha, and wife Agnes inherited from Vaclav a farm known as the home place. On May 18, 1950, the children conveyed their interests in the farm to their mother, Agnes. On June 8, 1950, Agnes conveyed the home place to Jerry. Jerry and Joe continued to farm the land. Some of their earnings went into the family "pool," although Jerry and Joe put money earned from custom farming into separate bank accounts. Martha testified that she did not share in the income from the farming operation, but got "what was from the ducks and geese and chickens." From 1949 until 1961, Agnes filed one income tax return for the whole family, claiming Jerry, Joe, and Martha, her adult children, as dependents. From then on, because of the intervention of the Internal Revenue Service, the mother and the two boys, at least, started filing separate returns. On January 10, 1961, Martha married Lad Cihal and left the family home.

However, before that marriage occurred, the Urbanek place was purchased in 1952, with the various family members contributing to the purchase price of $13,200. The ledger kept

by Martha at Agnes' direction revealed the source of those funds. Joe paid $3,955.92, Agnes $2,400, Jerry $4,450, and Martha $708. A note for $1,200 was also given, and that note and interest were paid from the sale of some steers and corn. The balance of approximately $486 was paid from the assets of the estate of Vaclav Brtek. Record title was taken in the name of Joe Brtek at the direction of Agnes.

Later on, at the direction of Agnes, Joe deeded the Urbanek place to himself and Martha as joint tenants. However, the deed was not given to Martha, but instead was placed by Agnes in her dresser drawer in which the family's papers were kept. Access to this dresser was available to Agnes, Joe, and Jerry, but the record does not reveal whether Martha enjoyed that privilege. Physical possession of that deed was not given to Martha before Joe's death on June 8, 1974.

Shortly after Joe's death, either Agnes brought the deed conveying the Urbanek place to Martha at the latter's home and declared that "the farm is yours" or Martha came to the home place, where Agnes gave her the deed. That deed was filed for record on July 1, 1974.

The petition for the determination of inheritance tax due and owing by reason of Joe's death was executed by both Jerry and Martha. The petition recited that the deed to the Urbanek place was executed by Joe "with instruction that said deed would be filed . . . on the death of the said Joseph Brtek." On August 23, 1974, Martha paid the inheritance tax of $370 on the property. Jerry stated that after the inheritance tax was paid, he and Martha had a conversation at attorney Clyde Worrall's office in which they discussed putting his name on the title to the Urbanek place. However, instead of doing that, Martha executed a deed on April 11, 1975, conveying the Urbanek place to herself and her husband, Lad, as joint tenants, which deed was filed for record on April 14, 1975.

Before Joe's death, he and Jerry farmed the Urbanek place and divided the income, giving one-third each to themselves and one-third to Agnes. After Joe died, Jerry continued to farm the Urbanek place, and Agnes received one-third of the income from this farm and Jerry received two-thirds. During the time that the farm was in the Agricultural Stabilization and

Conservation Service program, Jerry received 60 percent of the payments and Martha received 40 percent.

Jerry stated that he did not pay any rent on the Urbanek place, but paid property taxes. Martha stated that her mother told her not to charge Jerry rent, but a few years before her mother passed away in 1982, Martha started charging rent because she needed the money and could not pay the taxes without getting any crops off the land. Martha charged Jerry $1,600 a year and stated that she did not know how she arrived at that figure but that "he paid me for the taxes and I paid it at the treasurer's." In 1985, Martha demanded that Jerry vacate the premises.

The Pedersen place was purchased by Martha and Lad from a third party by means of a contract dated July 12, 1963. The purchase price was $32,000, with a $1,000 downpayment and a mortgage of $8,000 carried back by the seller. Of the principal balance of $23,000, plus some interest on the mortgage, $3,400 was paid by Joe, $1,800 by Jerry, and $6,481.60 by Agnes with checks dated December 18, 1963, all made payable to the Cihals. According to Jerry, at the time these first payments were made, they were considered a loan to Martha and Lad. Martha insisted that because no notes were signed by her, the payments were gifts. The canceled checks in the record show that the Cihals paid a total of $33,455.50 to the Pedersens, with the last payment having been made on December 31, 1968.

In 1968, Martha told her family she was short of money because they were also buying the Texel place and wanted to sell the Pedersen place. Jerry testified that he, Joe, and Agnes agreed to buy the 160-acre Pedersen place for $200 an acre. Jerry said that they were to pay in installments, with no set time for making payments, and that Martha was to turn the farm over to them when all the installments were paid. Jerry also stated that Martha said that the money loaned to her in 1963 would be accepted as a downpayment for the Pedersen place.

The first payment on the balance of the purchase price, according to Jerry, consisted of a check dated February 26, 1968, in the amount of $5,000 from Agnes to Martha, the proceeds to cover the check having come from the cashing of E bonds which were payable to Agnes, Joe, and himself. Martha

also received checks from Agnes or Joe on February 21, 1970 ($7,000), February 23, 1971 ($4,000), February 21, 1973 ($2,000), and February 26, 1974 ($2,000), as well as other amounts previously set forth. Although acknowledging agreement as to the amounts which the Brteks paid her, Martha testified that she could not recall ever agreeing to sell the Pedersen place to her family; she characterized the amounts listed above as "money Joe and Jerry gifted me."

Jerry stated that he had several conversations with Martha about getting a deed to the Pedersen place and that she hesitated to give it to him because she always needed money, but she never said that she would not give him the deed.

In August 1985, Martha and Jerry had an argument because Martha told Jerry that she intended to sell the Urbanek place so she could buy another farm, and Jerry said that she should not sell it. After this conversation took place, Jerry received a letter from the Cihals' attorney, informing him that his tenancy of the Urbanek farm was to be terminated. Jerry then contacted attorney James Egr. Egr, who did not represent the Brteks at the trial, testified about a meeting which took place between the Cihals and the Brteks and their attorneys on September 19, 1985. At that meeting, Egr questioned Martha about an agreement which Jerry told him that attorney Worrall had prepared stating that the Urbanek place was supposed to be split between Jerry and Martha. Egr stated to Martha that he had contacted Worrall and that Worrall could not find the agreement. When he asked Martha if there was such an agreement and if she remembered signing it, she replied, "Well, yes," and stated that she thought she had it; it was no longer in Worrall's files. The agreement never appeared.

As previously stated, Jerry and Lillian Brtek filed this action on September 9, 1986, seeking to have trusts impressed on the two farms for the benefit of Martha and Jerry, to cancel the deed from Joe to Joe and Martha, to quiet title to the two farms in Jerry and Martha, and for an accounting and general equitable relief. Defendants Lad and Martha Cihal answered and counterclaimed, requesting that a deed to Jerry from Agnes covering other land be set aside because Jerry had failed to comply with a condition therein that he pay Martha $2,000.

The latter issue is not involved in this appeal. On September 30, 1991, the court entered a judgment finding that the plaintiffs had failed to establish a resulting or constructive trust by clear and convincing evidence, that they had also failed to prove the allegations of the second cause of action relating to the deed from Joe to himself and Martha, and that the defendants had failed to prove the allegations of their cross-petition. The plaintiffs' amended petition and the defendants' cross-petition were dismissed. The Brteks filed this appeal.

THE URBANEK PLACE

In regard to the Urbanek place, the plaintiffs argue that the deed was clearly never delivered by Joe to Martha and, further, that there is clear and convincing evidence that Martha holds the Urbanek place as trustee of a resulting trust.

DELIVERY OF DEED

It seems apparent from the record that the deed from Joe to Joe and Martha was never delivered during Joe's lifetime.

It is essential to the validity of a deed that there be a delivery, and the burden of proof rests upon the party asserting delivery to establish it by a preponderance of the evidence. To constitute a valid delivery of a deed, there must be an intent on the part of the grantor that the deed shall operate as a muniment of title to take effect presently. *Moseley v. Zieg*, 180 Neb. 810, 146 N.W.2d 72 (1966); *Lewis v. Marker*, 145 Neb. 763, 18 N.W.2d 210 (1945). One of the problems in this litigation is that the only intent supported by evidence in the record is that of Agnes, not of the grantor.

However, the essential fact to render delivery effective always is that the deed itself has left the control of the grantor, who has reserved no right to recall it, and it has passed to the grantee. *Robinson v. Thompson*, 192 Neb. 428, 222 N.W.2d 123 (1974); *Kellner v. Whaley*, 148 Neb. 259, 27 N.W.2d 183 (1947).

No particular acts or words are necessary to constitute delivery of a deed; anything done by the grantor from which it is apparent that a delivery was intended, either by words or acts, or both combined, is sufficient. *In re Estate of Saathoff. Saathoff v. Saathoff*, 206 Neb. 793, 295 N.W.2d 290 (1980);

Milligan v. Milligan, 161 Neb. 499, 74 N.W.2d 74 (1955).

Whether a deed or other instrument conveying an interest in property has been delivered is largely a question of intent to be determined by facts and circumstances of the particular case. *In re Estate of Saathoff. Saathoff v. Saathoff, supra*; *Milligan v. Milligan, supra.*

In *Perry v. Markle*, 127 Neb. 29, 254 N.W. 692 (1934), in an action for foreclosure of a mortgage, the plaintiff claimed that there was not sufficient evidence of delivery of the deed by Samuel Perry to his children in 1915. This court found that the deed had been executed and acknowledged and that "some one" of the grantees had possession of the deed ever since that time. The *deed had been recorded a few months after its execution*. Later, the grantor inherited an undivided one-fifth interest in the property, and a mortgage was executed upon the land, in which he and his four surviving children had joined. We concluded that "[t]here can be little question that Samuel H. Perry recognized that the deed had been delivered and that his children had title to the land." *Id.* at 32, 254 N.W. at 694. Although the syllabus of the court in *Perry* states that "[d]elivery of a deed by the grantor to one of several named grantees is sufficient delivery as to all," it is clear from a reading of the opinion that this was only one of several factors which were considered in reaching the conclusion that a valid delivery had been made. Perhaps of great importance were the facts relating to adverse possession and statute of limitations and the fact that the deed was recorded prior to the death of the one grantee. Recordation of a deed generally presumes delivery. *Kresser v. Peterson*, 675 P.2d 1193 (Utah 1984).

In *Kresser*, the testatrix's two stepsons asserted a one-half interest in a home under the terms of a will. The testatrix, Della, had executed a will which devised the home to her two sons and two stepsons. Seven years later, she executed a warranty deed in which she named herself and her two sons as grantees, with right of survivorship. The deed was recorded and placed in a bank safe deposit box under a lease agreement which provided "exclusive access" to the box to the joint tenants. Although the agreement permitted the sons access to the box, they did not know the deed was in the box and did not have a key to the box.

The Utah court stated the general rules: "An effective deed requires delivery, actual or constructive, without exclusive control or recall. Recording generally presumes delivery. Delivery to one cotenant or reservation of an estate connotes delivery to all cotenants, where the grantor is also the grantee." *Id.* at 1194. The court did not rely upon this last rule, however, noting instead that

> [w]ithal the recognized indicia of an effective delivery in this case, perhaps the most significant is the statement of Della at the time she signed the deed. Before a notary public, Della's sister and a daughter-in-law, she made it a point to state that she intended her sons to have the property. She emphasized such intention by adding that she did not intend the stepsons to have any interest in the property. *Delivery was reflected by recordation of the deed and deposit by Della in the safety deposit box with written authority that any of the grantees, who also were tenants under the box rental agreement, had exclusive right of access to the box.*

(Emphasis supplied.) *Id.*

The primary issue in *Meadows v. Brich*, 606 S.W.2d 258 (Mo. App. 1980), was whether the trial court was correct in finding that a deed had been delivered. In making that determination, the court stated the following governing principles, with which we agree:

> Whether or not a deed has been delivered is a mixed question of law and fact. The element which controls the resolution of that question is the intention of the parties, especially the intention of the grantor. The vital inquiry is whether the grantor intended a complete transfer—whether the grantor *parted with dominion over the instrument* with the intention of relinquishing *all* dominion over it and of making it presently operative as a conveyance of the title to the land.
>
> It is not necessary, to effectuate delivery, that the deed actually be handed over to the grantee or to another person for the grantee. There may be a delivery notwithstanding the deed remains in the custody of the grantor. If a valid delivery takes place, it is not rendered

> ineffectual by the act of the grantee in giving the deed into the custody of the grantor for safekeeping. It is all a question of the intention of the parties, which may be manifested by words or acts or both.
>
> If the deed, although acknowledged, is not recorded and is in the grantor's possession at the time of his death, those circumstances, unless explained, are deemed conclusive that the parties did not intend a complete transfer. If there is an unequivocal showing that the grantee was given possession of the deed, a presumption of delivery arises. Such a presumption, however, does not arise where the evidence shows that the grantor handed the deed to one of two grantees momentarily, for the purpose of reading it, and at the grantor's direction it is immediately taken back into grantor's possession, to be kept by him until his death.
>
> There is a presumption of *non-delivery* if the evidence shows that the deed was in grantor's possession at the time of his death and was not then recorded. Such a showing places upon grantees the burden of going forward with the evidence, "more accurately, the burden of persuasion," to rebut the presumption of non-delivery.

Id. at 260.

The parties seem to agree that it was Agnes who decided that the Urbanek farm would be put in Joe's name originally, and it was Agnes who decided that Joe should add Martha's name to the deed. Thus, it is difficult to ascertain the *grantor's* intent. However, as noted in *Moseley v. Zieg*, 180 Neb. 810, 146 N.W.2d 72 (1966), the burden of proof rests upon the party asserting delivery to establish it by a preponderance of the evidence, and to constitute a valid delivery of a deed there must be an intent on the part of the grantor that the deed shall operate as evidence of title to take effect presently. Therefore, Martha had the burden of proof to show that Joe had the intention to relinquish dominion over the deed and to make it *presently* operative as a conveyance of the title to the land.

In deposition testimony, Martha stated:

> Q. After Joe died, did you get a deed to the Urbanek place?

A. Yes.

Q. How?

A. It was written in Joe's name. When he passed away, it was deeded to me.

Q. Well, but how did you get the deed?

A. It was made at the Schuyler Bank with Mr. Joe Beck when — well, the farm was Joe's, and after something happened to him, then it would be mine.

. . . .

Q. Did you record the deed?

A. No.

Q. Do you know what it means to record a deed?

A. Yes.

. . . .

Q. But you didn't record it?

A. No.

Q. Who did?

A. Nobody. Joe had it at home. He had it.

Q. In what?

A. In the dresser drawer, and it was there until —

Q. Until he died?

A. Until he died.

Martha further testified:

A. Well, then that Urbanek's, it was an estate. So we decided to buy it because it was just a mile and a half from the home place where I come from.

Q. Did anybody make any decisions about how it was going to be paid for?

A. We all pitched in.

Q. Joe and Jerry and Mom and you, right?

A. Yes.

Q. And the title was put in Joe's name?

A. Yes.

Q. How did you get your name on that title?

A. I don't know which year now, but then Mother decided — Well, it was with Dad's estate. The farm was put in just Dad's name and not in Mother's, and so we had it made that Urbanek's place, which Joe had in his name, *so it would be willed to me*, something should happen to

him.

Q. Why was that?

A. Mother decided it that way.

. . . .

Q. After your mother died, did Jerry rent this farm from you for awhile?

A. *I did not have no right to the farm until after Joe passed away.*

(Emphasis supplied.) This testimony clearly evidences the testamentary intent of the deed as to Martha.

Although factually distinct in that the grantor was not a cograntee, in *Moseley v. Zieg, supra*, we found that where an unrecorded deed was found after the grantor's death, in a safe deposit box to which the grantee had a right of access as a joint lessee with the grantor, this of itself would not sustain a finding that the deed was delivered when the grantor retained control, collected rents, and made repairs on the property, as he did before the purported delivery. On rehearing, in *Moseley v. Zieg*, 181 Neb. 691, 692, 150 N.W.2d 736 (1967), we reexamined the evidence and again concluded that there had been no delivery, noting that "the facts show an attempted testamentary disposition of the property, which can only be done by compliance with the will statute."

It is essential to the validity of a deed that there must be delivery, and the burden of proof rests upon the party asserting delivery to establish it by a preponderance of the evidence. *Moseley v. Zieg*, 180 Neb. 810, 146 N.W.2d 72 (1966). It is true that *Moseley* states that when the deed is found in the grantee's possession during the lifetime of the grantor, this is prima facie evidence of delivery, and the burden of proof is upon the one who disputes this presumption. However, here, the deed was never in Martha's possession during Joe's lifetime.

We find that there is insufficient evidence to support a conclusion that the deed from Joe to Joe and Martha was delivered to Martha during Joe's lifetime. Accordingly, there is no valid title in the Cihals upon which a trust may be impressed. To that extent, the judgment of the district court finding that the Brteks have failed to prove the establishment of a trust as to the Urbanek place is affirmed. By the same token, we reverse

the judgment of the trial court which confirmed title to the Urbanek place in the Cihals.

Rather, we find that at Joe's death without a will, title vested immediately in his heirs or heir. "Where an ancestor dies intestate his lands descend instantly to his heirs. It does not require settlement of his estate or a probate order declaring heirship to vest his title." *Noell v. Noell*, 214 Neb. 632, 635, 335 N.W.2d 303, 306 (1983). There is no question that Joe died in 1974, leaving no spouse or issue surviving him, so title descended to his mother, Agnes. Effective at that time was Neb. Rev. Stat. § 30-102 (Reissue 1964), which provided in substance that upon the death of one leaving no spouse or heir surviving, his or her property descended to parents if living. Accordingly, title descended to Agnes. Upon Agnes' death in 1982, in effect at that time was Neb. Rev. Stat. § 30-2303(1) (Reissue 1979), which provided that upon the death of a person leaving no spouse surviving, the estate passes to "the issue of the decedent . . . ." This, of course, would mean Jerry and Martha. Although this is not the lawsuit that was tried, nevertheless, the evidence supports such a conclusion. "[W]here a court of equity has obtained jurisdiction of a cause for any purpose, it will retain it for all, and will proceed to a final determination of the case, adjudicating all matters in issue, thus avoiding unnecessary litigation." *Whitehead Oil Co. v. City of Lincoln, ante* p. 680, 682, 515 N.W.2d 401, 405 (1994). Therefore, title is confirmed in Jerry and Martha as tenants in common, and the deeds to the Urbanek place purporting to vest title in Martha and then Martha and Lad are ordered canceled of record. There is no problem with the statutes of limitations, because the deed to Martha was not valid and she had no title to convey to herself and Lad. The judgment of the district court confirming title to the Urbanek place in Martha and Lad Cihal is reversed.

THE PEDERSEN PLACE

The Brteks argue in regard to the Pedersen place that a constructive trust should be imposed.

A constructive trust is imposed when one has acquired legal title to property under such circumstances that he or she may not in good conscience retain the beneficial interest in the

property. In such a situation, equity converts the legal titleholder into a trustee holding the title for the benefit of those entitled to the ownership thereof. *Gottsch v. Bank of Stapleton*, 235 Neb. 816, 458 N.W.2d 443 (1990); *Ford v. Jordan*, 220 Neb. 492, 370 N.W.2d 714 (1985).

A constructive trust is a relationship, with respect to property, subjecting the person who holds title to the property to an equitable duty to convey it to another on the grounds that his acquisition or retention of the property would constitute unjust enrichment. *Gottsch v. Bank of Stapleton, supra*; *Knoell v. Huff*, 224 Neb. 90, 395 N.W.2d 749 (1986).

Generally, a court, sitting in equity, will not impose a constructive trust and constitute an individual as a trustee of the legal title for property unless it be shown, by clear and convincing evidence, that the individual, as a potential constructive trustee, had obtained title to property by fraud, misrepresentation, or an abuse of an influential or confidential relationship and that, under the circumstances, such individual should not, according to the rules of equity and good conscience, hold and enjoy the property so obtained. *Gottsch v. Bank of Stapleton, supra*; *In re Estate of Lienemann*, 222 Neb. 169, 382 N.W.2d 595 (1986).

A party seeking the remedy of a constructive trust has the burden to establish the factual foundation, by evidence which is clear and convincing, required for a constructive trust. *Gottsch v. Bank of Stapleton, supra*; *Lone Oak Farm Corp. v. Riverside Fertilizer*, 229 Neb. 548, 428 N.W.2d 175 (1988).

The record simply does not support a conclusion that the Cihals "had obtained title to [this] property by fraud, misrepresentation, or an abuse of an influential or confidential relationship," *In re Estate of Lienemann*, 222 Neb. at 177, 382 N.W.2d at 601, and the district court was correct in declining to impose a constructive trust.

We next examine the requirements for a resulting trust, which was argued by the Brteks as to the Urbanek place, but not as to the Pedersen place.

The court will impose a resulting trust when the circumstances surrounding a conveyance make it clear that the parties intended such a result. *Superior Hybrids Co. v.*

Carmichael, 214 Neb. 384, 333 N.W.2d 911 (1983).

A resulting trust has been defined to be one raised by implication of law and presumed always to have been contemplated by the parties, the intention as to which is to be found in the nature of their transaction, but not expressed in deed or instrument of conveyance. *Superior Hybrids Co. v. Carmichael, supra*; *Biggerstaff v. Ostrand*, 199 Neb. 808, 261 N.W.2d 750 (1978).

With respect to the underlying issues involving a resulting trust, the rules in this state have been well established. Where a transfer of property is made to one person and the whole or a part of the purchase price is paid by another, a resulting trust arises in favor of the person by whom such payment is made. *Superior Hybrids Co. v. Carmichael, supra*; *Jirka v. Prior*, 196 Neb. 416, 243 N.W.2d 754 (1976).

The rationale for this rule is that individuals seldom give consideration to receive nothing. *Superior Hybrids Co. v. Carmichael, supra*; *Campbell v. Kirby*, 195 Neb. 610, 239 N.W.2d 792 (1976).

The burden is upon the one claiming the existence of a resulting trust to establish the facts upon which it is based by clear and satisfactory evidence. *Superior Hybrids Co. v. Carmichael, supra*; *Biggerstaff v. Ostrand, supra*.

Clear and convincing evidence means and is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved. *Castellano v. Bitkower*, 216 Neb. 806, 346 N.W.2d 249 (1984).

As stated in *Superior Hybrids Co. v. Carmichael*, 214 Neb. at 387, 333 N.W.2d at 913: " 'Where a transfer of property is made to one person and the whole or a part of the purchase price is paid by another, a resulting trust arises in favor of the person by whom such payment is made . . . .' " Although a resulting trust may not arise when the parties are sufficiently close so as to give rise to a presumption that a gift was intended, that presumption can be rebutted.

When the Cihals purchased the Pedersen place by contract with Walter and Isabelle Pedersen dated July 12, 1963, there seemed to be no question that they were buying this farm as their own. They obtained the deed on December 23, 1963, and

filed it for record that same day. The Cihals made payments to the Pedersens as follows:

7/12/63	$ 1,000.00
12/23/63	23,000.00
12/28/64	2,940.00
12/27/65	302.50
12/30/66	1,302.50
12/29/67	1,745.50
12/31/68	3,165.00
Total	$ 33,455.50

It was not until February 1968 that the Brteks ever suggested that an agreement was made between the Brteks and the Cihals for the sale of the Pedersen place to the Brteks. At that time, the Cihals had been the record titleholders and in possession for over 4 years.

The Brteks have not established by clear and convincing evidence that when the conveyance was made to the Cihals, the intention was that the farm was being purchased for the Brteks, and therefore, no resulting trust arose.

Whether the Pedersen transaction between the Brteks and the Cihals was intended to be a loan or gift to, or a sale from, the Cihals was not raised by the pleadings or argued in the briefs. Whether those issues can be decided under a prayer for general equitable relief we need not answer, because either claim would be barred by the statute of limitations.

Neb. Rev. Stat. § 25-202 (Reissue 1989) provides in part: "An action for the recovery of the title or possession of lands, tenements or hereditaments, or for the foreclosure of mortgages thereon, can only be brought within ten years after the cause of action shall have accrued . . . ."

An action "upon a contract, not in writing . . . can only be brought within four years." Neb. Rev. Stat. § 25-206 (Reissue 1989).

A cause of action in contract accrues at the time of the breach or failure to do the thing agreed to. *Hooker and Heft v. Estate of Weinberger*, 203 Neb. 674, 279 N.W.2d 849 (1979).

Assuming the transaction regarding the Pedersen place was either a contract of sale or a failure to repay a loan, the Cihals

would have been obligated to either execute a deed or repay the loan within a reasonable time after the final payment made by Agnes, Joe, and Jerry. The final payment made to the Cihals of any money related to the Pedersen transaction was February 26, 1974. This action was filed on September 9, 1986, more than 12 years 6 months after either action would have accrued.

It seems to be Jerry's position that his cause of action did not arise until sometime in 1985, when he and Martha got into an argument about title to both the Urbanek and Pedersen places. Under cross-examination by the Cihals' attorney, Jerry said that Martha told him in 1968 she would be giving him the deed to the Pedersen place, but that she refused to do so. On redirect by his own attorney, when asked what Martha had told Jerry about the deed to the Pedersen place, Jerry answered, "[T]hat she would make it right with me, that she will eventually some day. I haven't seen that day today, to this day I ain't got the title." During Jerry's examination by his own attorney, he produced a letter written by Martha and mailed to Jerry's wife, postmarked April 14, 1972, which in part stated:

> Received your letter & was quite disappointed. We are doing the best we can. [T]he farm up the hill is ours. [I]t cost us $32000.00 and I can not sign it over to you. I gave permission that you could live there. [T]hat is I don't know how it will be yet.

It seems to be the Brteks' position that during the next 12 years, Jerry kept waiting for this performance, and therefore, his action had not accrued. However, that did not toll the running of the statute. On the record before us, we must conclude that the statute of limitations had expired before this action was filed in 1986. Accordingly, that portion of the judgment of the district court confirming title to the Pedersen and Texel places in the Cihals and the home place in the Brteks is affirmed.

AFFIRMED IN PART, AND IN PART REVERSED.

WILLIAM J. SCHMIDT, APPELLANT, V. OMAHA PUBLIC POWER DISTRICT AND NEBRASKA UNDERGROUND HOTLINE, INC., ALSO KNOWN AS ONE CALL, APPELLEES.

515 N.W.2d 756

Filed May 6, 1994. Nos. S-92-264, S-92-541.

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. **Political Subdivisions Tort Claims Act.** All tort claims under the Political Subdivisions Tort Claims Act shall be filed with the clerk, secretary, or other official whose duty it is to maintain the official records of the political subdivision.
4. **Negligence.** For actionable negligence to exist, there must be a legal duty on the part of the defendant to protect the plaintiff from injury, a failure to discharge that duty, and damage proximately resulting from such undischarged duty.
5. _____. "Duty" is a question of whether the defendant is under any obligation for the benefit of the particular plaintiff, and in negligence cases, the duty is always the same—to conform to the legal standard of reasonable conduct in the light of the apparent risk.
6. **Negligence: Words and Phrases.** A duty, in negligence cases, may be defined as an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another.
7. **Negligence.** Foreseeability is a factor in establishing a defendant's duty.
8. _____. The risk reasonably to be perceived defines the duty to be obeyed.
9. **Negligence: Proximate Cause: Words and Phrases.** Contributory negligence is conduct for which the plaintiff is responsible, amounting to a breach of the duty imposed upon persons to protect themselves from injury, and which, concurring with actionable negligence on the part of the defendant, is a proximate cause of injury.
10. **Negligence.** To constitute want of due care on the plaintiff's part, it is not necessary that he or she have anticipated the exact risk which occurred or that the peril was a deadly one; it is sufficient that the plaintiff knew or should have known that substantial injury was likely to result from his or her acts.
11. _____. The question whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation.
12. **Expert Witnesses: Rules of Evidence.** Expert testimony concerning a question of law is generally not admissible in evidence.
13. _____: _____. Expert testimony is relevant and admissible only if it tends to

help the trier of fact understand the evidence or to determine a fact issue, and expert testimony concerning the status of the law does not tend to accomplish either of these goals.

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

Warren C. Schrempp and Lee R. Terry, of Schrempp and Terry, for appellant.

Michael F. Coyle and Leslie E. Kendrick, of Fraser, Stryker, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., for appellee Omaha Public Power District.

Eugene P. Welch and Alison T. Lonsdale, of Gross & Welch, P.C., for appellee Nebraska Underground Hotline.

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

FAHRNBRUCH, J.

William J. Schmidt appeals from two separate orders of the district court for Douglas County sustaining the summary judgment motions of Omaha Public Power District (OPPD), case No. S-92-264, and Nebraska Underground Hotline, Inc. (Hotline), case No. S-92-541.

Although Schmidt filed but one lawsuit against OPPD and Hotline as codefendants, the granting of summary judgment as to each defendant at different times has resulted in two separate appeals to this court. Because the facts and issues in each appeal are somewhat interrelated, we elect to consider the two appeals in a single opinion in the interest of judicial economy.

We reverse the district court's orders of summary judgment and remand the causes as to OPPD and Hotline for further proceedings in the district court.

I. FACTS

Schmidt, an employee of Bonn Fence Company (Bonn Fence), suffered electrical shock injuries on May 28, 1988, when he struck an electric powerline with an auger while digging post holes for his employer. Bonn Fence had been hired to build a beer garden, including a perimeter fence, adjacent to

an Omaha bar. Bonn Fence is a corporation whose president is Bo Bonn.

Bo Bonn testified in his deposition that prior to any digging, Bonn Fence always calls Hotline to obtain the location of any buried cables or other buried utilities. Bonn Fence was following that procedure in May 1988.

Randall Parker, president of Hotline, testified by deposition that the predecessor to Hotline, previously known as One Call, was formed in Omaha in the early 1970's by various utility companies, including OPPD. One Call was originally developed as a way for contractors to have underground utilities located, thereby preventing damage to utilities' underground equipment, without having to call each individual utility.

Parker described Hotline as it now exists as a "distribution service" which takes location information from a caller planning to dig and then determines by computer which member utilities have requested notification of excavation in that particular location. Parker further testified that after Hotline transmits the location information to member utilities requesting coverage for the location, dispatch personnel from each utility notify Hotline of the time when locators will be at the subject property. According to Parker, Hotline relays this information to the caller, and at that point, Hotline's role in the process is finished.

On May 24, someone from Bonn Fence contacted Hotline and requested a "locate" at the bar property. OPPD was scheduled to locate its lines at 8 a.m. the following day. The evidence is in conflict as to whether Bonn Fence agreed to have someone from the company meet with the OPPD locator. An OPPD locator testified in his deposition that he arrived at the worksite before 8 a.m. and that he left 15 minutes later without marking anything when no one from Bonn Fence appeared.

Brad Bonn, a brother of Bo Bonn and an employee of Bonn Fence, testified in his deposition that he called Hotline on May 25 and requested an additional locate because nothing had been marked. Brad Bonn further testified that when he called, a woman at Hotline told him that all powerlines were to the east and front or south of the building and that the area was clear of

powerlines to the back and west.

Parker testified that Hotline records and tapes its conversations with callers. A transcribed copy of conversations between Hotline and Bonn Fence was entered into evidence, accompanied by Parker's affidavit stating that it included "every conversation that exists between employees of [Hotline] and Bonn Fence personnel" and was an "accurate [reproduction] of the tape recorded conversations had between the parties." The transcribed conversations contain no statement by Hotline personnel as to the location of powerlines.

The OPPD locator thought he returned to the bar property on May 26, and again there was no one from Bonn Fence present. Because the second locate was scheduled for "any time," the locator marked OPPD's equipment and left. This consisted of marking OPPD's primary cable, which ran along the east side of the property from a transformer on the northeast corner of the property to a switch near the street at the southeast corner of the property.

On May 28, Schmidt, after being told by Bo Bonn that it was safe to dig in the area, began digging post holes on the north side of the building. Schmidt, operating a Bobcat tractor with an auger attachment, dug six holes. While digging the seventh hole, Schmidt struck a buried underground electric line and sustained a severe electrical shock. Schmidt claims that OPPD failed to shut off the electricity until Bo Bonn called a second time. Schmidt said that during the interval, he continued to receive electrical shock.

Schmidt sued, naming OPPD and Hotline as codefendants. He alleged negligence on the part of OPPD in the following respects: (1) failing to mark the buried electric line on the north side of the bar property; (2) representing that all lines had been properly marked, when such representation was false; (3) failing to warn of the existence of buried electric line on the north side of the property; (4) failing to timely turn off the electricity after Schmidt's contact with the electric line, causing a more severe injury; (5) failing to properly and timely communicate to Schmidt or his employer any policy concerning locating or not locating secondary buried electric lines; and (6) failing to inform defendant Hotline of any policy concerning

locating or not locating secondary buried electric lines on commercial property.

OPPD denied negligence because the underground electric line struck by Schmidt was not owned or controlled by OPPD. It therefore had no duty to Schmidt, argues OPPD. It is undisputed that the line Schmidt struck was a secondary line running from a transformer on the bar property to a business north of the bar and that the line was not owned by OPPD. A primary line is a high-voltage line which runs from a substation to a transformer. A secondary line is one which carries electricity from the transformer to a meter after the transformer has reduced the voltage.

An OPPD vice president testified by deposition that it is not OPPD's practice to locate secondary lines in a commercial setting unless those lines are owned by OPPD. He did not know of any written policy for OPPD's locators to follow, nor did he know whether the practice of locating only OPPD-owned equipment was communicated to customers in any way. An OPPD manager testified in his deposition that a contractor working on commercial property must ordinarily contact the property owner to have secondary lines marked.

OPPD maintains that it could not have made any representation of material fact to Bonn Fence or Schmidt, because OPPD never had any communication with either. OPPD also denies that it failed to timely shut off the electricity once Schmidt hit the secondary line. It submitted an affidavit stating that the fuses in the transformer cleared within .14 to .18 second after the dig-in, automatically deenergizing the line.

Finally, OPPD alleged that Schmidt assumed the risk of digging when he had knowledge that underground electric cables were in the immediate vicinity and that Schmidt was contributorily negligent in digging prior to ascertaining whether it was safe to do so.

Schmidt alleged that Hotline was negligent in (1) failing in its duty to inquire, request, or research whether or not OPPD locates all buried electric powerlines on commercial property; (2) failing to warn those who use its services that OPPD may not locate all buried electric powerlines; and (3) representing to Schmidt that all buried electric cables could be located, when

such representation was false.

Hotline maintains that it is not in the business of locating underground cables and had no duty to Schmidt because it did not own, possess, or control the property on which he was injured. Hotline disputes Schmidt's assertion that one of Hotline's employees assured Brad Bonn that all power was to the south and east of the building. Hotline entered into evidence transcripts of its conversations with Bonn Fence, which do not reflect that such a statement was made. Hotline further argues that even if such a statement had been made, there is no evidence that Hotline knew the statement to be false or made the statement with reckless disregard for the truth.

Hotline alleged that Schmidt was contributorily negligent by failing to ascertain the location of the underground cable which he struck with an auger, when he knew or should have known that the cable had not been marked by OPPD.

OPPD was granted summary judgment on Schmidt's fifth amended petition, the operative petition before the court at that time. On March 6, 1992, the trial court, after entering summary judgment in favor of OPPD, dismissed Schmidt's fifth amended petition with prejudice as to OPPD only. Schmidt appealed the trial court's summary judgment in favor of OPPD.

Schmidt filed a sixth amended petition on March 24, which Hotline answered on April 16. Hotline moved for summary judgment on May 29. The trial court granted Hotline's summary judgment motion on June 18.

In each case, the court specifically found that there was no basis or foundation for the opinion of Schmidt's expert witness, Dr. Bruce Johnson, and struck Johnson's opinion as a matter of law. Appeals of the trial court's summary judgment in favor of each of the defendants were timely filed.

II. ASSIGNMENTS OF ERROR

On appeal, Schmidt claims that the district court erred in (1) sustaining OPPD's motion for summary judgment when Schmidt offered evidence of material facts supporting genuine issues of law including misrepresentation, failure to warn, and failure to timely react; (2) sustaining Hotline's motion for summary judgment when Schmidt offered evidence of material

facts supporting genuine issues of law including misrepresentation and failure to warn; and, as to each defendant, (3) excluding the testimony of Dr. Bruce Johnson, Schmidt's expert witness.

III. 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. *Hawkins Constr. Co. v. Reiman Corp., ante* p. 131, 511 N.W.2d 113 (1994). 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.*

IV. ANALYSIS

1. SUMMARY JUDGMENT FOR OPPD

Turning to the issue of whether the trial court properly granted summary judgment in favor of OPPD, we note that OPPD is a political subdivision as defined by Neb. Rev. Stat. § 13-903(1) (Reissue 1987). Therefore, any suit brought against OPPD must be brought pursuant to the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. § 13-901 et seq. (Reissues 1987 & 1991 & Cum. Supp. 1992).

Section 13-905 of the Political Subdivisions Tort Claims Act states in pertinent part: "All tort claims under [the Political Subdivisions Tort Claims Act] shall be filed with the clerk, secretary, or other official whose duty it is to maintain the official records of the political subdivision . . . ."

Schmidt, in his fifth amended petition, the operative petition before the court at the time of OPPD's summary judgment motion, alleged that "O.P.P.D. [had] received valid and sufficient notice of claim under Nebraska Governmental Tort Claims Act, said claim was withdrawn on February 14, 1989, the letter of withdrawl [sic] is marked Exhibit A, attached hereto and incorporated herein as if fully set out."

In its answer to Schmidt's fifth amended petition, OPPD

"specifically [denied] that Plaintiff has complied with the provisions of the Nebraska Political Subdivision's [sic] Tort Claim [sic] Act and [put] Plaintiff on strict proof of same." In his reply, Schmidt made only a general denial of "each and every allegation in defendants' answer except those allegations which constitute an admission against the defendants."

Compliance with the filing or presentment of claim provision in § 13-905 is a condition precedent to commencement of a negligence action against a political subdivision. *Millman v. County of Butler*, 235 Neb. 915, 458 N.W.2d 207 (1990).

Because Schmidt has alleged that OPPD had received notice of his claim, and OPPD has specifically denied that Schmidt complied with the provisions of the Political Subdivisions Tort Claims Act, there exists a genuine issue of material fact as to whether Schmidt met a condition precedent to commencement of his negligence action against OPPD. Therefore, it was error for the trial court to enter summary judgment in favor of OPPD, and it is not necessary for us to further determine whether there are other genuine issues of material fact as to OPPD's liability.

2. Summary Judgment for Hotline

Schmidt argues that Hotline was not entitled to summary judgment because it (1) negligently failed to properly investigate whether OPPD locates all powerlines, (2) negligently failed to warn Schmidt that all powerlines would not be located, and (3) negligently misrepresented the location of powerlines on the worksite.

The issues raised by Schmidt are questions of first impression in Nebraska. Our research has found no law in this jurisdiction, nor in any other for that matter, on the liability of a one-call clearinghouse such as Hotline to a caller who requests that underground utilities be located prior to excavating in a particular area. We therefore look to the general principles of pleading and negligence law for guidance.

(a) Negligent Misrepresentation

We first turn to Schmidt's argument that Hotline negligently misrepresented that the only electric powerlines on the construction site were located to the east and south of the

property, when in fact there was a secondary line to the north of the bar. This argument is inconsistent with Schmidt's sixth amended pleading, which alleged in part:

> 6. That on May 24 and May 25, 1988, *O.P.P.D. represented* to Bonn Fence Company that all electric lines had been marked and that all electric lines were east of the building.
>
> 7. That Bonn Fence Company and its employees relied on Nebraska Underground Hotline, Inc.'s representation that all underground electric lines would be located. That Bonn Fence Company and its employees relied on *O.P.P.D.'s representation* that all buried electric lines had been marked and all electric lines were east of the building.
>
> . . . .
>
> 11. That the defendant, Nebraska Underground Hotline, Inc. by and through its agents and employees, was negligent in the following particulars:
>
> . . . .
>
> (c) In representing to plaintiff that all buried electric cables could be located when said representation was false.

(Emphasis supplied.)

Thus, the factual issues as to negligent misrepresentation raised by Schmidt's pleadings are (1) whether OPPD represented to Bonn Fence that all powerlines were located to the east of the building and (2) whether Hotline represented to Bonn Fence and its employees that all underground electric lines could or would be located.

As to the first issue, we note that nowhere in his pleadings does Schmidt allege that *Hotline* represented to him that all powerlines were located to the east of the building. His only factual allegation is that OPPD did so. The issues of a case are framed by the pleadings, see *Christianson v. Educational Serv. Unit No. 16*, 243 Neb. 553, 501 N.W.2d 281 (1993), and Schmidt cannot now argue that Hotline negligently misrepresented the location of the underground electric lines after failing to so plead.

Next, we determine whether there is any evidence that Hotline represented to Bonn Fence or to Schmidt that all

underground electric lines either could or would be located.

Bo Bonn testified in his deposition that his *understanding* was that when he would call Hotline, OPPD would come out and mark all powerlines within the work area. He based this conclusion on past experience, i.e., that OPPD had located and marked all lines in the past.

Brad Bonn had talked to Hotline regarding the locate at the bar worksite. He testified in his deposition that no one from Hotline ever stated to him that all buried electric cables would be marked.

Schmidt himself testified that his *understanding* was that all the powerlines had been marked. He testified that Bo Bonn had told him this, but he did not remember the specific conversation.

Hotline, in its answer to Schmidt's sixth amended petition, specifically denied that it made any representation to Bonn Fence and/or its employees that all underground electric lines would be located. In support of its motion for summary judgment, Hotline entered into evidence a transcribed copy of tape recordings of all conversations between Hotline and Bonn Fence personnel relative to the locates at the bar worksite. The transcript of those conversations contains no representation by Hotline that all electric lines could or would be located.

There exists no genuine issue of material fact as to whether Hotline represented to Schmidt that all electric lines could or would be located. Schmidt has offered no evidence that Hotline made such a representation, and any subjective understanding by Schmidt or other Bonn Fence employees is insufficient to create a fact issue as to whether such a representation was made. Therefore, Schmidt cannot prevail on a theory of negligent misrepresentation.

(b) Failure to Warn

Turning now to Schmidt's first two arguments, it is clear that any duty of Hotline to inquire whether OPPD located all powerlines is subsumed in any duty of Hotline to warn Schmidt that all powerlines would not be located. Stated another way, if Hotline had no duty to warn Schmidt, it would be pointless for the law to impose a duty on Hotline to acquire such knowledge

in the first place. We limit our analysis to whether Hotline negligently failed to warn Schmidt that not all electric lines would be located by OPPD.

For actionable negligence to exist, there must be a legal duty on the part of the defendant to protect the plaintiff from injury, a failure to discharge that duty, and damage proximately resulting from such undischarged duty. *First Nat. Bank of Omaha v. State*, 230 Neb. 259, 430 N.W.2d 893 (1988). Therefore, for Hotline to be liable to Schmidt, there first must be a legal duty running from Hotline to Schmidt.

> "[D]uty" is a question of whether the defendant is under any obligation for the benefit of the particular plaintiff; and in negligence cases, the duty is always the same—to conform to the legal standard of reasonable conduct in the light of the apparent risk. . . .
>
> A duty, in negligence cases, may be defined as an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another.

W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 53 at 356 (5th ed. 1984). Accord *Tiede v. Loup Power Dist.*, 226 Neb. 295, 411 N.W.2d 312 (1987).

"Foreseeability is a factor in establishing a defendant's duty, or, as expressed by Justice Cardozo in *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 394, 111 N.E. 1050, 1054 (1916): '[F]oresight of the consequences involves the creation of a duty . . . .' " *Holden v. Urban*, 224 Neb. 472, 475, 398 N.W.2d 699, 701 (1987). Again quoting Justice Cardozo, in what is undoubtedly his most famous opinion: "The risk reasonably to be perceived defines the duty to be obeyed . . . ." *Palsgraf v. Long Island R. R. Co.*, 248 N.Y. 339, 344, 162 N.E. 99, 100 (1928).

Under the facts of this case, the risk of serious harm to Schmidt was foreseeable by Hotline. It is common knowledge that electricity is a dangerous commodity, and it requires little imagination to perceive the risk of electric shock to an individual who digs in an area containing hidden underground electric lines. It is entirely foreseeable that a caller to Hotline, having requested a locate of electric lines and having observed

power company markings on the ground, would proceed to excavate in the belief that all electric lines had been marked.

It is also foreseeable that such a caller, having thus proceeded, could be seriously injured or killed by electric shock upon striking an electric line which has not been marked because it is not owned by the power company. The foreseeability and magnitude of this risk militates in favor of imposing a duty upon Hotline to inquire and to warn callers that not all electric lines are marked by the power company.

The imposition of a duty may also be grounded in public policy considerations. "The policy characteristic of duty is one method that courts use to allocate the costs of injury in a manner that considers the interests of both society and the injured person." 4F Personal Injury § 1.01[2][i] at 78 (Louis R. Frumer et al., eds., 1989).

The case *Hopkins v. Fox & Lazo Realtors*, 132 N.J. 426, 625 A.2d 1110 (1993), is in many ways analogous to the case at hand and offers guidance on whether liability may be imposed upon Hotline for failure to warn Schmidt that OPPD did not mark all underground electric lines. In *Hopkins*, potential home buyers and their relative were touring an open house at the invitation of a real estate broker. The relative fell and broke her ankle while proceeding from one level of the home to another and sued the real estate broker for failing to warn her of the danger. She claimed that the connecting step was "camouflaged" because a similar vinyl flooring covered both areas. The trial court granted summary judgment in favor of the real estate broker.

On appeal, the New Jersey Supreme Court addressed the issue of whether a real estate broker who holds an open house for the purpose of attracting potential buyers has a duty of care with respect to the safety of those touring the home, including a duty to warn of potential dangers in the home. In imposing a duty of care upon the real estate broker, the court looked to the principles of public policy and the perceptions of social values underlying the common law. The court stated:

> The actual imposition of a duty of care and the formulation of standards defining such a duty derive from considerations of public policy and fairness. [Citation

> omitted.] "This Court has carefully refrained from treating questions of duty in a conclusory fashion, recognizing that '[w]hether a duty exists is ultimately a question of fairness.' " [Citations omitted.]
>
> Whether a person owes a duty of reasonable care toward another turns on whether the imposition of such a duty satisfies an abiding sense of basic fairness under all of the circumstances in light of considerations of public policy. [Citation omitted.] That inquiry involves identifying, weighing, and balancing several factors—*the relationship of the parties, the nature of the attendant risk, the opportunity and ability to exercise care, and the public interest in the proposed solution.*

(Emphasis supplied.) 132 N.J. at 439, 625 A.2d at 1116.

In analyzing the above four factors, the New Jersey Supreme Court first noted that while a real estate broker acts as the homeowner's agent, the broker also receives tangible benefits from the relationship with any potential buyers who attend an open house. An open house enables the broker to sell the property and earn a commission, as well as to cultivate future clients. The court concluded that the relationship between a real estate broker and a customer in an open house inspection of property is substantial and that "implicit in the broker's invitation to customers is some commensurate degree of responsibility for their safety while visiting the premises." 132 N.J. at 441, 625 A.2d at 1117.

The court analyzed the nature of the attendant risk in terms of foreseeability and found it to be highly foreseeable that open house visitors wandering through an unfamiliar house could be injured by dangerous conditions.

As to the opportunity and ability to exercise care, the court noted that the reasonableness of precautions is dependent upon the practicability of preventing the harm. The court concluded that a broker is under a duty to conduct a reasonable broker's inspection consistent with the customary standards of real estate brokers conducting open house tours, contingent upon whether it is reasonable for a broker to inspect the premises and whether the broker has an adequate opportunity to do so in preparation for the open house. The court observed that real

estate agents derive economic benefits from an open house and that real estate agents should therefore be able to bear the cost of accident prevention.

Finally, the court concluded that the public interest was served by recognizing a duty of care on the part of brokers. The court reasoned that tort law is designed not only to provide legal redress to injured parties, but also to discourage tortious behavior by creating incentives to minimize the risks of harm, thus preventing accidents. However, in remanding the cause for trial, the court emphasized that although it had found the existence of a duty to the plaintiff, it was for the trier of fact to determine whether the real estate broker had breached that duty.

The New Jersey Supreme Court's analysis in *Hopkins* provides a useful framework for our analysis of this case. The relationship between the parties in this case is closely analogous to that of the parties in *Hopkins*. Hotline, as a service to its member utilities, invites those who are planning to dig or excavate to call the Hotline number for the location of buried cables or utilities.

Hotline advertises its services in the white and yellow pages of the telephone directory, in mailings, and on calendars, hats, coolers, key chains, wallet cards, and other advertising items. The Hotline telephone number is also advertised by member utility companies on pedestal stickers. Some of the advertising is paid for by Hotline, and some is paid for by the member utilities.

There is no charge to the caller for Hotline's services. Hotline is paid by each of the member utilities on a contractual basis. For example, the contract between OPPD and Hotline in effect at the time of Schmidt's accident required OPPD to pay Hotline a minimum monthly fee for a predetermined number of calls at $2.20 per call, for a minimum charge of $32,285 annually. The contract also required OPPD to pay Hotline $1.70 for each call in excess of the minimum monthly number.

An annual charge of $32,285 is a substantial amount of money. It seems obvious that to the extent that excavators decline to use Hotline's services for whatever reason, member utilities will no longer be willing to pay for Hotline's services.

Therefore, although Hotline has no contractual relationship with its callers, Hotline's continued existence is dependent upon the continued use of its services by callers who are planning to excavate.

Additionally, Parker testified in his deposition that public safety is one purpose of Hotline. Implicit in Hotline's invitation to excavators to use its services is some commensurate degree of responsibility for the safety of its callers, and such responsibility is consistent with Hotline's stated purpose of public safety.

As to the nature of the attendant risk, we have previously discussed the grave risk which is posed to an excavator who is digging in an area containing unmarked underground electric lines, and have concluded that such a risk to its callers is readily foreseeable by Hotline.

We now turn to the third factor, whether Hotline had the opportunity and ability to exercise care. It is clear that Hotline has both the opportunity and the ability to exercise care toward its callers. This is because Hotline is the universal point of contact for all callers needing underground utilities marked. All that Hotline need do is advise callers that its member utilities locate only their own equipment, and warn the caller that there could be additional buried equipment which the excavator or property owner is responsible for locating. Such a warning is reasonable under the circumstances, practical, and extremely cost-effective. In fact, the cost to Hotline of such a warning, which would take only a few seconds, would be negligible.

Finally, the public interest would be well served by recognizing a duty of care on the part of an entity such as Hotline. The public certainly has a vital interest in preventing accidents from electrical shock. If Hotline is in the business of public safety, as well as property damage control, it should be encouraged to minimize such risks to the public.

We therefore hold that Hotline has a duty of care to its callers. This duty arises because of the integral relationship which Hotline has to its callers in the course of performing its contractual obligations to member utilities. Ordinarily, the scope of Hotline's duty is limited to the duty to inquire of its member utilities as to what equipment the utility actually

locates, and to warn callers that only underground equipment owned by the member utility will be located. This warning should include the caveat that OPPD does not ordinarily locate underground secondary electric lines on commercial property.

Although we find that Hotline has a duty to warn callers that electric lines not owned by OPPD are not located, we do not determine that Hotline had such a duty to Schmidt. The duty to warn others of a particular peril is not absolute; the need to warn depends upon, among other things, the age, intelligence, and information of those to whom the warning might be due, and the obligation disappears entirely where it is shown that the injured person did in fact know of and fully appreciate the peril. *Tiede v. Loup Power Dist.*, 226 Neb. 295, 411 N.W.2d 312 (1987).

According to the record, Schmidt often functioned in a supervisory capacity at Bonn Fence. He was second in command after Bo Bonn and was authorized to act for the company, including bidding jobs and running whole jobs from start to finish. He was able to do grading work and had used a Bobcat tractor to do this, as well as hand and power augers. Although most of Bonn Fence's work during Schmidt's employment with the company was residential, Schmidt estimated that about 15 to 20 percent was commercial in nature. Schmidt testified by deposition that in preparing to start on a job, it was necessary to decide whether underground lines of any type would be a factor. If so, Schmidt utilized Hotline's services to have such lines located.

Schmidt further testified that he had worked near a transformer on jobs prior to the job at the bar property. He was aware that electric lines were buried underground leading to and from such transformers. He was also aware that to get electric power from a power source to another area, the power has to come either from a fuse box or from a power source going into a fuse box. Schmidt was surrounded by a group of commercial buildings at the jobsite where he was injured. He knew that underground electrical cable could be going into the various businesses. He further knew that the powerlines could be in the air.

Schmidt had been doing excavation for a retaining wall at the

jobsite for 2 weeks prior to the incident in question. In his deposition, Schmidt testified that the only OPPD markings he observed in the time he spent on the jobsite were in an area close to the transformer, on the pavement north of the transformer which was located on the north edge of the jobsite, and on a hill to the west of the building. Schmidt had observed all these markings prior to the time of his accident.

Nevertheless, Schmidt proceeded to dig upon the assurance of Bo Bonn that all the underground powerlines had been located and marked. The foregoing facts are sufficient to create a question of fact as to whether Schmidt was sufficiently aware of the peril to relieve Hotline of its duty to warn him of the danger.

Moreover, Hotline has raised in its answer the issue of Schmidt's contributory negligence. Contributory negligence is conduct for which the plaintiff is responsible, amounting to a breach of the duty imposed upon persons to protect themselves from injury, and which, concurring with actionable negligence on the part of the defendant, is a proximate cause of injury. See, *Behm v. Northwestern Bell Tel. Co.*, 241 Neb. 838, 491 N.W.2d 334 (1992); *Grote v. Meyers Land & Cattle Co.*, 240 Neb. 959, 485 N.W.2d 748 (1992).

To constitute want of due care on the plaintiff's part, it is not necessary that he or she have anticipated the exact risk which occurred or that the peril was a deadly one; it is sufficient that the plaintiff knew or should have known that substantial injury was likely to result from his or her acts. *Engleman v. Nebraska Public Power Dist.*, 228 Neb. 788, 424 N.W.2d 596 (1988).

There is sufficient evidence to create a genuine issue of material fact as to whether Schmidt knew or should have known of the danger of digging and thus was contributorily negligent, as well as whether Hotline had a duty to warn Schmidt, and it was error for the trial court to enter summary judgment in favor of Hotline. We reverse the trial court's order of summary judgment as to Hotline and remand the cause for trial.

3. Expert Testimony

In his final assignment of error as to both OPPD and

Hotline, Schmidt claims that the trial court erred in striking the testimony of his expert witness. Dr. Bruce Johnson, an electrical engineer, testified on Schmidt's behalf that in his opinion, OPPD had a duty to warn Schmidt of the presence of the secondary line, and that some lines were not located.

In Johnson's opinion, Hotline had a duty to inquire of OPPD whether the area would be safe to work and to warn Schmidt if the area would not be safe. The trial court, in ordering summary judgment in favor of both OPPD and Hotline, found that there was no basis or foundation for Johnson's opinion and ordered his opinion stricken as a matter of law.

The question whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation. *Lemke v. Metropolitan Utilities Dist.*, 243 Neb. 633, 502 N.W.2d 80 (1993); *Parrish v. Omaha Pub. Power Dist.*, 242 Neb. 783, 496 N.W.2d 902 (1993). Expert testimony concerning a question of law is generally not admissible in evidence. *Kaiser v. Western R/C Flyers*, 239 Neb. 624, 477 N.W.2d 557 (1991). See, also, Neb. Evid. R. 702, Neb. Rev. Stat. § 27-702 (Reissue 1989). "[E]xpert testimony is relevant and admissible only if it tends to help the trier of fact understand the evidence or to determine a fact issue and . . . expert testimony concerning the status of the law does not tend to accomplish either of these goals." 239 Neb. at 628, 477 N.W.2d at 560, citing *Sasich v. City of Omaha*, 216 Neb. 864, 347 N.W.2d 93 (1984).

Because Johnson's deposition testimony involved the duties of OPPD and Hotline to warn Schmidt, that testimony was properly stricken by the trial court, those matters being questions of law. Thus, Schmidt's third assignment of error is without merit.

V. CONCLUSION

We reverse the trial court's orders of summary judgment in favor of OPPD and Hotline and remand the causes to the district court for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

PATRICK KUHL ET AL., APPELLANTS, V. JAMES SKINNER ET AL., APPELLEES.

515 N.W.2d 641

Filed May 6, 1994. No. S-92-493.

1. **Statutes: Appeal and Error.** Statutory interpretation is a matter of law, in connection with which an appellate court has the obligation to reach an independent, correct conclusion irrespective of the determination made by the court below.
2. **Statutes.** In the absence of an indication to the contrary, statutory language is to be given its plain and ordinary meaning.
3. **Commission of Industrial Relations: Labor and Labor Relations.** Neb. Rev. Stat. § 48-816(1) (Reissue 1988) states that the Commission of Industrial Relations shall require good faith bargaining, but only after a petition has been filed invoking the jurisdiction of the commission.
4. _____: _____. Neb. Rev. Stat. § 48-816(5) (Reissue 1988) requires good faith bargaining, but only after the employer receives a request to bargain from the union.
5. **Commission of Industrial Relations: Labor and Labor Relations: Public Officers and Employees.** Neb. Rev. Stat. § 48-816(4) (Reissue 1988) does not require good faith bargaining. It simply authorizes public employers to negotiate with unions regarding the settlement of grievances and the establishment of written agreements as to wages, hours, and other conditions of employment. Without this statutory authorization, a public employer would not have the right to bargain with public employees.
6. **Labor and Labor Relations: Federal Acts: Statutes.** Although federal court decisions under the National Labor Relations Act are helpful where similar provisions exist in the Nebraska statutes, the federal decisions are of no help or benefit where similar provisions do not exist under Nebraska statutes.

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

Bruce G. Mason, of Bradford, Coenen, Ashford & Welsh, for appellants.

Kent N. Whinnery, Deputy Omaha City Attorney, and Sheri E. Long for appellees.

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

WHITE, J.

The Omaha Police Union Local 101 (Union) and three of its members, Patrick Kuhl, James Roberts, and Jack Caniglia

(collectively plaintiffs), brought a declaratory judgment action contesting the validity of an order issued by the chief of police, James Skinner. Plaintiffs named as defendants the City of Omaha (City), its chief of police, and its director of public safety, Pitmon Foxall. After a bench trial, the district court dismissed the petition, and plaintiffs appealed. Under our authority to regulate the caseloads of the appellate courts of this state, we removed the matter from the Nebraska Court of Appeals to this court. We now affirm.

The parties' dispute concerns holiday hours. The individual plaintiffs are employed under a collective bargaining agreement (CBA) entered into by the City and the Union. Under the CBA, work performed on a holiday is compensated at a premium rate. The CBA does not provide holiday work schedules and does not expressly indicate who has the power to decide holiday work schedules.

Prior to June 1991, sworn personnel worked holidays at their own discretion. Keith Lant, an ex-deputy police chief, testified that he had observed police officers who, upon approaching retirement, would increase the number of holidays they worked. By increasing the holiday hours worked and increasing their total yearly pay, the officers also increased their pensions because an officer's pension is based on his total yearly pay during his last year of work.

On June 5, 1991, the chief of police issued order No. 33-91. Order No. 33-91 established the following "policy": "[O]nly sworn personnel assigned to twenty-four hour functions will work on holidays unless otherwise determined as needed by the office of the Chief of Police." To effectuate this policy, order No. 33-91 announced the following "procedure": "All sworn personnel not on the card system and assigned regular days off will be off on the holiday unless otherwise authorized by the office of the Chief of Police." The record does not disclose what is meant by "on the card system." It appears, however, that order No. 33-91 prevented 5-day-a-week sworn personnel from working on holidays and earning premium holiday pay.

Plaintiffs filed suit seeking a declaratory judgment and injunctive relief. Plaintiffs alleged that the June 1991 order violated their rights under the CBA and violated their

constitutional rights to due process, equal protection, and freedom from impairment of contracts.

In discussing plaintiffs' due process claim, the district court first stated that plaintiffs had the burden to show that "fundamental fairness has been abdicated and fundamental rights have been abridged." The court noted that "[a]lthough it could be effectively argued that the Defendants have a duty to bargain . . . it could also be proffered that the Plaintiffs could have made this extra holiday pay a specific right in the Contract." Finding these arguments equally balanced, the court held that plaintiffs had failed to prove their case by a preponderance of the evidence. Accordingly, the court dismissed the petition.

Plaintiffs allege that the district court erred (1) in failing to find that the City had a duty to bargain prior to making a unilateral change, (2) in failing to find that plaintiffs possessed a property right in collective bargaining, (3) in applying fundamental fairness as the test for a due process violation, and (4) in finding plaintiffs had not met their burden of proof on their due process claim.

The alleged errors interrelate, as demonstrated by plaintiffs' argument, which proceeds in three steps. First, plaintiffs claim that under Neb. Rev. Stat. § 48-816 (Reissue 1988), the City had a duty to bargain collectively prior to making a unilateral change in the terms and conditions of plaintiffs' employment. Second, plaintiffs claim that the City breached its duty by failing to bargain prior to issuing order No. 33-91. Third, plaintiffs contend that the City's breach deprived them of property without due process of law.

We begin with the first step in plaintiffs' argument—their contention that the City had a mandatory duty to bargain collectively prior to making a unilateral change in the terms and conditions of their employment. Plaintiffs argue that this duty can be found in Nebraska's statutes and further argue that Nebraska's statutory scheme "mirror[s] the federal scheme." Brief for appellants at 28. It is important to note that plaintiffs rely entirely upon the duty to bargain as it may exist under Nebraska law; plaintiffs have relied upon federal law only to illuminate our understanding of Nebraska law. Plaintiffs'

argument necessitates an examination and comparison of federal and Nebraska law.

The federal scheme referred to is the National Labor Relations Act (NLRA). The NLRA makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees." 29 U.S.C. § 158(a)(5) (1988). The NLRA defines "to bargain collectively" as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment." § 158(d). The U.S. Supreme Court has held that these provisions, read together, establish an employer's duty to bargain in good faith. See, *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 101 S. Ct. 2573, 69 L. Ed. 2d 318 (1981); *Fibreboard Corp. v. Labor Board*, 379 U.S. 203, 85 S. Ct. 398, 13 L. Ed. 2d 233 (1964); *Labor Board v. Borg-Warner Corp.*, 356 U.S. 342, 78 S. Ct. 718, 2 L. Ed. 2d 823 (1958); *Labor Board v. American Ins. Co.*, 343 U.S. 395, 72 S. Ct. 824, 96 L. Ed. 2d 1027 (1952). The employer's duty to bargain extends only to subjects of mandatory bargaining: wages, hours, and other terms and conditions of employment. *First National Maintenance Corp, supra*; *Fibreboard Corp., supra*; *Borg-Warner Corp., supra*; *American Ins. Co., supra*.

Plaintiffs contend that Nebraska law also imposes on employers a duty to bargain. According to plaintiffs, the employers' duty to bargain can be found in § 48-816(1), (4), and (5).

Section 48-816(1) provides in relevant part:

> After a petition has been filed under section 48-811, the clerk shall immediately notify the commission which shall promptly take such preliminary proceedings as may be necessary to ensure a prompt hearing and speedy adjudication of the industrial dispute. . . . The commission shall require good faith bargaining concerning the terms and conditions of employment of its employees by any employer. . . . To bargain in good faith shall mean the performance of the mutual obligation of the employer and the labor organization to meet at

> reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . .

A petition filed "under section 48-811" is one which invokes the jurisdiction of the Commission of Industrial Relations to settle industrial disputes between employers and employees. See Neb. Rev. Stat. § 48-811 (Reissue 1988).

Section 48-816(4) provides in relevant part:

> When an employee organization has been certified as an exclusive collective-bargaining agent . . . the appropriate public employer shall be and is hereby authorized to negotiate collectively with such employee organization in the settlement of grievances arising under the terms and conditions of employment of the public employees . . . and to negotiate and enter into written agreements with such employee organizations in determining such terms and conditions of employment, including wages and hours.

Section 48-816(5) provides in relevant part:

> Upon receipt by an employer of a request from a labor organization to bargain on behalf of employees, the duty to engage in good faith bargaining shall arise if the labor organization has been certified by the commission or recognized by the employer as the exclusive bargaining representative for the employees in that bargaining unit.

Statutory interpretation is a matter of law, in connection with which an appellate court has the obligation to reach an independent, correct conclusion irrespective of the determination made by the court below. *Abdullah v. Nebraska Dept. of Corr. Servs., ante* p. 545, 513 N.W.2d 877 (1994); *In re Application of Jantzen, ante* p. 81, 511 N.W.2d 504 (1994). In the absence of an indication to the contrary, statutory language is to be given its plain and ordinary meaning. *Abdullah, supra*; *State v. Flye, ante* p. 495, 513 N.W.2d 526 (1994).

Two of the Nebraska statutory provisions upon which plaintiffs have relied do impose a duty to bargain, but only after specific events have occurred. Section 48-816(1) states the commission shall require good faith bargaining, but only after a petition has been filed invoking the jurisdiction of the commission. In the present action, there is no evidence that

such a petition was filed. Section 48-816(5) requires good faith bargaining, but only after the employer receives a request to bargain from the union. In the present action, there is no evidence that the employer received a request to bargain from the union.

The third statutory section cited by plaintiffs does not require good faith bargaining at all. Section 48-816(4) simply *authorizes* public employers to negotiate with unions regarding the settlement of grievances and the establishment of written agreements as to wages, hours, and other conditions of employment. Without this statutory authorization, a public employer would not have the right to bargain with public employees. See *University Police Officers Union v. University of Nebraska*, 203 Neb. 4, 277 N.W.2d 529 (1979).

Plaintiffs' contention of a mandatory duty to bargain is founded on the premise that the federal scheme mirrors the Nebraska scheme. Having examined both schemes, we reject plaintiffs' premise. Although federal court decisions under the NLRA are helpful where similar provisions exist in the Nebraska statutes, the federal decisions are of no help or benefit where similar provisions do not exist under Nebraska statutes. *University Police Officers Union, supra.* The Nebraska statutory provisions, unlike the NLRA, do not establish a duty to bargain.

We conclude that under Nebraska law and on the facts presented in the record, the City had no mandatory duty to bargain. Because we have determined that the City had no duty to bargain, we need not decide the issues of breach and due process.

The district court correctly determined that plaintiffs had failed to prove a due process violation. Accordingly, the district court's judgment dismissing plaintiffs' petition is affirmed.

AFFIRMED.

RONALD DAHLKE, DOING BUSINESS AS PIONEER COATING, APPELLANT, V. JOHN F. ZIMMER INSURANCE AGENCY, INC., DOING BUSINESS AS ZIMMER-BLANC INSURANCE AGENCY, INC., AND GALE WILLIAMS, APPELLEES.

515 N.W.2d 767

Filed May 6, 1994. No. S-92-501.

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 to be drawn from those facts 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. **Insurance: Agents: Contracts: Negligence: Proximate Cause: Liability: Damages.** An insurance agent who agrees to obtain insurance for another but negligently fails to do so is liable for the damage proximately caused by such negligence; the measure of damages is the amount that would have been due under the policy if it had been obtained by the agent.
4. **Insurance: Agents.** When an insured asks an insurance agent to procure insurance, the insured has a duty to advise the insurance agent as to the desired insurance.
5. _____: _____. An insurance agent has no duty to anticipate what coverage an insured should have.
6. **Insurance: Agents: Contracts.** Under certain circumstances, an insurance agent has a legal duty to explain policy terms to an insured.
7. _____: _____: _____. When an insurance agent knows that a provision of the insured's policy has been invoked, the agent has a duty to explain any changes to that provision appearing in a subsequent policy.
8. **Insurance: Agents: Contracts: Liability.** Absent a reason for an insured's failure to read his or her insurance policy, if a policy provision is clear and unambiguous, then the insured's failure to read the policy provision will insulate the agent from liability for failure to explain that provision.

Appeal from the District Court for Lancaster County: WILLIAM D. BLUE, Judge. Reversed and remanded for further proceedings.

Elaine A. Waggoner, of Waggoner Law Office, for appellant.

Randall L. Goyette and David D. Zwart, of Baylor, Evnen, Curtiss, Grimit & Witt, for appellees.

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

WHITE, J.

Ronald Dahlke sued his insurance agent, Gale Williams, and Williams' employer, John F. Zimmer Insurance Agency, Inc., for breach of agency and negligence. The court granted summary judgment in favor of Williams and Zimmer Insurance, and Dahlke appealed. Under our authority to regulate the caseloads of the appellate courts of this state, we removed the matter from the Nebraska Court of Appeals to this court. We reverse and remand.

Dahlke owns and operates a sole proprietorship known as Pioneer Coating, which provides roofing, construction, and waterproofing services. One of the hazards of Dahlke's business is "overspray": when Dahlke applies a foam or polyurethane coating to a roof using a sprayer similar to a paint sprayer, some of the coating spray can drift away from the roof and settle onto other objects, causing property damage. Dahlke is insured against damage caused by overspray. Since 1980, Dahlke has obtained his insurance through Williams.

In 1984, Dahlke's business suffered an overspray incident. The overspray damaged four to six cars. The damage was covered by insurance, and Dahlke paid a single deductible. The parties have referred to this as a "per-occurrence" deductible, and we will do likewise.

In 1988, Dahlke's business suffered another overspray incident. The insurer settled 25 claims. The insurer then informed Dahlke that he would have to pay a separate deductible for each damaged car. The parties have referred to this as a "per-claim" deductible, and we will again do likewise. The insurer eventually billed Dahlke for $10,835.47.

Dahlke filed suit against Williams and Zimmer Insurance. In his petition, Dahlke asserted that Williams had "breached their agency agreement" by failing to obtain proper insurance and by failing to disclose material information regarding the deductible. At deposition, Dahlke testified that he had never heard of the difference between a per-occurrence and a per-claim deductible until his discussions with the insurance

company following the 1988 overspray incident. Dahlke specifically testified that he and Williams did not discuss the various types of deductibles. Dahlke also testified that if he had known the difference, he would never have purchased insurance with a per-claim deductible.

Dahlke testified that the policy in force at the time of the 1988 overspray incident was obtained through the following transactions. In the fall of 1988, Dahlke and Williams discussed renewing Dahlke's policy. Williams informed Dahlke that the insurer would not renew the policy because the insurer would no longer cover roofing companies. Williams also informed Dahlke that he would look for a new policy, would obtain price quotes, and would present the package to Dahlke. Dahlke told Williams that he wanted a $1,000 deductible, but the two did not otherwise discuss any new policy terms. After further conversations, a policy was selected and Dahlke "had to sign something to get it in force." In late October, Williams informed Dahlke that the policy had been put in force. At the time of the 1988 overspray incident, Dahlke had received an insurance certificate but had not received a copy of the policy.

Williams and Zimmer Insurance filed a motion for summary judgment, and the trial court granted the motion. Dahlke appealed. Dahlke asserts that the trial court erred in granting 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 to be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Dalton Buick v. Universal Underwriters Ins. Co., ante* p. 282, 512 N.W.2d 633 (1994); *Hillie v. Mutual of Omaha Ins. Co., ante* p. 219, 512 N.W.2d 358 (1994); *Hawkins Constr. Co. v. Reiman Corp., ante* p. 131, 511 N.W.2d 113 (1994). 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. *Rowe v. Allely*, 244 Neb. 484, 507 N.W.2d 293 (1993); *Riley v. State*, 244 Neb. 250, 506 N.W.2d 45 (1993).

Dahlke first contends that Williams failed to procure the proper insurance. An insurance agent who agrees to obtain insurance for another but negligently fails to do so is liable for the damage proximately caused by such negligence; the measure of damages is the amount that would have been due under the policy if it had been obtained by the agent. *Flamme v. Wolf Ins. Agency*, 239 Neb. 465, 476 N.W.2d 802 (1991); *Kenyon & Larsen v. Deyle*, 205 Neb. 209, 286 N.W.2d 759 (1980).

In his petition, Dahlke alleged that in the summer of 1988 he had asked Williams to procure insurance with a per-occurrence deductible. In their answer, Williams and Zimmer Insurance denied that Dahlke had requested a per-occurrence deductible and alleged that the policy conformed to Dahlke's requested coverage. Based on this apparent dispute, Dahlke argues that one issue of material fact is "what specific instructions [Dahlke gave] to [Williams] in regard to procurring [sic] insurnace [sic]." Brief for appellant at 4.

Despite Dahlke's allegations and argument, the record reflects that Dahlke failed to advise Williams regarding the type of deductible he wanted. Dahlke testified at deposition that when he sought Williams' assistance in obtaining insurance, Dahlke told Williams that he wanted a $1,000 deductible. According to Dahlke, the two men did not discuss any aspects of the deductible other than the dollar amount. Dahlke also testified that at the time he sought Williams' assistance, he had never discussed the difference between per-claim and per-occurrence deductibles with Williams or anyone else.

Nebraska law on this issue is well settled. When an insured asks an insurance agent to procure insurance, the insured has a duty to advise the insurance agent as to the desired insurance. *Polski v. Powers*, 221 Neb. 361, 377 N.W.2d 106 (1985); *Manzer v. Pentico*, 209 Neb. 364, 307 N.W.2d 812 (1981); *Kenyon, supra*. An insurance agent has no duty to anticipate what coverage an insured should have. *Flamme, supra*; *Polski, supra*.

Dahlke had a duty to inform Williams of the deductible he wished to obtain. Having failed to inform Williams, Dahlke cannot now complain that Williams failed to procure the

proper type of deductible. Williams obtained the type of insurance he was instructed to procure. Accord *Flamme, supra* (agent not liable for negligent failure to procure coverage where insureds failed to show that they had requested coverage).

Dahlke next contends that Williams was negligent in failing to inform Dahlke that his deductible was per claim. In response, Williams and Zimmer Insurance argue that Dahlke did not request a specific type of deductible, that Dahlke had previously obtained policies with a per-claim deductible, and that Dahlke failed to inquire as to his deductible.

Dahlke admitted that during the two policy periods prior to the 1988 overspray incident, his insurance polices included a per-claim deductible. Dahlke also admitted that he customarily filed his insurance policies without reading them. Dahlke stated that even if he had read them, he would not have understood the deductible provisions. Dahlke also stated that because he had paid a per-occurrence deductible following the 1984 overspray, he assumed that his deductible had continued to be per occurrence.

We are thus faced with two issues. First, did Williams have a duty to explain that Dahlke's deductible changed from per occurrence to per claim? Second, if Williams had such a duty, is he nevertheless insulated from liability due to Dahlke's failure to read his policies? We address each issue in turn.

The parties have cited no Nebraska cases discussing an agent's duty to explain policy terms, and we have found none. However, other jurisdictions have addressed whether such a duty exists.

Courts which have addressed the issue generally take one of two positions. Some jurisdictions flatly declare that an agent has no duty to explain policy terms to an insured. See, *Greenway v. Insurance Co.*, 35 N.C. App. 308, 241 S.E.2d 339 (1978) (absent a request for explanation, agent has no duty to inform an insured as to all parts of his policy); *Heritage Manor of Blaylock v. Petersson*, 677 S.W.2d 689 (Tex. App. 1984). Accord, *Bush v. Mayerstein-Burnell Financial Services*, 499 N.E.2d 755 (Ind. App. 1986) (agent has no duty to explain unambiguous terms absent a request for an explanation); *Banker v. Valley Forge Ins. Co.*, 363 Pa. Super. 456, 526 A.2d

434 (1987) (where a policy provision is clear and unambiguous, agent has no duty to explain all of the hypothetical consequences). Other jurisdictions take a more moderate route and find that an agent's duty to explain policy terms can be triggered by certain circumstances. See, *Melin v. Johnson*, 387 N.W.2d 230 (Minn. App. 1986) (when an agent knows the insured's expectations for coverage, the agent has a duty to inform the insured of any policy provisions which will limit the expected coverage); *Precision Castparts v. Johnson & Higgins of Or.*, 44 Or. App. 739, 607 P.2d 763 (1980) (when an agent presents an insured with a number of policies for consideration, the agent has a duty to inform the insured regarding the differences between the policies under consideration). See, also, *Coe v. Farmers New World Life Ins. Co.*, 209 Cal. App. 3d 600, 257 Cal. Rptr. 411 (1989) (where plaintiff claimed that agent had a duty to inform the insured as to the effective date of a cancellation, agent's duty should be determined by the jury); *Martini v. Beaverton Ins. Agency, Inc.*, 314 Or. 200, 838 P.2d 1061 (1992) (relationship between agent and insured provides a context in which to decide whether the parties exercised reasonable care in light of foreseeable risks).

The more moderate route treads a desirable middle ground. On the one hand, insurance agents should not carry the overwhelming responsibility of explaining to insureds every provision of every policy. On the other hand, insurance agents should not be able to avoid exercising a reasonable amount of care for their clients. See, *Coe, supra*; *Martini, supra*. It is undeniable that many insurance contract provisions are not written in plain English and cannot be understood without some level of expertise. We therefore find most persuasive those cases which recognize that an agent has a legal duty to explain policy terms, but also require certain circumstances to trigger that duty. The triggering circumstances cannot be stated as an arbitrary list, but must, of necessity, be developed on a case-by-case basis.

We find that the circumstances underlying the present action are sufficient to trigger, on Williams' part, a duty to explain Dahlke's deductible. Williams had been Dahlke's agent for at least 8 years. In the 1984 overspray incident, multiple cars were

damaged. As a result, the insurer invoked the deductible provision of Dahlke's policy, and Dahlke was required to pay a per-occurrence deductible. Dahlke reported his 1984 overspray loss to Williams. A reasonable inference from this fact is that Williams knew that Dahlke had paid a per-occurrence deductible.

When an agent knows that a provision of the insured's policy has been invoked, the agent has a duty to explain any changes to that provision appearing in a subsequent policy. Because Williams was Dahlke's agent during the 1984 overspray incident and knew that Dahlke had paid a per-occurrence deductible, Williams had a duty to explain to Dahlke that his subsequent policy or policies included a different type of deductible—a per-claim deductible. It is undisputed that Williams failed to fulfill this duty.

We next address whether Williams and Zimmer Insurance are insulated from liability by Dahlke's failure to read his policy.

We have previously addressed this issue in the context of a negligent misrepresentation claim and have enumerated two rules. First, an insured has no right to rely on an agent's patently absurd interpretation of a policy. Second, an insured may rightfully rely on an agent's plausible interpretation of a policy, so long as the interpretation does not conflict with the printed policy. *Flamme v. Wolf Ins. Agency*, 239 Neb. 465, 476 N.W.2d 802 (1991); *Bayer v. Lutheran Mut. Life Ins. Co.*, 184 Neb. 826, 172 N.W.2d 400 (1969). The rationale for these rules is not difficult to discern: if an insured could have read and understood the policy, then the insured should be charged with knowledge of the policy's contents. Cf. *Flamme, supra*. By analogy to our misrepresentation rules and the rationale for those rules, we now hold that absent a reason for the insured's failure to read the policy, if a policy provision is clear and unambiguous, then the insured's failure to read the policy provision will insulate the agent from liability for failure to explain that provision.

This holding comports with decisions from other state courts. See, *Underwriters Adjusting Co. v. Knight*, 193 Ga. App. 759, 389 S.E.2d 24 (1989) (insured's claim against agent for failure to procure proper insurance is defeated by the

insured's failure to read the policy); *Ga. Farm Bureau Mut. Ins. Co. v. Arnold*, 175 Ga. App. 850, 334 S.E.2d 733 (1985) (insured's claim against agent for failure to procure proper insurance was not defeated because a reading of the policy would not have revealed the defect); *Barnes v. Levenstein*, 160 Ga. App. 115, 286 S.E.2d 345 (1981) (insured's claim against agent for failure to procure proper coverage is defeated because reading the policy would have informed the insured of the lacking coverage and because there was no good reason why the insured had failed to read the policy); *Heritage Manor of Blaylock v. Petersson*, 677 S.W.2d 689 (Tex. App. 1984) (insured had a duty to read the policy and, failing to do so, would be charged with knowledge of its contents). See, also, *Town & Country Mut. Ins. Co. v. Savage*, 421 N.E.2d 704 (Ind. App. 1981) (insured's failure to read the policy can be raised as contributory negligence); *Martini v. Beaverton Ins. Agency, Inc.*, 314 Or. 200, 838 P.2d 1061 (1992) (insured's failure to read the policy can be raised as contributory negligence). Several courts have held, similarly, that an agent has no duty to explain clear and unambiguous policy terms. See, *Bush v. Mayerstein-Burnell Financial Services*, 499 N.E.2d 755 (Ind. App. 1986); *Banker v. Valley Forge Ins. Co.*, 363 Pa. Super. 456, 526 A.2d 434 (1987).

In the present action, Dahlke admitted that he did not read the policy which was in force at the time of the 1988 overspray incident. However, there appears to be a good reason why Dahlke failed to read the policy. According to Dahlke's deposition testimony, the policy became effective either the day of or the day before the overspray incident. Dahlke had received verbal confirmation from Williams that the policy was in force, but had not received a copy of the policy. Williams and Zimmer Insurance have presented no other evidence to suggest that Dahlke had any other opportunity, prior to the 1988 overspray incident, to read the policy. If Dahlke did not have an opportunity to read the policy, then he cannot be charged with the knowledge of its terms, including the deductible provision.

We recognize the possibility that Dahlke could have read earlier policies and discovered that his deductible was per claim and not per occurrence. Dahlke admitted that for two policy

periods prior to the 1988 overspray incident, his policies included per-claim deductibles. If those provisions are clear and unambiguous, then Williams and Zimmer Insurance are insulated from liability; if those provisions are *not* clear and unambiguous, then Williams and Zimmer Insurance are *not* insulated from liability. Because the record does not contain copies of the two prior policies, we are unable to determine whether the deductible provisions are clear and unambiguous. Therefore, Williams and Zimmer Insurance are not entitled to summary judgment as a matter of law.

The decision of the trial court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

SINDIE KATSKEE, APPELLANT, V. BLUE CROSS/BLUE SHIELD OF NEBRASKA, APPELLEE.

515 N.W.2d 645

Filed May 6, 1994. No. S-92-1022.

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. **Summary Judgment: Proof.** The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law.
3. **Summary Judgment: Appeal and Error.** In reviewing an order granting summary judgment, the appellate court views the evidence in a light most favorable to the nonmoving party and gives that party the benefit of all reasonable inferences deducible from the evidence.
4. **Insurance: Contracts: Appeal and Error.** The interpretation and construction of an insurance contract ordinarily involve questions of law in connection with which an appellate court has an obligation to reach conclusions independent of the determinations made by the court below.
5. **Insurance: Contracts: Intent.** An insurance policy is to be construed as any other

contract to give effect to the parties' intentions at the time the contract was made. When the terms of the contract are clear, a court may not resort to rules of construction, and the terms are to be accorded their plain and ordinary meaning as the ordinary or reasonable person would understand them. In such a case, a court shall seek to ascertain the intention of the parties from the plain meaning of the policy.

6. _____: _____: _____. If a court finds that an insurance policy is ambiguous, then the court may employ rules of construction and look beyond the language of the policy to ascertain the intention of the parties. A general principle of construction, which has been applied to ambiguous insurance policies, holds that an ambiguous policy will be construed in favor of the insured. However, an appellate court will not read an ambiguity into policy language which is plain and unambiguous in order to construe it against the insurer.
7. **Insurance: Contracts.** When interpreting the plain meaning of the terms of an insurance policy, the natural and obvious meaning of the provisions in a policy is to be adopted in preference to a fanciful, curious, or hidden meaning, and further, while for the purpose of judicial decision dictionary definitions often are not controlling, they are at least persuasive that meanings which they do not embrace are not common.
8. **Insurance: Contracts: Words and Phrases.** The plain and ordinary meaning of the terms "bodily disorder" and "disease," as they are used in an insurance policy to define illness, encompasses any abnormal condition of the body or its components of such a degree that in its natural progression would be expected to be problematic; a deviation from the healthy or normal state affecting the functions or tissues of the body; an inherent defect of the body; or a morbid physical or mental state which deviates from or interrupts the normal structure or function of any part, organ, or system of the body and which is manifested by a characteristic set of symptoms and signs.

Appeal from the District Court for Douglas County: PAUL J. HICKMAN, Judge. Reversed and remanded for further proceedings.

Michael J. Mooney, of Gross & Welch, for appellant.

John F. Thomas and Ronald G. Fleming, of McGrath, North, Mullin & Kratz, P.C., for appellee.

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

WHITE, J.

This appeal arises from a summary judgment issued by the Douglas County District Court dismissing appellant Sindie Katskee's action for breach of contract. This action concerns the determination of what constitutes an illness within the

meaning of a health insurance policy issued by appellee, Blue Cross/Blue Shield of Nebraska. We reverse the decision of the district court and remand the cause for further proceedings.

In January 1990, upon the recommendation of her gynecologist, Dr. Larry E. Roffman, appellant consulted with Dr. Henry T. Lynch regarding her family's history of breast and ovarian cancer, and particularly her health in relation to such a history. After examining appellant and investigating her family's medical history, Dr. Lynch diagnosed her as suffering from a genetic condition known as breast-ovarian carcinoma syndrome. Dr. Lynch then recommended that appellant have a total abdominal hysterectomy and bilateral salpingo-oophorectomy, which involves the removal of the uterus, the ovaries, and the fallopian tubes. Dr. Roffman concurred in Dr. Lynch's diagnosis and agreed that the recommended surgery was the most medically appropriate treatment available.

After considering the diagnosis and recommended treatment, appellant decided to have the surgery. In preparation for the surgery, appellant filed a claim with Blue Cross/Blue Shield. Both Drs. Lynch and Roffman wrote to Blue Cross/Blue Shield and explained the diagnosis and their basis for recommending the surgery. Initially, Blue Cross/Blue Shield sent a letter to appellant and indicated that it might pay for the surgery. Two weeks before the surgery, Dr. Roger Mason, the chief medical officer for Blue Cross/Blue Shield, wrote to appellant and stated that Blue Cross/Blue Shield would not cover the cost of the surgery. Nonetheless, appellant had the surgery in November 1990.

Appellant filed this action for breach of contract, seeking to recover $6,022.57 in costs associated with the surgery. Blue Cross/Blue Shield filed a motion for summary judgment. The district court granted the motion. It found that there was no genuine issue of material fact and that the policy did not cover appellant's surgery. Specifically, the court stated that (1) appellant did not suffer from cancer, and although her high-risk condition warranted the surgery, it was not covered by the policy; (2) appellant did not have a bodily illness or disease which was covered by the policy; and (3) under the terms of the

policy, Blue Cross/Blue Shield reserved the right to determine what is medically necessary. Appellant filed a notice of appeal to the Nebraska Court of Appeals, and on our motion, we removed the case to the Nebraska Supreme Court.

Appellant contends that the district court erred in finding that no genuine issue of material fact existed and granting summary judgment in favor of appellee.

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. *Dalton Buick v. Universal Underwriters Ins. Co., ante* p. 282, 512 N.W.2d 633 (1994); *Hillie v. Mutual of Omaha Ins. Co., ante* p. 219, 512 N.W.2d 358 (1994); *Healy v. Langdon, ante* p. 1, 511 N.W.2d 498 (1994); *Plambeck v. Union Pacific RR. Co.*, 244 Neb. 780, 509 N.W.2d 17 (1993). The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law. *Transamerica Commercial Fin. Corp. v. Rochford*, 244 Neb. 802, 509 N.W.2d 214 (1993).

In reviewing an order granting summary judgment, the appellate court views the evidence in a light most favorable to the nonmoving party and gives that party the benefit of all reasonable inferences deducible from the evidence. *Hillie, supra*; *VonSeggern v. Willman*, 244 Neb. 565, 508 N.W.2d 261 (1993).

The substantive issues raised in this appeal are governed by the rule that the interpretation and construction of an insurance contract ordinarily involve questions of law in connection with which an appellate court has an obligation to reach conclusions independent of the determinations made by the court below. *Dalton Buick, supra*; *Decker v. Combined Ins. Co. of Am.*, 244 Neb. 281, 505 N.W.2d 719 (1993); *Polenz v. Farm Bureau Ins. Co.*, 227 Neb. 703, 419 N.W.2d 677 (1988).

Blue Cross/Blue Shield contends that appellant's costs are not covered by the insurance policy. The policy provides

coverage for services which are medically necessary. The policy defines "medically necessary" as follows:

> The services, procedures, drugs, supplies or Durable Medical Equipment provided by the Physician, Hospital or other health care provider, in the diagnosis or *treatment of the Covered Person's Illness*, Injury, or Pregnancy, which are:
>
> 1. *Appropriate for the symptoms and diagnosis of the patient's Illness*, Injury or Pregnancy; and
>
> 2. Provided in the most appropriate setting and at the most appropriate level of services[;] and
>
> 3. Consistent with the standards of good medical practice in the medical community of the State of Nebraska; and
>
> 4. Not provided primarily for the convenience of any of the following:
>
> a. the Covered Person;
>
> b. the Physician;
>
> c. the Covered Person's family;
>
> d. any other person or health care provider; and
>
> 5. Not considered to be unnecessarily repetitive when performed in combination with other diagnoses or treatment procedures.
>
> We shall determine whether services provided are Medically Necessary. Services will not automatically be considered Medically Necessary because they have been ordered or provided by a Physician.

(Emphasis supplied.) Blue Cross/Blue Shield denied coverage because it concluded that appellant's condition does not constitute an illness, and thus the treatment she received was not medically necessary. Blue Cross/Blue Shield has not raised any other basis for its denial, and we therefore will limit our consideration to whether appellant's condition constituted an illness within the meaning of the policy.

The policy broadly defines "illness" as a "bodily disorder or disease." The policy does not provide definitions for either bodily disorder or disease.

An insurance policy is to be construed as any other contract to give effect to the parties' intentions at the time the contract

was made. When the terms of the contract are clear, a court may not resort to rules of construction, and the terms are to be accorded their plain and ordinary meaning as the ordinary or reasonable person would understand them. In such a case, a court shall seek to ascertain the intention of the parties from the plain language of the policy. *Dalton Buick v. Universal Underwriters Ins. Co., ante* p. 282, 512 N.W.2d 633 (1994); *Decker, supra*; *Dobias v. Service Life Ins. Co.*, 238 Neb. 87, 469 N.W.2d 143 (1991); *Mahoney v. Union Pacific RR. Emp. Hosp. Assn.*, 238 Neb. 531, 471 N.W.2d 438 (1991); *Brown v. Farmers Mut. Ins. Co.*, 237 Neb. 855, 468 N.W.2d 105 (1991); *Elson v. Pool*, 235 Neb. 469, 455 N.W.2d 783 (1990); *Allstate Ins. Co. v. Farmers Mut. Ins. Co.*, 233 Neb. 248, 444 N.W.2d 676 (1989); *Malerbi v. Central Reserve Life*, 225 Neb. 543, 407 N.W.2d 157 (1987). See, also, Barry R. Ostrager & Thomas R. Newman, Handbook on Insurance Coverage Disputes § 1.01 (3d ed. 1990); 4 Samuel Williston, A Treatise on the Law of Contracts § 600 (3d ed. 1961); 43 Am. Jur. 2d *Insurance* §§ 271 and 277 (1982).

Whether a policy is ambiguous is a matter of law for the court to determine. If a court finds that the policy is ambiguous, then the court may employ rules of construction and look beyond the language of the policy to ascertain the intention of the parties. A general principle of construction, which we have applied to ambiguous insurance policies, holds that an ambiguous policy will be construed in favor of the insured. However, we will not read an ambiguity into policy language which is plain and unambiguous in order to construe it against the insurer. *Dalton Buick, supra*; *Economy Preferred Ins. Co. v. Mass*, 242 Neb. 842, 497 N.W.2d 6 (1993); *Allstate Ins. Co., supra*. See, also, Ostrager & Newman, *supra*; 4 Williston, *supra*.

When interpreting the plain meaning of the terms of an insurance policy, we have stated that the " ' "natural and obvious meaning of the provisions in a policy is to be adopted in preference to a fanciful, curious, or hidden meaning." ' " *Dalton Buick, ante* at 290, 512 N.W.2d at 640 (quoting *Decker v. Combined Ins. Co. of Am.*, 244 Neb. 281, 505 N.W.2d 719 (1993)). We have further stated that " '[w]hile for the purpose

of judicial decision dictionary definitions often are not controlling, they are at least persuasive that meanings which they do not embrace are not common.' " *Decker*, 244 Neb. at 284, 505 N.W.2d at 722 (quoting 2 George J. Couch et al., Cyclopedia of Insurance Law § 15.18 (rev. 2d ed. 1984)).

Applying these principles, our interpretation of the language of the terms employed in the policy is guided by definitions found in dictionaries, and additionally by judicial opinions rendered by other courts which have considered the meaning of these terms. Webster's Third New International Dictionary, Unabridged 648 (1981), defines disease as

> an impairment of the normal state of the living animal or plant body or of any of its components that interrupts or modifies the performance of the vital functions, being a response to environmental factors . . . to specific infective agents . . . to inherent defects of the organism (as various genetic anomalies), or to combinations of these factors : Sickness, Illness.

The same dictionary defines disorder as "a derangement of function : an abnormal physical or mental condition : Sickness, Ailment, Malady." *Id.* at 652. See, also, *Beggs v. Pacific Mutual Life Insurance Company*, 171 Ga. App. 204, 318 S.E.2d 836 (1984); Black's Law Dictionary (6th ed. 1990).

These lay definitions are consistent with the general definitions provided in Dorland's Illustrated Medical Dictionary (27th ed. 1988). Dorland's defines disease as

> any deviation from or interruption of the normal structure or function of any part, organ, or system . . . of the body that is manifested by a characteristic set of symptoms and signs and whose etiology [theory of origin or cause], pathology [origin or cause], and prognosis may be known or unknown.

Id. at 481. See, also, The Sloane-Dorland Annotated Medical-Legal Dictionary (1987). Dorland's defines disorder as "a derangement or abnormality of function; a morbid physical or mental state." *Id.* at 495. See, also, Sloane-Dorland, *supra*.

The Iowa Supreme Court considered the meaning of the terms "disease" and "illness" as these terms are used in insurance policies. In *Witcraft v. Sundstrand Health & Dis. Gr.*,

420 N.W.2d 785 (Iowa 1988), the Iowa Supreme Court stated that the terms "illness," "sickness," and "disease" are ordinarily synonymous in the context of an insurance policy and that these terms are defined as a " 'morbid condition of the body, a deviation from the healthy or normal condition of any of the functions or tissues of the body.' " *Id.* at 788 (quoting 45 C.J.S. *Insurance* § 893 (1946)). The Iowa court explained that because the insurance policy opted to define the terms regarding coverage by using broad language, the court would likewise consider and apply the broad and ordinary definition of these terms.

In *Cheney v. Bell National Life*, 315 Md. 761, 556 A.2d 1135 (1989), the Court of Appeals for Maryland considered whether hemophilia was a disease or sickness in the context of an exclusionary clause of an accidental death insurance policy. The insurer argued that hemophilia is not a disease because it is a genetic or hereditary condition of the body which tends to make the individual susceptible to certain diseases, but the court disagreed. The court recognized that the scientific community is not unanimous in its descriptions and characterizations of hemophilia. The court, however, stated that its interpretation of the term "disease" should be controlled by its ordinary and common meaning. Relying on definitions found in several dictionaries and reference materials, the court broadly interpreted disease to encompass an abnormal condition of such a degree that in its natural progression would be expected to be a source of trouble; a condition which has impaired, or will impair if it progresses, the working of bodily functions; a significant condition which would be commonly referred to as a disease; or an inherent defect which impairs the normal state of the body. See, *Silverstein v. Metropolitan Life Ins. Co.*, 254 N.Y. 81, 171 N.E. 914 (1930); 10 George J. Couch, Couch on Insurance 2d § 41:389 (rev. ed. 1982); 1B John A. & Jean Appleman, Insurance Law and Practice § 391 (1981); Webster's Third New International Dictionary, Unabridged (1981). Applying the commonly accepted meaning of the term "disease," the court concluded that hemophilia is a disease as that term is used in the insurance policy. See, also, *Beggs, supra*; *Orman v. Prudential Ins. Co. of America*, 296 N.W.2d 380

(Minn. 1980) (stating that because the medical profession classifies an aneurysm as an unhealthy condition, aneurysms constitute a disease or illness within the meaning of the insurance policy); *Kitchen v. Time Insurance Co.*, 232 N.W.2d 863 (Iowa 1975) (stating that chronic alcoholism, unaccompanied by other physical or organic maladies, is considered by the medical profession to be a disease or sickness and holding that alcoholism is a sickness within the meaning of the insurance policy).

We find that the language used in the policy at issue in the present case is not reasonably susceptible of differing interpretations and thus not ambiguous. The plain and ordinary meaning of the terms "bodily disorder" and "disease," as they are used in the policy to define illness, encompasses any abnormal condition of the body or its components of such a degree that in its natural progression would be expected to be problematic; a deviation from the healthy or normal state affecting the functions or tissues of the body; an inherent defect of the body; or a morbid physical or mental state which deviates from or interrupts the normal structure or function of any part, organ, or system of the body and which is manifested by a characteristic set of symptoms and signs.

The issue then becomes whether appellant's condition—breast-ovarian carcinoma syndrome—constitutes an illness.

Blue Cross/Blue Shield argues that appellant did not suffer from an illness because she did not have cancer. Blue Cross/Blue Shield characterizes appellant's condition only as a "predisposition to an illness (cancer)" and fails to address whether the condition itself constitutes an illness. Brief for appellee at 13. This failure is traceable to Dr. Mason's denial of appellant's claim. Despite acknowledging his inexperience and lack of knowledge about this specialized area of cancer research, Dr. Mason denied appellant's claim without consulting any medical literature or research regarding breast-ovarian carcinoma syndrome. Moreover, Dr. Mason made the decision without submitting appellant's claim for consideration to a claim review committee. The only basis for

the denial was the claim filed by appellant, the letters sent by Drs. Lynch and Roffman, and the insurance policy. Despite his lack of information regarding the nature and severity of appellant's condition, Dr. Mason felt qualified to decide that appellant did not suffer from an illness.

Appellant's condition was diagnosed as breast-ovarian carcinoma syndrome. To adequately determine whether the syndrome constitutes an illness, we must first understand the nature of the syndrome.

The record on summary judgment includes the depositions of Drs. Lynch, Roffman, and Mason. In his deposition, Dr. Lynch provided a thorough discussion of this syndrome. In light of Dr. Lynch's extensive research and clinical experience in this particular area of medicine, we consider his discussion extremely helpful in our understanding of the syndrome.

According to Dr. Lynch, some forms of cancer occur on a hereditary basis. Breast and ovarian cancer are such forms of cancer which may occur on a hereditary basis. It is our understanding that the hereditary occurrence of this form of cancer is related to the genetic makeup of the woman. In this regard, the genetic deviation has conferred changes which are manifest in the individual's body and at some time become capable of being diagnosed.

At the time that he gave his deposition, Dr. Lynch explained that the state of medical research was such that detecting and diagnosing the syndrome was achieved by tracing the occurrences of hereditary cancer throughout the patient's family. Dr. Lynch stated that at the time of appellant's diagnosis, no conclusive physical test existed which would demonstrate the presence of the condition. However, Dr. Lynch stated that this area of research is progressing toward the development of a more determinative method of identifying and tracing a particular gene throughout a particular family, thus providing a physical method of diagnosing the condition.

Women diagnosed with the syndrome have at least a 50-percent chance of developing breast and/or ovarian cancer, whereas unaffected women have only a 1.4-percent risk of developing breast or ovarian cancer. In addition to the genetic deviation, the family history, and the significant risks

associated with this condition, the diagnosis also may encompass symptoms of anxiety and stress, which some women experience because of their knowledge of the substantial likelihood of developing cancer.

The procedures for detecting the onset of ovarian cancer are ineffective. Generally, by the time ovarian cancer is capable of being detected, it has already developed to a very advanced stage, making treatment relatively unsuccessful. Drs. Lynch and Roffman agreed that the standard of care for treating women with breast carcinoma syndrome ordinarily involves surveillance methods. However, for women at an inordinately high risk for ovarian cancer, such as appellant, the standard of care may require radical surgery which involves the removal of the uterus, ovaries, and fallopian tubes.

Dr. Lynch explained that the surgery is labeled "prophylactic" and that the surgery is prophylactic as to the prevention of the onset of cancer. Dr. Lynch also stated that appellant's condition itself is the result of a genetic deviation from the normal, healthy state and that the recommended surgery treats that condition by eliminating or significantly reducing the presence of the condition and its likely development.

Blue Cross/Blue Shield has not proffered any evidence disputing the premise that the origin of this condition is in the genetic makeup of the individual and that in its natural development it is likely to produce devastating results. Although handicapped by his limited knowledge of the syndrome, Dr. Mason did not dispute the nature of the syndrome as explained by Dr. Lynch and supported by Dr. Roffman, nor did Dr. Mason dispute the fact that the surgery falls within the standard of care for many women afflicted with this syndrome.

In light of the plain and ordinary meaning of the terms "illness," "bodily disorder," and "disease," we find that appellant's condition constitutes an illness within the meaning of the policy. Appellant's condition is a deviation from what is considered a normal, healthy physical state or structure. The abnormality or deviation from a normal state arises, in part, from the genetic makeup of the woman. The existence of this

unhealthy state results in the woman's being at substantial risk of developing cancer. The recommended surgery is intended to correct that morbid state by reducing or eliminating that risk.

Although appellant's condition was not detectable by physical evidence or a physical examination, it does not necessarily follow that appellant does not suffer from an illness. The record establishes that a woman who suffers from breast-ovarian carcinoma syndrome does have a physical state which significantly deviates from the physical state of a normal, healthy woman. Specifically, appellant suffered from a different or abnormal genetic constitution which, when combined with a particular family history of hereditary cancer, significantly increases the risk of a devastating outcome.

We are mindful that not every condition which itself constitutes a predisposition to another illness is necessarily an illness within the meaning of an insurance policy. There exists a fine distinction between such conditions, which was recognized by Chief Justice Cardozo in *Silverstein v. Metropolitan Life Ins. Co.*, 254 N.Y. 81, 171 N.E. 914 (1930). Writing for the court, Chief Justice Cardozo explained that when a condition is such that in its probable and natural progression it may be expected to be a source of mischief, it may reasonably be described as a disease or an illness. On the other hand, he stated that if the condition is abnormal when tested by a standard of perfection, but so remote in its potential mischief that common speech would not label it a disease or infirmity, such a condition is at most a predisposing tendency. The *Silverstein* court found that a pea-size ulcer, which was located at the site of damage caused by a severe blow to the deceased's stomach, was not a disease or infirmity within the meaning of an exclusionary clause of an accident insurance policy because if left unattended, the ulcer would have been only as harmful as a tiny scratch.

Blue Cross/Blue Shield relies upon our decision in *Fuglsang v. Blue Cross*, 235 Neb. 552, 456 N.W.2d 281 (1990), and contends that we have already supplied a definition for the terms "disease," "condition," and "illness." Although we find that reliance on *Fuglsang* is somewhat misplaced, the opinion is relevant to our determination of the meaning of "disease,"

"illness," and "disorder," and whether the condition from which appellant suffered constitutes an illness.

The issue raised in *Fuglsang* was whether the disease from which the plaintiff suffered constituted a preexisting condition which was excluded from coverage by the terms of the policy. Blue Cross/Blue Shield relies on the following rule from *Fuglsang* as a definition of "disease":

> A disease, condition, or illness exists within the meaning of a health insurance policy excluding preexisting conditions only at such time as the disease, condition, or illness is manifest or active or when there is a distinct symptom or condition from which one learned in medicine can with reasonable accuracy diagnose the disease.

Id. at 557-58, 456 N.W.2d at 284.

This statement concerns *when* an illness exists, not whether the condition itself is an illness. If the condition is not a disease or illness, it would be unnecessary to apply the above rule to determine whether the condition was a preexisting illness. In the present case, Blue Cross/Blue Shield maintains that the condition is not even an illness.

Even assuming arguendo that the rule announced in *Fuglsang* is a definition of "disease," "illness," and "condition," the inherent problems with the argument put forth by Blue Cross/Blue Shield undermine its reliance on that rule. Blue Cross/Blue Shield emphasizes the fact that appellant was never diagnosed with cancer and therefore, according to Blue Cross/Blue Shield, appellant did not have an illness because cancer was not active or manifest. Appellant concedes that she did not have cancer prior to her surgery. The issue is whether the condition she did have was an illness. Blue Cross/Blue Shield further argues that "[n]o disease or illness is 'manifest or active' and there is no 'distinct symptom or condition' from which Dr. Lynch or Dr. Roffman could diagnose a disease." Brief for appellee at 13. We stated above that lack of a physical test to detect the presence of an illness does not necessarily indicate that the person does not have an illness.

When the condition at issue—breast-ovarian carcinoma

syndrome—is inserted into the formula provided by the *Fuglsang* rule, the condition would constitute an "illness" as Blue Cross/Blue Shield defines the term. The formula is whether the breast-ovarian carcinoma syndrome was manifest or active, or whether there was a distinct symptom or condition from which one learned in medicine could with reasonable accuracy diagnose the disease. The record establishes that the syndrome was manifest, at least in part, from the genetic deviation, and evident from the family medical history. The condition was such that one learned in medicine, Dr. Lynch, could with a reasonable degree of accuracy diagnose it. Blue Cross/Blue Shield does not dispute the nature of the syndrome, the method of diagnosis, or the accuracy of the diagnosis.

In the present case, the medical evidence regarding the nature of breast-ovarian carcinoma syndrome persuades us that appellant suffered from a bodily disorder or disease and, thus, suffered from an illness as defined by the insurance policy. Blue Cross/Blue Shield, therefore, is not entitled to judgment as a matter of law. Moreover, we find that appellant's condition did constitute an illness within the meaning of the policy. We reverse the decision of the district court and remand the cause for further proceedings. See *Design Data Corp. v. Maryland Cas. Co.*, 243 Neb. 945, 503 N.W.2d 552 (1993).

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

WRIGHT, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V. ROY L. JONES, APPELLANT.
515 N.W.2d 654

Filed May 6, 1994. No. S-92-1054.

1. **Homicide: Intent: Case Overruled.** *State v. Pettit*, 233 Neb. 436, 445 N.W.2d 890 (1989), holding that manslaughter is an intentional killing of another under Nebraska law, is overruled.
2. **Jury Instructions: Lesser-Included Offenses.** "Step" instructions, requiring consideration of the most serious crime charged before consideration of

lesser-included offenses, held not erroneous.

3. **Homicide: Intent: Jury Instructions: Appeal and Error.** Malice is a necessary element of murder in the second degree, and an instruction that fails to include it as an essential element of murder in the second degree is plain error and prejudicial.
4. **Jury Instructions: Appeal and Error.** Before an error in the giving of instructions can be considered as a ground for reversal of a conviction, it must be considered prejudicial to the rights of the defendant.

Appeal from the District Court for Douglas County: ROBERT V. BURKHARD, Judge. Reversed and remanded for a new trial.

Thomas M. Kenney, Douglas County Public Defender, and Thomas C. Riley for appellant.

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

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

BOSLAUGH, J.

The defendant, Roy L. Jones, was charged with first degree murder and use of a firearm in the commission of a felony in the shooting death of his wife, Tara Jones. He was convicted by a jury of second degree murder and use of a firearm and was sentenced by the district court to consecutive terms of imprisonment for not less than 50 years on the murder conviction and 5 to 10 years for the use of a firearm conviction.

On March 22, 1992, the defendant left Omaha, Nebraska, to take a job selling cars in Salt Lake City, Utah. His wife, Tara, and her 6-year-old son, Brian, planned to move to Utah with the defendant after the end of the school year.

During that first week in Utah, the defendant called his wife at home several times a day. On Thursday, March 26, Tara told the defendant she would be attending a cat show in Sioux City, Iowa, on Saturday and Sunday. She planned to drive there with two of her friends, Tonya Wendt and Barbara Curry.

On Friday, March 27, the defendant was unable to reach his wife at home when he tried to call. On Friday evening, he called Wendt, who told him that due to illness of her children, she was unable to attend the cat show, and that Tara had driven up with some other people on Friday. Wendt testified at trial that the

defendant threatened to kill her and Tara if she was lying.

Later that evening, the defendant called Curry, who also told him she had decided not to go to Sioux City. She told the defendant that Tara had gone to the cat show with some other people. Curry also testified that the defendant threatened to kill her and Tara if she was covering for Tara.

The defendant became concerned about the whereabouts of his wife and called the paternal grandmother of Tara's son. He discovered that Brian had been dropped off at his grandmother's by Tara on Thursday night.

The defendant then determined where the cat show was being held in Sioux City and attempted to locate Tara there. He discovered that Tara was not registered at the cat show. He then called the cat show hall, asked that Tara be paged, and found that no one responded to the page.

The defendant called his mother-in-law, Sandy Schaeffer, who told him that Tara had gone to the Sioux City cat show.

The defendant decided to come back to Omaha to try to find his wife. He purchased an airline ticket and returned to Omaha on Saturday, March 28. The defendant was met at the airport by his father, and they drove to Tara's apartment to see if the cats were there. Upon entering the apartment, he observed that two of their four cats were gone.

The defendant later discovered that there was a cat show taking place in the Chicago area and that Tara had gone to that show. The defendant called the Champaign-Urbana police, telling them he needed to contact his wife for a family emergency. The police station was across the street from the building housing the cat show, and the police agreed to contact her. The police contacted Tara, and she phoned the defendant.

While waiting for Tara to call him, the defendant looked through her dresser drawer and noticed that her lingerie and miniskirts were missing. A neighbor testified that she heard the defendant yelling, " 'I'm going to blow her head off.' "

When Tara called, she was unable to explain where she was staying, and they got into an argument. Tara told the defendant she would be returning to Omaha by airplane on Sunday evening. During the rest of Saturday evening, the defendant made several phone calls to his mother-in-law and also spoke

again with his wife.

On Sunday, the defendant and his father went to the airport and picked up his and Tara's car. After picking up the car, the defendant returned alone to the apartment and left a note and his wedding ring for Tara. He expressed his regret that she felt the marriage was over and stated that he would always love her.

Late Sunday night, March 29, the defendant received a phone call at his parents' house from Tara. She was at her mother's house and asked if the defendant would come over.

The defendant went to see Tara and argued with her in the presence of her mother and stepfather. During the argument, Tara told the defendant that she had been with another man in Illinois and had slept with him.

The defendant then returned to his parents' home. Sometime thereafter, Tara called and asked him to return to her parents' residence. The defendant went back, and he and Tara had sex. He returned to his parents' home around 9 o'clock on Monday morning.

The defendant thought after spending the night with Tara that things were going to be better between them. He returned later that morning to pick up Tara to take her home. Upon his return, Tara indicated that she was still confused and needed more time. The defendant reacted with anger and disgust.

Later that Monday afternoon, the defendant returned to his apartment for the purpose of retrieving some clothes and his father's video cassette recorder. When he arrived at the apartment, his wife, stepson, and Tara's brother Scott were there.

After a short period of time, the defendant asked Scott to leave so he could be alone with Tara to talk things out. After Scott left, the defendant and Tara began to talk and soon began to argue about her infidelity and their relationship.

The argument escalated, and Tara locked herself in the master bedroom of the apartment. The defendant kicked in the door. He testified that Tara was pointing a gun at him, that they struggled over the gun, and that he snapped. He did not recall the shooting itself.

Tricia Ferguson, a resident of the apartment complex, testified that on March 30, as she was driving into the

apartment parking lot, she saw what appeared to be Tara trying to get back into her apartment through the window. Next she saw Tara's shirt "fly off" and Tara running away from the window. Ferguson then observed a hand with a gun in it extend from the window area and heard approximately four shots. As the shots were fired, Tara staggered and eventually fell. Within seconds, the defendant came out of the apartment and shot Tara two more times in the head. Then he went back into the apartment.

The shooting occurred in the daylight hours in front of numerous witnesses, including several construction workers who were all yelling at the defendant to leave Tara alone. Their testimony concerning the killing was the same as Ferguson's.

Dr. Jerry Jones, the pathologist who performed the autopsy on Tara, testified that the two shots to her head were the fatal shots.

From Friday, March 27, through the time the defendant shot and killed his wife, the defendant had been drinking constantly.

On appeal to this court, the defendant contends that the trial court erred by overruling the defendant's objection to jury instruction No. 6, which required the jury to find the defendant not guilty of murder in the second degree before they could consider the lesser-included offense of voluntary manslaughter; that the trial court erred by overruling the defendant's objection to that portion of instruction No. 11 which defines malice as the state of mind shown by intentionally doing a wrongful act; and that the trial court erred by giving Nebraska's pattern jury instruction NJI 14.08 on reasonable doubt because that instruction violates due process in that it equates reasonable doubt with substantial doubt, grave uncertainty, and moral certainty contrary to the U.S. Supreme Court's ruling in *Cage v. Louisiana*, 498 U.S. 39, 111 S. Ct. 328, 112 L. Ed. 2d 339 (1990).

Instruction No. 6 has been referred to as a "step" instruction or "acquittal first" instruction. As given in the defendant's trial, it is set forth as follows:

> Under Count I of the Information in this case, depending on the evidence, you may find the defendant:
>
> A. Guilty of murder in the first degree; or

B. Guilty of murder in the second degree; or

C. Guilty of voluntary manslaughter; or

D. Not guilty.

The material elements which the State must prove by evidence beyond a reasonable doubt in order to convict the defendant of the crime of murder in the first degree in Count I are:

1. That the defendant, Roy L. Jones, killed Tara L. Jones;

2. That the defendant did so purposely and with deliberate and premeditated malice;

3. That the defendant did so on or about March 30, 1992; and

4. That the defendant did so in Douglas County, Nebraska.

The State has the burden of proving beyond a reasonable doubt each and every one of the foregoing material elements of the crime of murder in the first degree necessary for conviction.

If you find from the evidence beyond a reasonable doubt that each of the foregoing material elements is true, it is your duty to find the defendant guilty of the crime of murder in the first degree in Count I, and you shall complete Verdict Form 1; and you shall not then consider the next lesser-included offense hereafter set forth in this instruction. On the other hand, if you find that the State has failed to prove beyond a reasonable doubt any one or more of the foregoing material elements, it is your duty to find the defendant not guilty of the crime of murder in the first degree in Count I. You shall then proceed to consider the lesser-included offense of murder in the second degree.

The material elements which the State must prove by evidence beyond a reasonable doubt in order to convict the defendant of the crime of murder in the second degree are:

1. That the defendant, Roy L. Jones, killed Tara L. Jones;

2. That the defendant did so intentionally but without premeditation;

3. That the defendant did so on or about March 30, 1992; and

4. That the defendant did so in Douglas County, Nebraska.

The State has the burden of proving beyond a reasonable doubt each and every one of the foregoing material elements of the crime of murder in the second degree necessary for conviction.

If you find from the evidence beyond a reasonable doubt that each of the foregoing material elements is true, it is your duty to find the defendant guilty of the crime of murder in the second degree in Count I, and you shall complete Verdict Form 2, and you shall not then consider the next lesser included offense hereinafter set forth in this instruction. On the other hand, if you find the State has failed to prove beyond a reasonable doubt any one or more of the foregoing material elements, it is your duty to find the defendant not guilty of the crime of murder in the second degree in Count I. You shall then proceed to consider the next lesser-included offense of voluntary manslaughter.

The material elements which the state must prove by evidence beyond a reasonable doubt in order to convict the defendant of the crime of voluntary manslaughter are:

1. That the defendant, Roy L. Jones, killed Tara L. Jones;

2. That the defendant did, without malice, kill Tara L. Jones intentionally upon a sudden quarrel;

3. That the defendant did so on or about March 30, 1992; and

4. That the defendant did so in Douglas County, Nebraska.

The state has the burden of proving beyond a reasonable doubt each and every one of the foregoing material elements of the crime of voluntary manslaughter necessary for conviction.

If you find from the evidence beyond a reasonable doubt that each of the foregoing material elements is true, it is your duty to find the defendant guilty of the crime of

> voluntary manslaughter in Count I; and you shall complete Verdict Form 3. On other other [sic] hand, if you find the State has failed to prove beyond a reasonable doubt any one or more of the foregoing material elements, it is your duty to find the defendant not guilty of the crime of voluntary manslaughter and not guilty of any charge in this case in Count I, and you shall complete Verdict Form 4.
>
> The burden of proof is always on the State to prove beyond a reasonable doubt all of the material elements of the crime charged or included therein, and this burden never shifts.

The defendant contends that since the jury could not consider the offense of voluntary manslaughter until it unanimously reached a verdict of not guilty on the offense of second degree murder, in any case where a greater charge than voluntary manslaughter is presented to the jury, the possibility of the jury returning a verdict of guilty of voluntary manslaughter is effectively negated.

The instruction as given does not require that the jury unanimously decide that the defendant is not guilty of first degree murder before considering a lesser offense. Although any verdict finally arrived at by the jury must be unanimous, the jury is not required in its preliminary deliberations and discussion to be unanimous before considering whether the defendant is guilty of a lesser offense.

The defendant argues that if the jury deliberates and finds that an intentional killing occurred without premeditation, they would have to find the defendant guilty of second degree murder without ever getting to the issue of whether or not the intentional killing was upon a sudden quarrel, the element that under *State v. Pettit*, 233 Neb. 436, 445 N.W.2d 890 (1989), distinguishes manslaughter from second degree murder.

The problem with instruction No. 6 is not that it requires the jury to acquit the defendant on the greater charge before considering the lesser charge. An acquittal first instruction provides "for a more logical and orderly process for the guidance of the jury in its deliberations." *State v. Wussler*, 139 Ariz. 428, 430, 679 P.2d 74, 76 (1984). There are many

jurisdictions that approve the propriety of instructions requiring acquittal of the most serious offense charged before consideration of lesser offenses. See, e.g., *Lindsey v. State*, 456 So. 2d 383 (Ala. Crim. App. 1983), *aff'd* 456 So. 2d 393 (Ala. 1984), *cert. denied* 470 U.S. 1023, 105 S. Ct. 1384, 84 L. Ed. 2d 403 (1985); *Whiteaker v. State*, 808 P.2d 270 (Alaska App. 1991); *State v. Wussler, supra*; *People v. Padilla*, 638 P.2d 15 (Colo. 1981); *State v. Sawyer*, 227 Conn. 566, 630 A.2d 1064 (1993); *Lamar v. State*, 243 Ga. 401, 254 S.E.2d 353 (1979), *appeal dismissed* 444 U.S. 803, 100 S. Ct. 23, 62 L. Ed. 2d 16; *State v. Van Dyken*, 242 Mont. 415, 791 P.2d 1350 (1990), *cert. denied* 498 U.S. 920, 111 S. Ct. 297, 112 L. Ed. 2d 251; *People v. Boettcher*, 69 N.Y.2d 174, 505 N.E.2d 594, 513 N.Y.S.2d 83 (1987); *State v. Wilkins*, 34 N.C. App. 392, 238 S.E.2d 659 (1977), *review denied* 294 N.C. 187, 241 S.E.2d 516; *Commonwealth v. Hart*, 388 Pa. Super. 484, 565 A.2d 1212 (1989), *appeal denied* 525 Pa. 642, 581 A.2d 569 (1990); *State v. McNeal*, 95 Wis. 2d 63, 288 N.W.2d 874 (Wis. App. 1980).

The problem with instruction No. 6 is that because of the holding of *State v. Pettit, supra*, in any case where evidence of a greater charge than manslaughter upon a sudden quarrel is presented to the jury, the possibility of returning a verdict of guilty of manslaughter upon a sudden quarrel is effectively negated. According to *Pettit*, the only element that distinguishes manslaughter upon a sudden quarrel and second degree murder is the element of the sudden quarrel, since both killings are intentional.

In *Pettit*, the majority held that to be guilty of manslaughter committed upon a sudden quarrel, the killer must commit the slaying with the intent to kill. The majority relied on cases from other jurisdictions that had statutes which specifically distinguished and defined voluntary and involuntary manslaughter.

As the dissenters in *Pettit* point out, "the words 'voluntary' and 'involuntary' have not been a part of Nebraska's manslaughter statute since 1873." 233 Neb. at 474, 445 N.W.2d at 912 (Fahrnbruch, J., dissenting). Currently, Nebraska's manslaughter statute provides: "(1) A person commits manslaughter if he kills another without malice, either upon a

sudden quarrel, or causes the death of another unintentionally while in the commission of an unlawful act. (2) Manslaughter is a Class III felony." Neb. Rev. Stat. § 28-305 (Reissue 1989).

Neb. Rev. Stat. § 28-304 (Reissue 1989) provides: "(1) A person commits murder in the second degree if he causes the death of a person intentionally, but without premeditation. (2) Murder in the second degree is a Class IB felony."

Under the present statutes, second degree murder is the intentional killing of another without premeditation. Manslaughter is the killing of another without malice, upon a sudden quarrel, or an unintentional killing while in the commission of an unlawful act.

Malice has most recently been defined in our cases as "that condition of the mind which is manifested by the intentional doing of a wrongful act without just cause or excuse." *State v. Thompson*, 244 Neb. 375, 399, 507 N.W.2d 253, 270 (1993).

Since our statutes define manslaughter as a killing without malice, there is no requirement of an intention to kill in committing manslaughter. The distinction between second degree murder and manslaughter upon a sudden quarrel is the presence or absence of an intention to kill. *State v. Pettit*, 233 Neb. 436, 445 N.W.2d 890 (1989), was incorrect in its reasoning and holding, and to that extent, it is overruled.

At the time instruction No. 6 was given to the jury, it was appropriate to require the jury to acquit on the greater charge before considering the lesser. Before an error in the giving of instructions can be considered as a ground for reversal of a conviction, it must be considered prejudicial to the rights of the defendant. *State v. Bartholomew*, 212 Neb. 270, 322 N.W.2d 432 (1982).

The defendant's argument that he was prejudiced because the jury was unable to consider his defense that the killing was manslaughter is without merit because under any type of instruction, "the jury would have been required to consider the evidence in relation to the greater charge first." *State v. Yamashiro*, 8 Haw. App. 595, 608, 817 P.2d 123, 130 (1991). Under the evidence and circumstances of this case, it cannot reasonably be said that the verdict was compelled by the instruction rather than by the evidence.

However, instruction No. 6 is erroneous for a different reason. In *State v. Myers*, 244 Neb. 905, 510 N.W.2d 58 (1994), we held that malice is a necessary element of murder in the second degree and that an instruction that failed to include malice as an essential element of murder in the second degree was plain error and was prejudicial. This error requires that the judgment be reversed and the cause be remanded for a new trial.

Next, the defendant contends that the trial court erred in giving instruction No. 11, which reads as follows:

> The Nebraska Criminal Code in full force and effect at the time alleged in the Information pertaining to the crime of voluntary manslaughter provides in substance as follows:
>
> "(1) A person commits manslaughter if he kills another without malice . . . upon a sudden quarrel . . . [.]"
>
> "Malice" is defined as that condition of the mind which is shown by intentionally doing a wrongful act without just cause or excuse. It means any willful or corrupt intention of mind.

The defendant argues that the definition is confusing when it is combined with the manslaughter instruction requiring a showing of an intentional killing upon a sudden quarrel.

The jury was also given instruction No. 12, which stated:

> A sudden quarrel is a legally recognized and sufficient provocation which causes a reasonable person to lose normal self control.
>
> The phrase "sudden quarrel" does not necessarily mean an exchange of angry words or an altercation contemporaneous with an unlawful killing and does not require a physical struggle or other combative corporal contact between the defendant and Tara Jones.
>
> In considering the offense of voluntary manslaughter, you should determine whether the defendant acted under the impulse of passion suddenly aroused which clouded reason and prevented rational action, whether there existed reasonable and adequate provocation to excite the passion of the defendant and obscure and disturb his power of reasoning to the extent that he acted rashly and

> from passion, without due deliberation and reflection, rather than from judgment, and whether, under all the facts and circumstances as disclosed by the evidence, a reasonable time had elapsed from the time of provocation to the instant of the killing for the passion to subside and reason resume control of the mind.
>
> You should determine whether the suspension of reason, if shown to exist, arising from sudden passion, continued from the time of provocation until the very instant of the act producing death took place.
>
> Therefore, if the evidence convinces you beyond a reasonable doubt that the defendant killed Tara Jones intentionally upon a sudden quarrel, you should find him guilty of the offense of manslaughter.

Since we are overruling the holding in *State v. Pettit, supra*, that manslaughter is an intentional killing of another under Nebraska law, both instructions Nos. 6 and 12 regarding the crime of manslaughter were in error. In each of those instructions, the trial court erroneously instructed the jury that to convict the defendant of voluntary manslaughter, the State was required to prove that the defendant intentionally killed the victim.

Finally, the defendant claims that the trial court erred in giving instruction No. 5, which defined reasonable doubt. Relying upon the ruling of the U.S. Supreme Court in *Cage v. Louisiana*, 498 U.S. 39, 111 S. Ct. 328, 112 L. Ed. 2d 339 (1990), the defendant argues that his conviction should be reversed.

Instruction No. 5 is the same jury instruction on reasonable doubt we examined and approved in *State v. Morley*, 239 Neb. 141, 474 N.W.2d 660 (1991). Subsequently, on March 22, 1994, the U.S. Supreme Court found the Nebraska instruction on reasonable doubt not erroneous in *Victor v. Nebraska*, ____ U.S. ____, 114 S. Ct. 1239, 127 L. Ed. 2d 583 (1994).

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

REVERSED AND REMANDED FOR A NEW TRIAL.

SHANAHAN, J., not participating.

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

I agree that the trial court's omission of the element of malice in its definition of second degree murder requires that this cause be remanded for a new trial. See, *State v. Myers*, 244 Neb. 905, 510 N.W.2d 58 (1994); *State v. Franklin*, 241 Neb. 579, 489 N.W.2d 552 (1992); *State v. Dean*, 237 Neb. 65, 464 N.W.2d 782 (1991); *State v. Trevino*, 230 Neb. 494, 432 N.W.2d 503 (1988); *State v. Keithley*, 227 Neb. 402, 418 N.W.2d 212 (1988); *State v. Rowe*, 214 Neb. 685, 335 N.W.2d 309 (1983).

However, I disagree with the majority's view that *State v. Pettit*, 233 Neb. 436, 445 N.W.2d 890 (1989), was wrongly decided. Its careful analysis of the manslaughter statute, Neb. Rev. Stat. § 28-305 (Reissue 1989), is correct, and I adhere to it.

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

STATE OF NEBRASKA, APPELLEE, V. ROBERT C. BLACKSON, APPELLANT.

515 N.W.2d 773

Filed May 6, 1994. No. S-93-528.

1. **Homicide: Intent.** A finding that the defendant killed another purposely and maliciously but without deliberation and premeditation and without just cause of excuse satisfies the requirement that the killing was done with malice.
2. **Jury Instructions: Lesser-Included Offenses.** An instruction that requires the jury to first consider whether the State has proved the defendant guilty of second degree murder before considering a lesser-included offense is not erroneous.

Appeal from the District Court for Douglas County: LAWRENCE J. CORRIGAN, Judge. Affirmed.

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

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

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

BOSLAUGH, J.

The defendant-appellant, Robert C. Blackson, was convicted of second degree murder, first degree assault, and two counts of using a firearm in the commission of a felony. He was sentenced to a term of life imprisonment for his murder conviction, 6 to 10 years' imprisonment for his assault conviction, and terms of 10 years' imprisonment for each count of using a firearm to commit a felony, such sentences to run consecutively. The appellant now appeals his murder conviction, contending only that the district court erred in overruling his objection to the jury instruction which instructed the jury to consider the lesser offense of manslaughter only after finding that the State failed to prove that the appellant was guilty of second degree murder.

The events which led to the appellant's conviction began on the night of December 19, 1992, when the assault victim, George Smith, accompanied the murder victim, Richard Green, to a birthday party. Both Smith and Green were members of the "Crips" street gang. Smith had been at the party earlier in the evening and had then encountered members of the rival "Bloods" street gang. As he returned to the party accompanied by Green, Smith was carrying a loaded gun in his waistband.

When Smith and Green arrived at a point near the location of the party, they exited their vehicle and immediately began arguing with members of the Bloods. Smith then pulled his gun from his waistband and returned to the vehicle, placing his gun on the floorboard. Green also returned to the vehicle, but the two could not leave because they could not locate the keys to the vehicle.

Although the record contains conflicting testimony as to who fired the initial shots, Smith testified that while looking through the backseat passenger window of the vehicle, he observed the appellant pointing a revolver at him. According to Smith, the appellant shot him and continued shooting while Smith reached down, retrieved his gun, and returned fire. Smith suffered a wound to his neck. Green died from acute blood loss due to hemorrhaging from a gunshot wound to his stomach.

In his sole assignment of error, the appellant asserts that the district court erred in overruling his objection to jury instruction No. 6. That instruction, as given to the jury, states:

> Under the Information in this case, depending on the evidence which you find that the State has proved beyond a reasonable doubt, you may find the defendant as to Count I:
>
> 1. Guilty of murder in the second degree, or
> 2. Guilty of manslaughter, or
> 3. Not guilty.
>
> SECTION I
>
> The material elements which the State must prove by evidence beyond a reasonable doubt in order to convict the defendant of the crime of murder in the second degree are:
>
> 1. That the defendant, Robert C. Blackson, on or about December 19, 1992, did kill Richard L. Green, Jr.
> 2. That he did so in Douglas County, Nebraska; and
> 3. That the defendant did so intentionally, but without premeditation.
>
> The State has the burden of proving beyond a reasonable doubt each and every one of the foregoing material elements of the crime of murder in the second degree in order to convict the defendant of the crime of murder in the second degree.
>
> If you find from the evidence beyond a reasonable doubt that each of the foregoing material elements set out in this Section I is true, it is your duty to find the defendant guilty of the crime of murder in the second degree done purposely and maliciously but without deliberation and premeditation, and you shall so indicate by your verdict.
>
> If, on the other hand, you find that the State has failed to prove beyond a reasonable doubt any one or more of the material elements in Section I, it is your duty to find the defendant not guilty of the crime of murder in the second degree. You shall then proceed to consider the lesser included offense of manslaughter set out in Section II.

SECTION II

The material elements which the State must prove by evidence beyond a reasonable doubt in order to convict the defendant of the crime of manslaughter are:

1. That the defendant, Robert C. Blackson, killed Richard L. Green, Jr.

2. That he did without malice, either

a. intentionally upon a sudden quarrel, or

b. unintentionally while in the commission of an unlawful act.

3. That he did so on or about December 19, 1992 in Douglas County, Nebraska.

If you find from the evidence beyond a reasonable doubt that each of the foregoing material elements has been proved beyond a reasonable doubt, it is your duty to find the defendant guilty of the crime of manslaughter. On the other hand, if you find the State has failed to prove beyond a reasonable doubt any one or more of the foregoing material elements, it is your duty to find the defendant not guilty of manslaughter and not guilty of any charge in Count I . . . .

The appellant argues that jury instruction No. 6 required the jury to reach a unanimous not guilty verdict with respect to the charge of second degree murder before it could consider the lesser offense of manslaughter. The appellant also contends that under *State v. Pettit*, 233 Neb. 436, 445 N.W.2d 890 (1989), the only distinction between second degree murder, Neb. Rev. Stat. § 28-304 (Reissue 1989), and manslaughter, Neb. Rev. Stat. § 28-305 (Reissue 1989), with respect to an intentional killing, is that manslaughter contains an additional element, i.e., that the intentional killing occurred "upon a sudden quarrel." With that distinction in mind, he then contends that because the jury was instructed to find him guilty of second degree murder if it found the State had proven each of the elements of that crime, the jury was precluded from considering the lesser offense of manslaughter, which required the additional element that the killing occurred upon a sudden quarrel.

In *State v. Jones, ante* p. 821, 515 N.W.2d 654 (1994), a

case released today that involves a similar jury instruction, this court addressed the issues raised by the appellant. As stated in *Jones*:

> The instruction as given does not require that the jury unanimously decide that the defendant is not guilty of first degree murder before considering a lesser offense. Although any verdict finally arrived at by the jury must be unanimous, the jury is not required in its preliminary deliberations and discussion to be unanimous before considering whether the defendant is guilty of a lesser offense.

Id. at 828, 515 N.W.2d at 658.

In addition, *Jones* overrules *Pettit* and holds that there is no requirement of an intention to kill in committing manslaughter. As decided in *Jones*, "[t]he distinction between second degree murder and manslaughter upon a sudden quarrel is the presence or absence of an intention to kill." *Id.* at 830, 515 N.W.2d at 659. Thus, once a jury finds that a killing is intentional, it cannot reach a manslaughter verdict in lieu of a second degree murder verdict. In this instance, the jury necessarily found that the killing was intentional in order to find the appellant guilty of second degree murder.

In *State v. Myers*, 244 Neb. 905, 510 N.W.2d 58 (1994), this court held that malice is an essential element of second degree murder and that an instruction which failed to include malice as such an element of that offense was plain error and prejudicial. Although the intructions given in this case did not define malice and did not specifically define malice as a necessary element of second degree murder, in instruction No. 6 the jury was advised that if the jury found from the evidence beyond a reasonable doubt each of the material elements of murder in the second degree as set out in the instruction, it was the duty of the jury to find the defendant guilty of murder in the second degree "done purposely and maliciously but without deliberation and premeditation, and you shall so indicate by your verdict."

A finding that the defendant killed another purposely and maliciously but without deliberation and premeditation and without just cause or excuse satisfies the requirement that the killing was done with malice. The trial court in separate

instructions advised the jury as to justification for the use of force by the defendant.

The judgment of the district court is affirmed.

AFFIRMED.

WRIGHT, J., participating on briefs.

BRIAN T. BENNETT AND MARY JO BENNETT, HUSBAND AND WIFE, ET AL., APPELLANTS, V. BOARD OF EQUALIZATION OF CITY OF LINCOLN, NEBRASKA, AND CITY OF LINCOLN, NEBRASKA, A MUNICIPAL CORPORATION, APPELLEES.

515 N.W.2d 776

Filed May 6, 1994. No. S-93-606.

1. **Special Assessments: Appeal and Error.** An appeal from a board of equalization's levy of special assessments is heard in the district court as in equity and without a jury.
2. **Equity: Appeal and Error.** 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 material issues of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
3. **Special Assessments: Improvements: Words and Phrases.** Special assessments are charges imposed by law on land to defray the expense of a local municipal improvement on the theory that the property has received special benefits from the improvements in excess of the benefits accruing to property or people in general.
4. **Special Assessments: Improvements.** The foundation for a local assessment lies in the special benefits conferred by the improvement upon the property assessed, and an assessment beyond the benefit so conferred is a taking of property for public use without compensation and, therefore, illegal.
5. **Special Assessments.** The amount of the special assessment cannot exceed the amount of benefit conferred.
6. _____. An assessment may not be arbitrary, capricious, or unreasonable, but the law does not require that a special assessment correspond exactly to the benefits received.
7. **Special Assessments: Presumptions.** Absent evidence to the contrary, it will be presumed that a special assessment was arrived at with reference only to the benefits which accrued to the property affected.

8. **Special Assessments: Improvements.** It is a question of fact whether a property which has been specially assessed has or will benefit from an improvement project.

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 Lancaster County, DONALD E. ENDACOTT, Judge. Judgment of Court of Appeals reversed, and cause remanded with direction.

J. Michael Rierden for appellants.

William F. Austin, Lincoln City Attorney, and Don W. Taute for appellees.

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

FAHRNBRUCH, J.

The issue in this appeal is whether the appellants' properties received a special benefit for which assessments for nearby paving could be made against the properties.

The City of Lincoln (City) imposed a 9-cent-per-square-foot special assessment against the real estate of each of the appellants after the City paved 27th Street south from Old Cheney Road to the southern boundary of Southern Hills 1st Addition.

The assessments were upheld by the district court for Lancaster County and upon appeal by the Nebraska Court of Appeals. We granted appellants' petition for further review.

ASSIGNMENTS OF ERROR

To dispose of appellants' petition for further review, we need only consider appellants' first assignment of error, that the Court of Appeals erred in finding that the appellants received special benefits from the paving of South 27th Street beyond those received by the general public.

After a de novo review of the record, we reverse the Court of Appeals' decision. That court is instructed to remand the cause to the district court for Lancaster County with direction to void the special assessments against the appellants' properties.

STANDARD OF REVIEW

An appeal from a board of equalization's levy of special assessments is heard in the district court as in equity and without a jury. Neb. Rev. Stat. § 15-1205 (Reissue 1991). 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 material issues of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. See, *Purdy v. City of York*, 243 Neb. 593, 500 N.W.2d 841 (1993); *Garden Dev. Co. v. City of Hastings*, 231 Neb. 477, 436 N.W.2d 832 (1989); *Equitable Life v. Lincoln Cty. Bd. of Equal.*, 229 Neb. 60, 425 N.W.2d 320 (1988).

FACTS

In December 1987, the City of Lincoln passed an ordinance creating a district for the paving of South 27th Street from Old Cheney Road to the southern boundary of Southern Hills 1st Addition. The district included properties within 200 feet on either side of the centerline of South 27th Street. In addition, the district included Lots 9 through 14 and portions of Lots 8 and 15 around Norman Circle in the Chez Ami Knolls 5th Addition, even though these lots or portions of them are more than 200 feet from the centerline of South 27th Street.

After completion of the paving and improvements authorized under the ordinance, the City passed a resolution proposing to levy special assessments against the property within the paving district. The City calculated the proposed special assessment rate by reducing the estimated construction cost by one-half as credit for existing adjacent paving and then deducting one-third of the remainder of that amount for lack of direct vehicular access to the newly paved South 27th Street. The remaining portion of the estimated cost was divided by the total square footage of the property within the assessment area, to arrive at an assessment rate of 9 cents per square foot.

Following a hearing on the proposed assessments, the Lincoln City Council, sitting as a board of equalization, levied a 9-cent-per-square-foot assessment against the property within

the paving district. Assessment on property in the district totaled $80,726.12, or about 18.425 percent of the $438,134.62 total cost of paving and improving South 27th Street. The remaining cost of the paving and improvements, $357,408.50, was paid by the City.

Pursuant to Neb. Rev. Stat. § 15-1201 et seq. (Reissue 1991), the appellants, 24 couples and individuals who owned property within the paving district, appealed their assessments to the district court for Lancaster County. In their appeal, they claimed they had received no special benefits from the project beyond those enjoyed by the general public and that the City's designation and assessment of property within the paving district was arbitrary, capricious, unreasonable, illegal, and void.

The district court first ruled in favor of the appellants. Later, the court sustained the City's motion for a new trial. Following the new trial, the district court affirmed the City's assessments. The appellants' motion for new trial was denied. On appeal to the Court of Appeals, the appellants argued, inter alia, that the district court erred in finding that the appellants received special benefits from the paving project beyond those enjoyed by the general public.

ANALYSIS

Special assessments are charges imposed by law on land to defray the expense of a local municipal improvement on the theory that the property has received special benefits from the improvements in excess of the benefits accruing to property or people in general. *North Platte, Neb. Hosp. Corp. v. City of North Platte*, 232 Neb. 373, 440 N.W.2d 485 (1989); *Nebco, Inc. v. Speedlin*, 198 Neb. 34, 251 N.W.2d 710 (1977).

The foundation for a local assessment lies in the special benefits conferred by the improvement upon the property assessed, and an assessment beyond the benefit so conferred is a taking of property for public use without compensation and, therefore, illegal. *Briar West, Inc. v. City of Lincoln*, 206 Neb. 172, 291 N.W.2d 730 (1980).

The amount of the special assessment cannot exceed the amount of benefit conferred. See Neb. Rev. Stat. §§ 15-701

through 15-701.02 (Reissue 1991) (authorizing cities of the primary class, such as Lincoln, to pave and improve streets and to assess the cost of such improvements, *proportionate to the benefits conferred*, on the property benefited).

> An assessment may not be arbitrary, capricious, or unreasonable but the law does not require that a special assessment correspond exactly to the benefits received. . . . The most any officer or any tribunal can do in this regard is to estimate the benefits to each tract of real estate upon as uniform a plan as may be in the light afforded by available information.

Bitter v. City of Lincoln, 165 Neb. 201, 208-09, 85 N.W.2d 302, 307-08 (1957).

Absent evidence to the contrary, it will be presumed that a special assessment was arrived at with reference only to the benefits which accrued to the property affected. *Brown v. City of York*, 227 Neb. 183, 416 N.W.2d 574 (1987). The validity of an assessment is further aided by the presumption of law that all real estate is benefited to some degree from the improvement of a street or alley on which it abuts or from a like improvement made in a district of which the property assessed is a part. *Bitter, supra.*

A party challenging a special assessment has the burden of establishing its invalidity. See, *Brown, supra*; *Bitter, supra*. It is a question of fact whether a property which has been specially assessed has or will benefit from an improvement project. See, *Purdy v. City of York*, 243 Neb. 593, 500 N.W.2d 841 (1993); *North Platte, Neb. Hosp. Corp., supra*; *Nebco, Inc., supra*.

We begin our analysis of this case with an examination of the City's decision to include within the paving district Lots 9 through 14 and portions of Lots 8 and 15 around Norman Circle, while excluding other similarly situated property.

South 27th Street is a main arterial street which at the time of trial was scheduled to join Interstate 80 to the north. In addition, the street provides access to the intersection of South 27th Street and Pine Lake Road, an area designated even before the time of trial for construction of a multiuse regional shopping center. Thus, the general public has benefited by the paving of South 27th Street. The City contends, however, that

the paving and improvement of South 27th Street benefited the assessed property in the district by (1) reducing dust, (2) improving drainage, (3) providing easier access for emergency vehicles to the area, and (4) improving the area's appearance. Even assuming arguendo that the paving district in general was so benefited, none of these special benefits supports the City's decision to levy special assessments against the properties around Norman Circle. If such special benefits had been conferred on the lots around Norman Circle, then the same four benefits would have also been conferred upon all other property that is the same distance from South 27th Street as are the assessed lots around Norman Circle. Such similarly situated property would include lots to the north and south of Norman Circle on the west side of South 27th Street and lots all along the paving district on the east side of South 27th Street.

The City did not assess any property beyond 200 feet from the centerline of South 27th Street other than the lots around Norman Circle. The City claims that it did so because South 27th Street is the *only* street from which the owners of the assessed property around Norman Circle can enter and exit their properties. Therefore, the City determined that the paving and improvement of South 27th Street conferred upon those lots a special benefit for which they could be specially assessed.

We find that this alleged benefit of access from Norman Circle to South 27th Street also fails to support the City's decision to assess the lots around Norman Circle. Even before South 27th Street was paved, Norman Circle had been paved and the properties around it had access to South 27th Street. The paving of South 27th Street conferred no greater benefit of access to South 27th Street upon the lots around Norman Circle than it did upon, for example, those lots along Jane Lane, Jacquelyn Drive, and Cindy Drive that are the same distance from South 27th Street as are the assessed lots around Norman Circle. The owners of all these lots have the benefit of traveling the same distance from their properties to the improved and paved South 27th Street.

We are mindful of the presumption in favor of an assessment's validity and that the burden is upon the property owner challenging an assessment to establish the assessment's

invalidity. However, in this case, the City drew the lines of the paving district to exclude property located the same distance from the improved street and benefited in the same way as property included within the district. The City failed to estimate the benefits to each tract of real estate upon as uniform a plan as it could have in light of available information. We find, as a matter of law, such gerrymandering of paving district lines to be arbitrary, capricious, and unreasonable.

With regard to the remainder of the paving district, we find that the appellants met their burden of establishing the invalidity of the special assessments. Six owners of property within the district testified at trial for the appellants. In sum, the property owners disputed that they had benefited from the paving and improvement of South 27th Street through dust reduction or drainage improvements. The property owners testified that dust from South 27th Street was not a problem before it was paved and that any dust that did exist was generated by the numerous construction projects in the area. The property owners also testified that rather than improving drainage, the paving of South 27th Street created or exacerbated drainage problems in the area. More importantly, the property owners testified that the paving had burdened their properties by dramatically increasing traffic volume on South 27th Street. One property owner testified that the value of his home had decreased by $3,000 because of the increased traffic.

The City does not dispute that traffic on South 27th Street has increased significantly since it was paved. The City's traffic engineer testified that prior to the street's being paved, only about 485 vehicles per day traveled on South 27th Street from Old Cheney Road to Jane Lane. After South 27th Street was paved, traffic volume increased to 3,600 vehicles per day. The City offered evidence reflecting that despite this dramatic increase in traffic, the paving of South 27th Street had reduced dust in the area to one-seventh of what it had been prior to paving. The City also produced evidence that to improve drainage in the area, the City had filled in ditches alongside South 27th Street and installed additional storm sewer pipes and inlets.

In light of this evidence, including the conflicting evidence regarding dust reduction and drainage improvements, the district court found that the appellants' properties had received special benefits from the paving of South 27th Street in excess of the benefits conferred upon the general public. Giving weight to the fact that the trial judge heard and observed the witnesses and accepted one version the facts rather than another, we agree that the appellants were benefited in some degree by dust reduction and drainage improvements. However, such benefits are greatly outweighed by the detriments to appellants' properties caused by the paving of 27th Street, which increased vehicular traffic more than sevenfold. We find that the burden imposed on the appellants' properties by a 742-percent increase in traffic clearly outweighs any benefits of dust reduction or drainage improvements. Because the burden of heavy traffic imposed on appellants' properties outweighs any special benefits to those properties, the appellants' properties received no benefits from the paving project in excess of the benefits conferred upon the general public. Absent such excess benefits, a special assessment against the appellants' properties is arbitrary, capricious, unreasonable, and void.

CONCLUSION

We reverse the Court of Appeals' decision and remand the cause to that court with direction to remand the cause to the district court for Lancaster County with direction to vacate the special assessments levied against the appellants' properties by the City's board of equalization.

REVERSED AND REMANDED WITH DIRECTION.

WRIGHT, J., not participating.

ELSIE STUTHMAN, APPELLEE, V. PAUL STUTHMAN, APPELLANT.

515 N.W.2d 781

Filed May 13, 1994. No. S-92-043.

1. **Statutes: Appeal and Error.** Statutory interpretation presents a question 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. **Courts: Judgments: Appeal and Error.** In an appeal from a county court's judgment rendered in a bench trial of a law action, an appellate court conducts a review for error appearing on the record made in the county court.
3. **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.
4. **Forcible Entry and Detainer: Leases.** Nebraska's forcible entry and detainer statutes apply to farm leases.
5. **Landlord and Tenant: Leases.** When farmland is leased to a tenant for 1 year for a stipulated rent reserved, and after the expiration of the lease, the tenant, without further contract, remains in possession and is recognized as a tenant by the landlord in the receipt of rent for another year, this will create a tenancy from year to year.
6. **Landlord and Tenant: Presumptions: Proof.** A holdover tenancy upon the same conditions as specified in the original lease may be created when, after a year lease has ended and without further agreement, the tenant remains in possession and is recognized by the landlord by receiving rent or in any other way, showing that both parties regard the relation of landlord and tenant as still continuing. Only a presumption of a tenancy from year to year arises from such a holding over, and the presumption is rebuttable by proof of a different agreement or of facts inconsistent with the presumption.

Petition for further review from the Nebraska Court of Appeals, CONNOLLY, IRWIN, and WRIGHT, Judges, on appeal thereto from the District Court for Colfax County, JOHN C. WHITEHEAD, Judge, on appeal thereto from the County Court for Colfax County, GERALD E. ROUSE, Judge. Judgment of Court of Appeals reversed, and cause remanded with direction.

Paul Stuthman, pro se.

Frank J. Skorupa for appellee.

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

FAHRNBRUCH, J.

Further appellate review by this court was granted in this

litigation to consider whether the Nebraska Court of Appeals was correct in holding that forcible entry and detainer actions do not apply to agricultural property.

We reverse the decision of the Court of Appeals and hold that a landlord may regain possession of his or her agricultural property by forcible entry and detainer when the property is unlawfully and forcibly detained by another.

In this cause, Elsie Stuthman, hereinafter referred to as the landlord, filed a petition in the Colfax County Court seeking the return of certain agricultural property that she and her late husband had leased, by a written instrument, to their son Paul Stuthman, hereinafter referred to as the tenant.

The county court found that the landlord was entitled to regain possession of her property in Colfax County, and on appeal, the district court for Colfax County affirmed the judgment of the trial court. On appeal from the district court, the Court of Appeals held that the forcible entry and detainer statutes did not apply to the Stuthmans' lease because agricultural land was involved. The Court of Appeals then determined that under common law, a factual question existed as to whether a tenant continued to be recognized as a tenant after the written lease terminated. The Court of Appeals remanded the cause to the district court with direction to remand the cause to the county court for a determination of that factual question. *Stuthman v. Stuthman*, 2 Neb. App. 173, 507 N.W.2d 674 (1993).

FACTS

On March 25, 1990, the tenant and his parents, Elsie and Ernst Stuthman, entered into a written lease whereby the tenant rented from his parents (1) real estate and farm buildings located on 135 acres of cultivated cropland, 9 acres of prairie grassland, and 6 acres of farmstead, collectively known as the Bernard Loseke farm, in Colfax County; (2) 15 acres of pastureland, but not the buildings, located on property known as the Fred Stuthman farm in Colfax County; and (3) a portion of a hog barn located on property known as the Martha Kreye farm in Platte County. By its terms, the lease was to terminate without notice on February 28, 1991.

The elder Stuthmans each owned an undivided one-half

interest in the property they rented to the tenant. Ernst Stuthman died during the term of the lease. In his will, Ernst devised his interest in the property to his wife with certain restrictions on her ability to convey it. After succeeding to her husband's interest in the property here involved, Elsie Stuthman appointed another son, Herbert Stuthman, to be manager of the farm property.

In a letter dated September 7, 1990, the landlord advised the tenant that she had appointed Herbert Stuthman as farm manager and that she would no longer discuss business matters with the tenant on the telephone or in person because the tenant had scared her. In the letter, the landlord also advised the tenant that "Herbert has stated that he will rent to you at least until next summer the Loseke house, corncrib, and barn for $1.00 rent if we do not have to provide insurance for the barn."

The tenant testified that he visited his mother in February 1991, hoping to settle with her on the 1990 lease and to agree on a lease for 1991. The tenant further testified that he was unable to arrange such a settlement or new lease because "the conditions [at the meeting] were not to talk" and the conversation was about "[e]verything except what [he] wanted to talk to."

On February 27, 1991, the day before the original lease was to expire, Herbert Stuthman sent the tenant copies of a proposed new lease that would have expired February 29, 1992. Under the proposed new lease, the tenant would have rented (1) a 12-acre alfalfa field; (2) the 9 acres of prairie grassland; (3) the 6-acre Loseke farmstead, including the house, corncrib, and cattle barn; and (4) the 15 acres of pastureland, but not the buildings, located on the property known as the Fred Stuthman farm. The tenant never executed this proposed lease.

After the March 25, 1990, lease expired on February 28, 1991, the landlord again offered to rent the tenant some, but not all, of the property that the tenant had rented under the March 25 lease. In a letter to the tenant dated April 23, 1991, the landlord's attorney wrote: "Your mother is not willing to rent the cropland to you. She is willing to rent you the six acre farmstead and the 15 acre pasture (but not the buildings)." The evidence fails to reflect that the parties ever entered into a new

lease.

On June 17, 1991, the landlord sent the tenant a notice of termination, advising him to leave the premises and stating that the landlord would file an action for possession of the property 3 days after service of the notice. The tenant remained on the property, and the landlord filed her forcible entry and detainer petition on July 2, 1991, in the county court. In his motion to dismiss and in his answer, the tenant claimed, inter alia, that he was a holdover tenant entitled to extend the lease for another term because his mother, by making "offers of exchange for the leased property," had established "a constructive and implied continuation of the lease" and had acted contrary to the termination clause of the lease.

After trial, the county court found that the lease had terminated by its terms, that the tenant had been served a 3-day notice to vacate, and that the tenant "continues to unlawfully and forcibly detain said premises." The county court held that the landlord was entitled to possession of the property and issued a writ of restitution in her favor in regard to the property in Colfax County. The district court for Colfax County affirmed the county court's decision, finding that the lease had expired and that neither party had taken any action to extend the lease.

On appeal, the Court of Appeals first determined that the farm lease at issue was governed neither by the Uniform Residential Landlord and Tenant Act (URLTA), as it existed on March 25, 1990, Neb. Rev. Stat. §§ 25-21,219 (Reissue 1989) and 76-1401 to 76-1449 (Reissue 1990), nor by the forcible entry and detainer statutes, Neb. Rev. Stat. §§ 25-21,219 to 25-21,235 (Reissue 1989). The court instead determined the case based upon common law. *Stuthman v. Stuthman*, 2 Neb. App. 173, 507 N.W.2d 674 (1993).

Citing Restatement (Second) of Property § 12.3, comment *k*. (1977), the Court of Appeals related that "[t]here is authority for the proposition of law that negotiations for a new lease may give rise to a finding that the continuation by the tenant of his occupation of the leased property is with the landlord's consent." *Stuthman*, 2 Neb. App. at 177, 507 N.W.2d at 676. The Court of Appeals found that a factual question existed as

to whether the tenant had continued to be recognized as a tenant after the lease terminated. If he was recognized as a tenant, then a year-to-year tenancy would be presumed and 6 months' notice to terminate would be required. The Court of Appeals reversed the district court's order and remanded the cause to the district court with direction to remand the cause to the county court for a determination of whether the tenant was a holdover tenant. The landlord then petitioned for and was granted further review by this court.

ASSIGNMENTS OF ERROR

The landlord claims that the Court of Appeals erred in (1) holding that a farm lease is not governed by the forcible entry and detainer statutes and (2) remanding the cause for a determination of whether the tenant was a holdover tenant.

STANDARD OF REVIEW

Statutory interpretation presents a question 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. *Rigel Corp. v. Cutchall, ante* p. 118, 511 N.W.2d 519 (1994); *In re Application of Jantzen, ante* p. 81, 511 N.W.2d 504 (1994).

In an appeal from a county court's judgment rendered in a bench trial of a law action, an appellate court conducts a review for error appearing on the record made in the county court. See, *Nelson-Holst v. Iverson*, 239 Neb. 911, 479 N.W.2d 759 (1992); *Dammann v. Litty*, 234 Neb. 664, 452 N.W.2d 522 (1990). See, also, § 25-21,233 and Neb. Rev. Stat. § 25-2733(1) (Reissue 1989). Furthermore, 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. See *Barnes v. Davitt*, 160 Neb. 595, 71 N.W.2d 107 (1955) ("clearly erroneous" standard applied in review of forcible entry and detainer actions). Accord *Mathiesen v. Bloomfield*, 184 Neb. 873, 173 N.W.2d 29 (1969).

ANALYSIS

FORCIBLE ENTRY AND DETAINER STATUTES

On appeal to the Court of Appeals, the tenant essentially

argued that because his lease is a farm lease, URLTA as it existed on March 25, 1990, was inapplicable to his case, and that therefore the county court lacked jurisdiction. The landlord agrees that URLTA does not apply to farm leases, but argues that the forcible entry and detainer statutes do apply to farm leases and that those statutes provide the county court with jurisdiction over this case.

In finding that the forcible entry and detainer statutes do not apply to farm leases, the Court of Appeals relied on § 76-1408 of URLTA. Section 76-1408 provides: "Unless created to avoid the application of sections *25-21,219* and 76-1401 to 76-1449, the following arrangements are not governed by sections *25-21,219* and 76-1401 to 76-1449: . . . (7) Occupancy under a rental agreement covering premises used by the occupant primarily for agricultural purposes." (Emphasis supplied.) The Court of Appeals held that § 76-1408 explicitly excludes farm leases not only from URLTA, but also from § 25-21,219, which grants jurisdiction to the district and county courts over forcible entry and detainer proceedings.

An examination of the forcible entry and detainer statutes, URLTA, and their legislative histories shows that excluding farm leases from the forcible entry and detainer statutes is inconsistent with the purposes of those statutes. In 1974, the Legislature enacted URLTA. See 1974 Neb. Laws, L.B. 293. Section 8 of L.B. 293, which became § 76-1408 of URLTA, originally stated: "Unless created to avoid the application of *this act*, the following arrangements are not governed by *this act*." (Emphasis supplied.) When the statute was published, the Revisor of Statutes changed "this act" to read "sections *25-21,219* and 76-1401 to 76-1449." (Emphasis supplied.) Sections 76-1401 to 76-1449 constitute Nebraska's URLTA. The inclusion by the Revisor of Statutes of § 25-21,219 as part of URLTA apparently occurred by mistake.

L.B. 293 stated that one of its purposes was "to amend section 24-568," which later became § 25-21,219. This reference to § 24-568 (§ 25-21,219) apparently caused the Revisor of Statutes to mistakenly cite that section, along with §§ 76-1401 to 76-1449, in designating URLTA. See § 76-1401.

The Legislature's intent that § 25-21,219 *not* be included in

URLTA can further be determined by how L.B. 293 amended § 24-568 (§ 25-21,219). That amendment stated: "This section [§ 24-568 (§ 25-21,219)] shall not apply to actions for possession of any premises subject to the provisions of the Uniform Residential Landlord and Tenant Act." Thus, the only reason the Legislature referred to § 24-568 (§ 25-21,219) in URLTA at all was to differentiate the proceedings governed by URLTA from those governed by the forcible entry and detainer statutes. In light of this amendment, it would be inconsistent to include § 25-21,219 as part of URLTA.

We also note that the Legislature corrected this error in 1991 when it eliminated § 25-21,219 from the designation of URLTA in § 76-1401. See 1991 Neb. Laws, L.B. 324; § 76-1401 (Cum. Supp. 1992).

This court addressed a similar situation in *State v. Karel*, 204 Neb. 573, 284 N.W.2d 12 (1979). In *Karel*, the court determined that when publishing a comprehensive Nebraska Rules of the Road bill, the Revisor of Statutes had substituted certain specific statutory sections for the words "this act." This substitution had erroneously resulted in the charge of first-offense drunk driving being classified as a traffic infraction, for which a defendant would not be entitled to a jury trial, rather than as a misdemeanor, for which a defendant would be entitled to a jury trial.

The court in *Karel* noted that under Neb. Rev. Stat. § 49-705(1) (Reissue 1988), the Revisor of Statutes had the authority, in preparing supplements and reissued or replacement volumes of the Revised Statutes, to renumber and rearrange sections. However, section 49-705(1) also makes clear that any such changes made by the Revisor of Statutes cannot change the substantive meaning of any statute as enacted by the Legislature. Because the Revisor's substitution changed the meaning of the Nebraska Rules of the Road bill, the *Karel* court held that first-offense drunk driving was not a traffic infraction and that the defendant in that case was entitled to a jury trial.

Similarly, in publishing URLTA, the Revisor of Statutes substituted specific statutory sections for the words "this act." In doing so, the Revisor impermissibly changed the meaning of URLTA and the forcible entry and detainer statute. See

§ 49-705(1). Therefore, we find that Nebraska's forcible entry and detainer statutes do apply to farm leases, and we reverse the decision of the Court of Appeals on this issue. See *Otto v. Hongsermeier Farms*, 217 Neb. 45, 348 N.W.2d 422 (1984) (appeal of judgment in forcible entry and detainer proceedings involving farmland).

YEAR-TO-YEAR TENANCY

The Court of Appeals first found that the tenant and landlord had entered into negotiations before the lease terminated and that the tenant had remained on the property after the lease terminated. The Court of Appeals then found that a factual question existed as to whether the tenant had continued to be recognized by the landlord as a tenant after the lease terminated, or in other words, whether the landlord had consented to the tenant's holding over, thereby creating a year-to-year tenancy for which 6 months' notice to terminate would be required. The Court of Appeals erred in making this finding and in remanding the cause on that basis.

The Court of Appeals stated that authority exists to support the proposition that negotiations for a new lease may give rise to a finding that a tenant's continued occupation of leased property after termination of the lease is with the landlord's consent. For this proposition, the Court of Appeals cited comment *k.* to the Restatement (Second) of Property § 12.3 (1977), a section dealing with the time within which a vacating tenant must restore leased property to its former condition or remove annexations. Comment *k.* states:

> If the tenant remains on the leased property after the termination of the lease *with the consent of the landlord*, the lease is not terminated for the purposes of this section *until the consent is withdrawn*. . . .
>
> The usual situation that gives rise to the continuation by the tenant of his occupation of the leased property with the landlord's consent is where they enter into negotiations for a new lease and the negotiations have not resulted in an agreement by the time the original lease ends. The tenant continues his occupancy of the leased property *with the acquiescence of the landlord*, and some time later the

> negotiations collapse and the landlord orders the tenant to vacate the leased property.

(Emphasis supplied.)

While comment *k.* suggests that a landlord may allow a tenant to remain on the property during negotiations for a new lease, the reverse of that suggestion is that *the landlord can withdraw that consent* and order the tenant to vacate the leased property when the negotiations fail.

We have not been cited to any cases dealing with the effect of negotiations on the status of a tenant who holds over after the expiration of a *farm* lease, nor has our research disclosed any such cases. With regard to other types of leases, courts have stated generally that when a tenant remains in possession of leased property after the expiration of his lease, but at the same time negotiates with the landlord for a new lease, *such negotiations negate the possibility of any acquiescence or election by the landlord to create a holdover tenancy*. See, e.g., *Masterson v. DeHart Paint & Varnish Co.*, 843 S.W.2d 332 (Ky. 1992); *Ebert v. Dr. Scholl's Foot Comfort Shops*, 137 Ill. App. 3d 550, 484 N.E.2d 1178 (1985); *Potter v. Henry Field Seed Co.*, 239 Iowa 920, 32 N.W.2d 385 (1948).

No cases have been cited to us nor have we found where this court has determined the effect in Nebraska of negotiations on the status of a tenant holding over after the expiration of the tenant's lease. We have held, however, that when farmland is leased to a tenant for 1 year for a stipulated rent reserved, and after the expiration of the lease, the tenant, without further contract, remains in possession and *is recognized as a tenant by the landlord* in the receipt of rent for another year, this will create a tenancy from year to year. See *Moudry v. Parkos*, 217 Neb. 521, 349 N.W.2d 387 (1984). This court has also held that a holdover tenancy upon the same conditions as specified in the original lease may be created when, after a year lease has ended and without further agreement, the tenant remains in possession and is recognized by the landlord by receiving rent or in any other way, showing that both parties regard the relation of landlord and tenant as still continuing. See *Otto v. Hongsermeier Farms*, 217 Neb. 45, 348 N.W.2d 422 (1984). Only a presumption of a tenancy from year to year arises from

such a holding over, and the presumption is rebuttable by proof of a different agreement or of facts inconsistent with the presumption. *Barnes v. Davitt*, 160 Neb. 595, 71 N.W.2d 107 (1955).

Generally, in Nebraska, in the absence of any different agreement, a yearly lease of farmland begins on March 1 and ends on February 28 of the succeeding year. *Moudry, supra.* In this case, the lease was not for a full year, but for a term approximately 24 days less than a year. When a lease is for less than a year and a tenant holds over with the landlord's consent, a holdover tenancy for the same duration as the original lease is usually created. See *Otto, supra.*

We need not address what the duration of any holdover tenancy would have been in this case. That is because the evidence is uncontroverted that the landlord never intended or agreed to create a holdover tenancy in regard to the same property that was covered in the original lease. Although the tenant attempted to negotiate a renewal lease with the landlord, the landlord steadfastly refused to rent to the tenant for another term the 135 acres of cropland covered by the March 25, 1990, lease. Instead, the landlord offered to rent to the tenant only some of the same property involved in the March 25, 1990, lease. The landlord's desire to rent to the tenant only some of the same property was communicated to the tenant (1) by the landlord in a letter to the tenant dated September 7, 1990, (2) by her farm manager's offer of the new lease sent to the tenant the day before the original lease expired, and (3) by the landlord's attorney in a letter to the tenant dated April 23, 1991.

The landlord's communications, which uniformly excluded the cropland, show that the landlord did not want the tenant to rent for another term on the same terms as specified in the original lease. The record contains no evidence of a different agreement between the parties, nor does it contain evidence that the landlord accepted rent or that the tenant ever attempted to pay the landlord rent for another term.

The evidence is uncontroverted that the tenant was unsuccessful in negotiating a new lease and that the landlord offered the tenant a lease for less property than was covered by the March 25, 1990, lease. This evidence negates the tenant's

claim that the landlord had acquiesced or consented to a holdover tenancy for another term, which, by operation of law, would have been upon the same terms and conditions as specified under the original lease.

From these facts, the county court properly found that the tenant was *unlawfully and forcibly* holding over his tenancy and that the landlord was entitled to regain possession of her property in Colfax County. Implicit in these findings is the county court's determination that the landlord had not, through negotiations or otherwise, recognized the tenant as a holdover tenant or consented to the tenant's holding over. The county court was not clearly wrong in finding for the landlord upon her forcible entry and detainer petition or in granting the landlord a writ of restitution to her Colfax County property. Thus, the Court of Appeals erred in remanding the cause for further proceedings.

CONCLUSION

We hold that Nebraska's forcible entry and detainer statutes do permit a landlord to evict a tenant who unlawfully and forcibly detains farmland after the tenant's lease has expired.

We, therefore, reverse the decision of the Court of Appeals and remand the cause to that court with direction to affirm the judgment of the district court which affirmed the judgment of the county court in favor of the landlord.

REVERSED AND REMANDED WITH DIRECTION.

WRIGHT, J., not participating.

AL SCHMID AND DOROTHEA SCHMID, APPELLEES AND CROSS-APPELLANTS, V. CLARKE, INC., A NEBRASKA CORPORATION, AND ITS WHOLLY OWNED SUBSIDIARY, BANK OF PAPILLION, APPELLANTS AND CROSS-APPELLEES.

515 N.W.2d 665

Filed May 13, 1994. No. S-92-311.

1. **Directed Verdict.** In order to sustain a motion for directed verdict, the trial court resolves the controversy as a matter of law and may do so only when the facts are

such that reasonable minds can draw only one conclusion.

2. **Directed Verdict: Evidence.** In considering the evidence for the purpose of a motion for directed verdict, the party against whom the motion is directed is entitled to the benefit of all proper inferences which can be deduced therefrom.
3. _____: _____. If there is any evidence in favor of the party against whom a motion for directed verdict is made, the case may not be decided as a matter of law.
4. **Corporations: Banks and Banking: Merger: Stock.** Under Neb. Rev. Stat. § 21-2079 (Reissue 1991), shareholders of a banking corporation, unlike ordinary business corporations, do not have the right to dissent from a merger and receive the fair market value for their shares.
5. **Corporations: Stock: Estoppel.** Where a party doing business with a corporation has expended time and money in reliance on the actions of the corporation, the stockholders are estopped from denying those actions.
6. **Corporations: Stock: Merger: Waiver.** Stockholders who fail to approve a merger and do nothing except accept a part of the offer until after the merger has been completed may be held to have waived their objections to the merger.
7. **Trial: Proof.** Where proof relating to a specific issue is so clear and convincing that reasonable minds cannot reach different conclusions, it is the duty of the trial court to dismiss the jury and enter judgment in accordance with the evidence.

Appeal from the District Court for Sarpy County: GEORGE A. THOMPSON, Judge. Reversed and remanded with directions to dismiss.

Gerald P. Laughlin and Jill Robb Ackerman, of Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, for appellants.

Edward D. Hotz and Edith T. Peebles, of Zweiback, Hotz & Lamberty, P.C., for appellees.

HASTINGS, C.J., BOSLAUGH, WHITE, FAHRNBRUCH, and WRIGHT, JJ., and GRANT, J., Retired.

BOSLAUGH, J.

This case arose out of a controversy concerning the merger of Midlands Bancorp, Inc. (MBI), the holding company for Bank of the Midlands (Bank), and Clarke, Inc., the holding company for the Bank of Papillion.

In the spring of 1989, Bank and Bank of Papillion and MBI and Clarke drafted an agreement and plan of merger subject to MBI stockholder approval for the purchase of Bank by the

Bank of Papillion. MBI stockholders were to receive $3.75 per share of stock and an additional $1.50 per share if the stockholder signed a release and covenant not to compete.

The plaintiffs, Al and Dorothea Schmid, were shareholders of MBI. Al Schmid had been the president and chief executive officer of Bank for over 7 years until his termination in January 1988. Following his termination, Al Schmid worked for American National Bank (American) in Douglas and Sarpy Counties. In an effort to expand further into Sarpy County, American had offered to buy out Bank. A third-party evaluation of Bank valued its stock at between $5 and $5.50 per share. The board of Bank recommended that the shareholders not accept American's offer of $5 per share. The Schmids claim that the board elected not to sell to American because Al Schmid would have been appointed president of American's Sarpy County bank. American thereafter chartered and opened a new bank in Sarpy County with Al Schmid as its president. Clarke then offered to purchase MBI.

MBI notified its stockholders, including the Schmids, of the details of the proposal, and the stockholders voted to sell under the terms of the agreement. The Schmids did not appear or object at the stockholders' meeting where the decision to sell was made, claiming that their objection would have been fruitless. The Schmids did not sign the covenant not to compete, claiming that Al's employment with American was in violation of the agreement. Accordingly, they did not receive the additional $1.50 per share that the other stockholders received. They did, however, surrender their stock certificates to the Bank of Papillion later and received $3.75 per share.

The Schmids filed this action on October 23, 1990, against MBI, Clarke, and Bank of Papillion in the district court for Sarpy County. The Schmids sought recovery of $202,500 under theories of conspiracy, breach of fiduciary duty, restraint of trade, and contract, claiming that the covenant not to compete was unenforceable. The trial court dismissed each of the defendants as parties, including the directors of MBI who were added later, except Clarke and Bank of Papillion, stating that no grounds for liability had been shown against the individual defendants and that the other corporate defendants had been

merged out of existence. The trial court also ordered a directed verdict for each of the actions argued by the Schmids, but found, sua sponte, that "[Schmids have] a right to have fair value for [their] stock." The trial court then stated: "The issue that the jury is going to get is what is the fair value of his shares?"

The jury returned a verdict for the defendants, and the Schmids moved for a judgment notwithstanding the verdict. The trial court granted the motion based on its finding that the covenant not to compete was invalid as a matter of law. Without further explanation, the trial court held that the Schmids were entitled to recover an additional $1.50 for each of their shares.

The appellants, Clarke and Bank of Papillion, contend that the trial court erred in granting a judgment notwithstanding the verdict, in submitting to the jury the question of fair value, in giving incorrect jury instructions, and in denying their motion for directed verdict.

The Schmids cross-appeal and assert that the trial court erred in granting directed verdicts on the original causes of action and in dismissing the corporate defendants because of the merger.

We find that the trial court erred in denying the defendants' motion for directed verdict. Because this finding is dispositive, we need not address the other assignments of error.

In order to sustain a motion for directed verdict,. the trial court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw only one conclusion. In considering the evidence for the purpose of a motion for directed verdict, the party against whom the motion is directed is entitled to the benefit of all proper inferences which can be deduced therefrom. If there is any evidence in favor of the party against whom the motion is made, the case may not be decided as a matter of law. *Macholan v. Wynegar, ante* p. 374, 513 N.W.2d 309 (1994); *Baker v. St. Paul Fire & Marine Ins. Co.*, 240 Neb. 14, 480 N.W.2d 192 (1992).

The trial court found that since the covenant not to compete was unenforceable, as a matter of law reasonable minds could conclude only that the Schmids were entitled to collect

everything that the other shareholders had collected as a matter of law. Because we find that the Schmids had waived their claim that the terms of the merger—including the terms of the covenant not to compete—were unfair, we need not address the other assignments of error and the accuracy of the trial court's reasoning.

In March 1989, the Schmids received notice of the terms of the proposed merger and of the meeting at which the vote to merge was held. The Schmids did not attend the meeting either to object or to vote. In September 1989, the Schmids tendered their shares for payment, which was received in November of that year. This action was not brought until almost a year after the Schmids received payment for their shares. The Schmids do not dispute any of these facts. Rather, the Schmids argue that they were not compelled by law to voice dissent from the merger during the time of the transaction.

The Schmids concede that under Neb. Rev. Stat. § 21-2079 (Reissue 1991), shareholders of a banking corporation, unlike ordinary business corporations, do not have the right to dissent from a merger and receive the fair market value for their shares. The Schmids claim that they did not need to object to the merger at the time of the merger because they alleged that the noncompetition agreement caused them to suffer a distinct injury. The Schmids argue that a shareholder who is singled out and subjected to unfair treatment can bring a direct action against the corporation. The Schmids then point to cases which state that a minority shareholder need not give notice of a direct suit or object to corporate action if the notice or objection would be unavailing. See, *Meyerson v. Coopers & Lybrand*, 233 Neb. 758, 448 N.W.2d 129 (1989); *E. K. Buck Retail Stores v. Harkert*, 157 Neb. 867, 62 N.W.2d 288 (1954).

This argument incorrectly assumes that the Schmids' only recourse was to the corporation. The Schmids had the opportunity to object to the Department of Banking and Finance about the terms of the merger. Under Neb. Rev. Stat. § 8-122 (Reissue 1991), the Department of Banking and Finance is required to hold a public hearing to determine, among other things, the integrity of the parties applying for the merger. The legislative history explains that the Department of

Banking and Finance has the authority to consider the fairness of a merger to minority stockholders. Banking Committee Hearing, L.B. 916, 86th Leg., 2d Sess. 48 (Feb. 11, 1980). The Schmids complain that they were subject to the treatment that the banking committee is supposed to prevent, but they sat on their rights and did not avail themselves of the opportunity to voice their concerns. They cannot now attempt to circumvent the statutory scheme and claim an additional benefit from the merger after its completion.

The weight of authority supports this conclusion. In *Dold Packing Co. v. Doermann*, 293 F. 315 (8th Cir. 1923), the shareholders of a corporation attempted to cancel a lease on the grounds that the corporation did not notify the shareholders of the meeting at which the lease was discussed, despite the fact that the shareholders had known of the lease for over a year. The U.S. Court of Appeals for the Eighth Circuit held that where a party doing business with a corporation had expended time and money in reliance on the actions of the corporation, the stockholders were estopped from denying those actions and were held to have acquiesced in those actions. The court refused to set aside the lease.

In a case which was analogous to this case, the U.S. Court of Appeals for the District of Columbia held that minority shareholders of an acquired corporation who felt that they had not received an " 'arms-length' " price for their shares in a merger should have challenged the merger before it was completed. *Nerken v. Standard Oil Co. (Indiana)*, 810 F.2d 1230, 1233 (D.C. Cir. 1987). The court stated that "[b]y failing to oppose the merger [the shareholders] waived any claim that they were being injured by [the acquiring corporation's] alleged bad faith of which they were fully aware at the time." *Id.* The court held that the shareholders were estopped from claiming bad faith, and upheld the dismissal of the case.

At the close of testimony in the present case, the defendants made a motion for directed verdict on the grounds that no cause of action was pled or proved. Although the defendants did not move for a directed verdict on the grounds of estoppel and waiver, those theories were raised on the first day of the trial as a proposed jury instruction. The trial court should have ordered

the directed verdict on the basis of waiver and estoppel.

Ordinarily, a motion for directed verdict should state the specific grounds therefor. Neb. Rev. Stat. § 25-1315.01 (Reissue 1989). However, this court has held that where proof relating to a specific issue is so clear and convincing that reasonable minds cannot reach different conclusions, it is the duty of the trial court to dismiss the jury and enter judgment in accordance with the evidence. *Swink v. Smith*, 173 Neb. 423, 113 N.W.2d 515 (1962).

We find that the proof of waiver and estoppel meets the standard for a directed verdict. In *Five Points Bank v. Scoular-Bishop Grain Co.*, 217 Neb. 677, 681, 350 N.W.2d 549, 552 (1984), this court found that

> [w]aiver has been defined 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.

The actions of the Schmids were clearly inconsistent with their desire to object to the terms of the merger. We find as a matter of law that the parties to the merger were warranted in inferring that the Schmids had waived their objections.

Our finding that the Schmids were estopped from objecting to the terms of the merger renders the remaining assignments of error by both parties immaterial. The judgment is reversed, and the cause is remanded to the district court with directions to enter judgment for the defendants dismissing the petition.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

JAMES B. FRANKSEN, DOING BUSINESS AS J.B. FRANKSEN & ASSOCIATES, APPELLANT, V. CROSSROADS JOINT VENTURE ET AL., APPELLEES.

515 N.W.2d 794

Filed May 13, 1994. No. S-92-579.

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. **Mechanics' Liens: Foreclosure: Equity.** An action to foreclose a construction lien is one grounded in equity.
4. **Equity: Appeal and Error.** 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.
5. **Appeal and Error.** 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.
6. **Construction Contracts: Liens.** A person who furnishes services or materials pursuant to a real estate improvement contract has a construction lien, to the extent provided in the Nebraska Construction Lien Act, to secure the payment of his or her contract price. Neb. Rev. Stat. § 52-131(1) (Reissue 1988).
7. **Construction Contracts: Liens: Notice.** If at the time a construction lien is recorded there is a recorded notice of commencement covering the improvement pursuant to which the lien arises, the lien is on the contracting owner's real estate described in the notice of commencement. Neb. Rev. Stat. § 52-133(1) (Reissue 1988).
8. **Construction Contracts: Words and Phrases.** Contracting owner shall mean a person who owns real estate and who, personally or through an agent, enters into a contract, express or implied, for the improvement of the real estate. Neb. Rev. Stat. § 52-127(3) (Reissue 1988).
9. **Agency: Words and Phrases.** An agency is a fiduciary relationship, resulting from one person's manifested consent that another may act on behalf and subject to the control of the person manifesting such consent, and, further, resulting from another's consent to so act.
10. **Agency.** Whether an agency exists depends on the facts underlying the relationship of the parties irrespective of the words or terminology used by the parties to characterize or describe their relationship.
11. **Principal and Agent.** Apparent or ostensible authority to act as an agent may be conferred if the alleged principal affirmatively, intentionally, or by lack of

ordinary care causes third persons to act upon the apparent authority.

12. **Principal and Agent: Liability.** The apparent authority or agency for which a principal may be liable must be traceable to the principal and cannot be established by the acts, declaration, or conduct of the agent.
13. **Principal and Agent: Words and Phrases.** Apparent or ostensible authority is the power which enables a person to affect the legal relationships of another with third persons, professedly as agent for the other, from and in accordance with the other's manifestations to such third persons.
14. **Principal and Agent.** One who is placed on inquiry as to an agent's or employee's authority, and who has reasonable means of making inquiry, occupies the same position in law as if he had actual knowledge of the employee's lack of authority, because he is charged with knowledge of the facts which the inquiry would have developed.
15. **Principal and Agent: Estoppel.** A party who has knowingly permitted others to treat one as her or his agent is estopped from denying the agency.
16. **Estates: Merger.** The general rule is that where two unequal estates vest in the same person at the same time without an intervening estate, the smaller is thereupon merged in the greater.
17. **Merger: Equity: Intent.** Equity will prevent or permit a merger as will best subserve the purposes of justice and the actual and just intent of the parties, whether express or implied.
18. **Estates: Equity: Mechanics' Liens.** Although a mechanic's lien when filed attaches only to an equitable estate, it may be enforced against the fee after the equitable and legal titles have merged.
19. **Estoppel.** Equitable estoppel is the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, of contract, or of remedy, as against another person who in good faith relied upon such conduct and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right either of property, of contract, or of remedy.
20. _____. Equitable estoppel rests largely on the facts and circumstances of the particular case and will be applied where the wisdom and justice of the principle are founded upon equity, morality, and justice in accordance with good conscience, honesty, and reason. Under such circumstances, the doctrine subserves its true purpose as a practical, fair, and necessary rule of law.
21. **Merger: Equity.** In determining whether a merger has taken place, the court will consider the circumstances of the particular case in the light of equity and good conscience.

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

Martin P. Pelster and, on brief, David J. Lanphier, of Croker, Huck, Kasher, Lanphier, DeWitt & Anderson, P.C., for appellant.

Patrick B. Griffin and Shentell L. Auffart, of Kutak Rock, for appellee Crossroads Joint Venture.

D.C. Bradford and C. Gregg Larson, of Bradford, Coenen, Ashford & Welsh, for appellee Timothy Hawbaker.

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

HASTINGS, C.J.

This is an action to foreclose a construction lien on property located on what is commonly known as the Crossroads Mall in Omaha. The motion for summary judgment filed by plaintiff James B. Franksen was overruled; cross-motions for summary judgment filed by defendants Crossroads Joint Venture (CJV) and Timothy Hawbaker were sustained. Franksen appeals, asserting that the district court erred in (1) determining that he did not contract with a party (or an agent thereof) having an interest in the property, (2) sustaining the motions for summary judgment filed by defendants CJV and Hawbaker, (3) overruling his motion for summary judgment, and (4) overruling his motion for new trial.

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. *Hawkins Constr. Co. v. Reiman Corp., ante* p. 131, 511 N.W.2d 113 (1994); *Healy v. Langdon, ante* p. 1, 511 N.W.2d 498 (1994).

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. *Hawkins Constr. Co. v. Reiman Corp., supra*; *Healy v. Langdon, supra*.

An action to foreclose a construction lien is one grounded in equity. *Hulinsky v. Parriott*, 232 Neb. 670, 441 N.W.2d 883 (1989). 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. *Id.*; *Hughes v. Enterprise Irrigation Dist.*, 226 Neb. 230, 410 N.W.2d 494 (1987).

Sometime in January 1990, Hawbaker contacted a representative of CJV regarding the leasing from CJV of space in the Crossroads Mall in which to operate a restaurant. Negotiations between Hawbaker and Dale Kline, lease coordinator for CJV, continued during the months of March and April 1990, at which time the various provisions of a written lease later executed by Hawbaker and CJV were discussed.

In April 1990, Franksen was contacted by Hawbaker and asked if he would be interested in becoming involved with the construction of a restaurant, later to be known as the Graffiti Eatery, located at the Crossroads Mall. Franksen later undertook the construction of that project. Although he testified that he would not call himself the "general contractor" of the project, Franksen did engage the subcontractors and was responsible for project design and construction coordination. The written terms of the agreement were contained in correspondence between Hawbaker as president of defendant Hawbaker & Associates, Inc., and Franksen as president of J.B. Franksen & Associates. The letter of June 15, 1990, from Hawbaker & Associates addressed to Franksen & Associates confirmed the employment of Franksen and set forth the terms of that employment, including the architectural design, the hiring and managing of all construction crews, and the payment of costs plus 10 percent, as well as provisions for a completion bonus and a budget bonus. Franksen & Associates in letters of June 18 and July 30 addressed to Hawbaker & Associates accepted the terms of the proposal with some slight modifications. During the course of the summer of 1990, there were telephone conversations between Hawbaker and Kline. Hawbaker testified that there were times he had to put Franksen on the phone inquiring why blueprints had not been approved by CJV.

When construction of the project commenced on September 27, 1990, Franksen was aware that Hawbaker & Associates had not yet signed a lease with the property owner, CJV. A written

lease was entered into between Graffiti Eatery, Inc., and CJV covering the premises, the various agreements as to construction required of the tenant, the monthly rentals, and so forth. Although the lease was dated October 23, Hawbaker testified that he thought it must have been executed by CJV on December 21, because that was the date on a letter from CJV enclosing the executed lease. Franksen testified that he went all the way through construction without knowing of the entity Graffiti Eatery or that a lease had been executed.

The lease also provided that when all construction work required of the tenant had been completed, all costs had been paid in full, and satisfactory evidence of the attachment of no liens had been furnished, CJV would "pay to Tenant as Landlord's contribution, if any, for Tenant's Work the sum of $112,000.00 [deletion] and no more." The lease goes on to provide: "In addition, Landlord shall contribute to Tenant the sum of One Hundred Thousand and 00/100 Dollars ($100,000), (herein referred to as 'Tenant Finish Allowance')." This payment was in consideration of the tenant's paying additional rental as defined in the lease agreement and conforming to certain other provisions, notably the satisfactory completion of the construction and payment in full of all construction costs. Finally, there was a provision that the "Tenant may retain, as Landlord's Contribution to Tenant's Work, fifty percent (50%) of the Minimum Rent otherwise payable to Landlord, until such time as the total sum retained equals $28,000.00."

Franksen testified that no representative of Simon Development, the mall management company, or CJV told him that they were contributing money to the project. None of the employees of CJV to whom Franksen talked ever told him that Hawbaker had any authority to act on behalf of CJV, nor did Hawbaker make any inquiry in this regard. However, Franksen stated that as of July 30, 1990, he believed that Hawbaker was acting on behalf of CJV because Hawbaker said that CJV was putting up some financing.

As previously stated, Graffiti Eatery eventually entered into a lease with CJV covering the particular premises. Simon Development was aware that construction had begun prior to execution of the lease.

Hawbaker was the sole incorporator of both Hawbaker & Associates and Graffiti Eatery. Hawbaker testified that when he first contacted CJV in January 1990 regarding the leasing of the space for restaurant purposes, he was acting in a corporate capacity for Hawbaker & Associates and that he did not plan to incorporate under a different name. In answer to a question as to when it was decided to incorporate under Graffiti Eatery, Hawbaker stated that it was only after "all financing had fallen out," in October 1990, that Hawbaker & Associates backed out of the project and Graffiti Eatery had to "start afresh and do it on their own." However, the record contains a letter from Hawbaker & Associates to Simon Development, dated June 15, 1990, stating that Graffiti Eatery would be the tenant and that Graffiti Eatery had hired Franksen as project designer and construction coordinator. The record also reflects that a letter dated June 15, 1990, was sent from Hawbaker & Associates to Franksen, confirming Franksen's employment in the "GRAFFITI EATERY" project; however, Franksen testified that he was not aware of Graffiti Eatery as an "entity" until the project was completed.

On October 2, 1990, Hawbaker issued a check to Franksen for payment of services provided on the construction project. When Franksen attempted to negotiate the check, he found that a stop-payment order had been issued by Hawbaker, who informed Franksen that the account on which the check was drawn contained insufficient funds. Franksen later, on November 7, spoke with Rob Morse, variously referred to in the record as Morse and Morris, an employee of Simon Development, in regard to his concerns about Hawbaker, including the fact that Hawbaker's checks were no good and that Hawbaker had been trying to get Franksen to squeeze false lien waivers out of the subcontractors. During this conversation, Morse called someone named "Jim," and after hanging up, told Franksen that "Simon will pay you guys off, and we'll throw his ass out." Franksen testified that he did not think about whether Morse had the authority to bind CJV to the payment of his costs. However, he also stated that after this meeting, he believed that Simon Development would "do the right thing." Franksen spoke to Morse again the following day,

and Morse told him to finish the job. Franksen stated that after November 8, he believed that Simon Development or CJV would be responsible to him and to his subcontractors for the payment of fees and expenses. When asked about completing the work, Franksen said, "[T]here was very little I could do to stop the job."

Construction was completed on November 23, 1990, and the Graffiti Eatery restaurant opened on November 25. On December 6, Franksen filed a notice of commencement with the Douglas County register of deeds. Copies of the notice of commencement were sent to John Milam, Kline, and Jim Prysiazny, of Melvin Simon & Associates; to Graffiti Eatery; and to Hawbaker & Associates. On December 19, Mark Reed, tenant coordinator of CJV, sent a letter to Franksen which stated that they were preparing to disburse funds for construction of the restaurant and that lien waivers would be required. Reed testified by affidavit that when the letter was written, it was not his belief that CJV was under any obligation to pay funds directly to the contractors. However, while the lease provided that CJV was obligated only to release funds to Graffiti Eatery, CJV was willing to disburse the "Landlord's Contribution Toward Tenant's Work" and loan funds jointly to Graffiti Eatery and the contractors in order to resolve the contractors' claims. The disbursement was conditioned upon CJV's being provided with final lien waivers, but the condition was not met.

On June 4, 1991, Graffiti Eatery was served with a notice of termination of lease for violating the terms of the lease, including the failure to pay rent when and as due. Graffiti Eatery vacated its leased space on October 31, pursuant to court order, owing CJV rent in excess of $59,000. Crossroads Mall manager Curt Fickeisen testified by affidavit dated March 27, 1992, that since Graffiti Eatery vacated, Crossroads had been unable to lease the space, and it remained vacant.

As a result of not receiving payment for the construction expenses, Franksen filed a construction lien on the property on January 22, 1991. An amended petition for foreclosure of the construction lien was filed on July 9. Motions for summary judgment were filed by Franksen, CJV, and Hawbaker. In

sustaining the motions of CJV and Hawbaker, the district court found that the construction contract was between Franksen and Hawbaker & Associates and that there was no competent evidence to show that Graffiti Eatery was acting as an agent for CJV or that Hawbaker & Associates was acting as an agent for Graffiti Eatery; therefore, the construction lien could not attach to the leasehold estate. The court further found that when the leasehold estate of Graffiti Eatery was terminated by CJV, there was no agency relationship between Graffiti Eatery and CJV which would create an implied or actual contract necessary to bind the estate of the fee title holder as the "contracting owner."

Although Franksen assigns as error that the district court erred in sustaining Hawbaker's motion for summary judgment, this assignment of error was not discussed in the brief. 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. *State v. Vermuele*, 241 Neb. 923, 492 N.W.2d 24 (1992). We therefore turn to the assignments of error as they relate to CJV.

The creation, enforcement, and foreclosure of construction liens is governed by the Nebraska Construction Lien Act, Neb. Rev. Stat. § 52-125 et seq. (Reissue 1988). A person who furnishes services or materials pursuant to a real estate improvement contract has a construction lien, to the extent provided in the act, to secure the payment of his or her contract price. § 52-131(1). If at the time a construction lien is recorded there is a recorded notice of commencement covering the improvement pursuant to which the lien arises, the lien is on the contracting owner's real estate described in the notice of commencement. § 52-133(1). Contracting owner shall mean a person who owns real estate and who, personally or through an agent, enters into a contract, express or implied, for the improvement of the real estate. § 52-127(3).

Franksen first contends that he contracted with an agent of CJV to construct the improvements in question. Although he testified that he thought Hawbaker was being backed up by CJV and argues that he was not made aware of Hawbaker's lack of authority to bind CJV's interest in the property until well

after construction commenced, his own testimony indicates that he was aware that no lease had been signed, that he did not go to CJV for payment, and that he did not know if anyone he spoke to had authority to bind CJV, although he expected CJV "to do the right thing." After construction had commenced, Franksen received a copy of a letter sent from an attorney for Simon Development to Hawbaker, dated October 9, 1990, which granted permission to the tenant to commence construction and provided that the tenant agreed "to accept full responsibility for said construction."

An agency is a fiduciary relationship, resulting from one person's manifested consent that another may act on behalf and subject to the control of the person manifesting such consent, and, further, resulting from another's consent to so act. *Gottsch v. Bank of Stapleton*, 235 Neb. 816, 458 N.W.2d 443 (1990); *Dunn v. Hemberger*, 230 Neb. 171, 430 N.W.2d 516 (1988).

Whether an agency exists depends on the facts underlying the relationship of the parties irrespective of the words or terminology used by the parties to characterize or describe their relationship. *Delicious Foods Co. v. Millard Warehouse*, 244 Neb. 449, 507 N.W.2d 631 (1993); *Gottsch v. Bank of Stapleton, supra*.

Apparent or ostensible authority to act as an agent may be conferred if the alleged principal affirmatively, intentionally, or by lack of ordinary care causes third persons to act upon the apparent authority. *Corman v. Musselman*, 232 Neb. 159, 439 N.W.2d 781 (1989); *Western Fertilizer v. BRG*, 228 Neb. 776, 424 N.W.2d 588 (1988). However, the apparent authority or agency for which a principal may be liable must be traceable to the principal and cannot be established by the acts, declaration, or conduct of the agent. *Corman v. Musselman, supra*; *Pioneer Animal Clinic v. Garry*, 231 Neb. 349, 436 N.W.2d 184 (1989).

Apparent or ostensible authority is the power which enables a person to affect the legal relationships of another with third persons, professedly as agent for the other, from and in accordance with the other's manifestations to such third persons. *Corman v. Musselman, supra*; *Western Fertilizer v. BRG, supra*.

One who is placed on inquiry as to an agent's or employee's

authority, and who has reasonable means of making inquiry, occupies the same position in law as if he had actual knowledge of the employee's lack of authority, because he is charged with knowledge of the facts which the inquiry would have developed. *American Surety Co. v. Smith, Landeryou & Co.*, 141 Neb. 719, 4 N.W.2d 889 (1942).

The record indicates that Franksen was at least placed on inquiry as to Hawbaker's authority to bind CJV to construction costs. However, while the record is inconclusive as to whether Graffiti Eatery was actually an entity as of October 9, 1990, it does clearly establish that there was no lease with Graffiti Eatery or Hawbaker & Associates as of that date. Yet in a letter addressed to Graffiti Eatery, to the attention of Hawbaker, CJV granted its "tenant" permission to commence construction as of that date. Franksen received a copy of this letter after construction had begun. Thus, while aware that there was no lease, and thus no tenant, Franksen also knew that CJV agreed to allow construction to take place on its property—construction which Hawbaker & Associates had contracted for with Franksen. A party who has knowingly permitted others to treat one as her or his agent is estopped from denying the agency. *Corman v. Musselman, supra*; *Western Fertilizer v. BRG, supra*. However, going back to the November 7 conference with Morse, Franksen testified in his deposition that Morse never told him that CJV would be responsible and pay Franksen's fees and those of the subcontractors, that Morse never told him that Hawbaker was acting on behalf of CJV, and that Morse did tell him that "Simon will pay you guys off." Under the circumstances as outlined above, there can be no dispute that Hawbaker was not acting as an agent in fact for CJV.

As an alternative theory of recovery, Franksen asserts that the equitable doctrine of merger dictates that the termination of the leasehold estate caused the leasehold estate and the attached construction lien to merge into the fee simple estate, thereby making the construction lien enforceable against CJV's interest in the property.

The general rule is that where two unequal estates vest in the same person at the same time without an intervening estate, the

smaller is thereupon merged in the greater. *Waite Lumber Co., Inc. v. Masid Bros., Inc.*, 189 Neb. 10, 200 N.W.2d 119 (1972); *Central Construction Co. v. Highsmith*, 155 Neb. 113, 50 N.W.2d 817 (1952).

But in equity the common law legal rule as to merger is not always followed, and the doctrine of merger is not favored. Equity will prevent or permit a merger as will best subserve the purposes of justice and the actual and just intent of the parties, whether express or implied. *Waite Lumber Co., Inc. v. Masid Bros., Inc., supra*; *American Savings & Loan Ass'n v. Barry*, 123 Neb. 523, 243 N.W. 628 (1932).

Although a mechanic's lien when filed attaches only to an equitable estate, it may be enforced against the fee after the equitable and legal titles have merged. *Waite Lumber Co., Inc. v. Masid Bros., Inc., supra*; *Central Construction Co. v. Highsmith, supra*.

In *Harte v. Shukert*, 94 Neb. 210, 142 N.W. 517 (1913), the landlord failed to declare a forfeiture of a long-term lease for nonpayment of monthly rentals while the tenant, with the landlord's consent, made permanent improvements on the property at a cost in excess of $70,000. When work on the improvements ceased, the landlord attempted to declare a forfeiture of the lease and to take possession of the improvements as his own. We found that there were two estates, the fee and the leasehold; that they had not been kept separate; and that for the purposes of the lien, the leasehold had merged in the fee.

In *Waite Lumber Co., Inc. v. Masid Bros., Inc., supra*, the landlord, Masid, and tenant, Verges, agreed in the lease to make improvements to the open area of a building so that it could be used as a restaurant and lounge. We found that the improvements required of the tenant were substantial, indicating that they would not have been made except in contemplation of their use during the 10-year term plus 5-year option to renew fixed by the lease. Construction began in November 1969 and was completed in early March 1970. Verges made the required rent payment in November and December 1969, but none thereafter, and was therefore in default during most of the construction period. However, Masid never

exercised the option to forfeit or cancel the lease, but allowed the material and labor suppliers to finish the construction. After Verges suddenly abandoned the premises, Masid took possession, made improvements, and leased the property to another tenant, Copper Kettle, Inc., less than 6 months later. We stated:

> [A] merger that would make Masid liable for Gray's lien will occur only if equity and good conscience so dictate.
>
> That such a merger should result here becomes evident when we examine the position of the parties at the time Masid relet to Copper Kettle, Inc. It now owned a building, half of which had been completely changed into a restaurant and lounge, at a cost of nearly $20,000, of which Masid paid nothing and Verges paid over $8,000, notwithstanding the lease called for a significant portion of the improvement to be made by Masid. . . .
>
> To allow Masid to so enrich itself at the expense of Gray, and the other lienholders, would produce an unconscionable result, which equity will not permit.

Id. at 19-20, 200 N.W.2d at 125.

Relying on *Harte v. Shukert, supra*, CJV contends that in order for Franksen to prevail on his theory of equitable merger, Franksen must establish (1) that CJV is equitably estopped from asserting that the lease was terminated and (2) that the leasehold may be equitably merged into the fee. CJV also asserts that implicit in *Harte* is the ruling in *Stevens v. Burnham*, 62 Neb. 672, 87 N.W. 546 (1901), that, absent estoppel, where a mechanic's lien attaches only to the leasehold estate, termination of the leasehold terminates the lien attached thereto.

Equitable estoppel is the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, of contract, or of remedy, as against another person who in good faith relied upon such conduct and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right either of property, of contract, or of remedy. *Stratman v. Hagen*, 221 Neb. 157, 376 N.W.2d 3 (1985); *DeBoer v.*

Oakbrook Home Assn., 218 Neb. 813, 359 N.W.2d 768 (1984).

Equitable estoppel rests largely on the facts and circumstances of the particular case and will be applied where the wisdom and justice of the principle are founded upon equity, morality, and justice in accordance with good conscience, honesty, and reason. Under such circumstances, the doctrine subserves its true purpose as a practical, fair, and necessary rule of law. *Muller v. Thaut*, 230 Neb. 244, 430 N.W.2d 884 (1988); *Koop v. City of Omaha*, 173 Neb. 633, 114 N.W.2d 380 (1962).

In both *Harte v. Shukert*, 94 Neb. 210, 142 N.W. 517 (1913), and *Waite Lumber Co., Inc. v. Masid Bros., Inc.*, 189 Neb. 10, 200 N.W.2d 119 (1972), the landlord allowed construction to continue while the tenants were in default for nonpayment of rent. In the instant case, the construction was commenced before Graffiti Eatery executed the lease and was completed 2 days before the restaurant opened. While default for nonpayment of rent is apparently not at issue here, other pertinent facts include: (1) Mall representatives were in contact with Franksen on a regular basis during the course of construction, and plans and specifications were approved by, and coordinated with, Simon Development; (2) the lease stated that CJV would provide $112,000 as landlord's contribution to tenant's work, provide a loan of $100,000 as a "Tenant Finish Allowance," and permitted the tenant to retain $28,000 from the minimum rent due for the landlord's contribution toward tenant's work; (3) Hawbaker stopped payment on checks to Franksen beginning in early October 1990, and mall representatives were made aware of that fact, perhaps before Hawbaker executed the lease on October 23, but certainly before the lease was signed by Herb Simon, apparently on or about December 21; (4) although aware that Hawbaker was experiencing financial difficulties, a mall representative told Franksen to complete construction and "Simon will pay you guys off"; (5) although CJV asserted in its brief and at oral argument that it had waived the $300,000 letter of credit required of the tenant in favor of the landlord prior to commencement of tenant's work, in response to plaintiff's interrogatory number 19, CJV responded that the letter of

credit was not waived, but instead was never issued; and (6) Simon Development sent a letter to Franksen on December 19 which stated that it was preparing to disburse funds for the construction although Graffiti Eatery had been open for business for nearly 1 month, and according to Hawbaker, the lease had not yet been executed by Simon; and (7) CJV did execute the lease knowing that construction costs had not been fully paid.

The record indicates that $399,090.78 in construction costs have not been paid. While CJV contends that it has not benefited from the improvements, the record is insufficient to make that determination.

In determining whether a merger has taken place, the court will consider the circumstances of the particular case in the light of equity and good conscience. *Waite Lumber Co., Inc. v. Masid Bros., Inc., supra*; *American Savings & Loan Ass'n v. Barry*, 123 Neb. 523, 243 N.W. 628 (1932).

Viewed in a light most favorable to Franksen, the items delineated above raise genuine issues of material fact or as to the ultimate inferences that may be drawn from the facts relating to whether CJV, considering principles of justice, equity, good conscience, honesty, and reason, should be estopped from denying the effect of its conduct when in the absence of a tenant and with knowledge of Hawbaker's financial difficulties, it permitted or encouraged Franksen to make valuable improvements on its property and accepted the benefits of those improvements, claiming there was no corresponding liability.

Whether or to what extent the improvements *actually* enhanced the value of the premises is also a disputed question of fact which must be resolved by the trial court.

Accordingly, the judgment of the district court in granting summary judgment in favor of CJV and in denying summary judgment to Franksen & Associates is reversed, and the cause is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

LANPHIER, J., not participating.

DANIEL HOIENGS, ON BEHALF OF HIMSELF AND ALL OTHER PERSONS SIMILARLY SITUATED, APPELLANT, V. COUNTY OF ADAMS ET AL., APPELLEES.

516 N.W.2d 223

Filed May 13, 1994. No. S-92-777.

1. **Demurrer: Declaratory Judgments.** The use and determination of a demurrer in actions for declaratory judgment are controlled by the same principles as apply in other cases.
2. **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.
3. **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.
4. **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, a demurrer based on the failure to state a cause of action is to be overruled.
5. **Actions: Parties.** The propriety of substituting parties depends on whether the cause of action otherwise remains the same; thus, where such substitution will introduce a new cause of action into the case, the substitution will not be allowed.
6. _____: _____. In determining whether a new cause of action results from the substitution of parties, the test is whether an attempt is made to state facts giving rise to a wholly distinct and different legal obligation against the defendant, or to change the liability sought to be enforced.
7. **Parties.** In order to substitute one party for another, the party substituted must bear some relation to the original party or possess an interest in the controversy sufficient to enable that party to maintain the proceeding.
8. **Pleadings.** Under Neb. Rev. Stat. § 25-852 (Reissue 1989), a court may, either before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process, or proceeding by adding or striking out the name of any party.
9. _____. The decision whether to allow or deny an amendment to any pleading lies within the discretion of the court to which application is made.
10. _____. Neb. Rev. Stat. § 25-852 (Reissue 1989) is to be liberally construed and amendments permitted when proposed at an opportune time in the furtherance of justice.
11. **Actions: Immunity.** For purposes of applying the doctrine of sovereign immunity, a suit against an agency of the state is the same as a suit against the state.
12. **Political Subdivisions: Counties.** A county is a political subdivision of the state

having subordinate powers of sovereignty conferred by the Legislature.

13. **Constitutional Law: Immunity: Waiver.** Neb. Const. art. V, § 22, providing that the state may sue and be sued and that the Legislature shall provide by law in what manner and in what courts suits shall be brought, permits the state to lay its sovereignty aside and consent to be sued on such terms and conditions as the Legislature may prescribe.
14. **Statutes: Immunity.** Statutes authorizing suits against the state are to be strictly construed because such statutes are in derogation of the state's sovereign immunity.
15. **Immunity: Waiver.** Waiver of sovereign immunity will only be found where stated by the most express language or by such overwhelming implications from the text as will leave no room for any other reasonable construction.
16. **Declaratory Judgments: Words and Phrases.** The term "person," as used in the declaratory judgment statutes, is broad enough to include the state or any subdivision thereof.
17. **Declaratory Judgments: Immunity: Appeal and Error.** Just as an appellate court must determine the scope of review in an action for declaratory judgment from the nature of the dispute, so does such a court determine whether sovereign immunity lies.
18. **States: Contracts: Employer and Employee.** State retirement systems create contracts between the state and its employees who are members of the system.
19. **Administrative Law: Governmental Subdivisions.** An administrative agency is a governmental authority, other than a court and other than a legislative body, which affects rights of private parties through either adjudication or rulemaking.
20. **Counties: Claims: Warrants.** Neb. Rev. Stat. § 23-135 (Reissue 1991) applies where a claim is not a mere formal prerequisite to the issuance of a warrant in payment, but, rather, requires quasi-judicial action in the sense that an exercise of discretion is required in ascertaining or fixing the amount to be allowed, or resolution of the claim otherwise involves a determination of factual questions based upon evidence.
21. **Declaratory Judgments: Parties.** The declaratory judgment statutes are applicable only where all interested persons are made parties to the proceedings.
22. **Parties: Words and Phrases.** An indispensable or necessary party to a suit is one who has an interest in the controversy to an extent that such party's absence from the proceedings prevents a court from making a final determination concerning the controversy without affecting such party's interest.
23. **Parties: Jurisdiction: Waiver.** The presence of necessary parties to a suit is a jurisdictional matter and cannot be waived by the parties; it is the duty of the plaintiff to join all persons who have or claim any interest which would be affected by the judgment.
24. **Actions: Words and Phrases.** A cause of action consists of the fact or facts which give one a right to judicial relief against another.
25. **Actions.** Whether more than one cause of action is stated depends mainly upon whether more than one primary right or subject of controversy is presented and also upon whether recovery on one ground would bar recovery on the other,

whether the same evidence would support the different counts, and whether separate actions could be maintained for separate relief.

26. **Declaratory Judgments.** In addition to the requirement that a justiciable issue must be presented for declaratory relief, a court should enter a declaratory judgment only where such judgment would terminate or resolve the controversy between the parties.
27. **Courts: Jurisdiction: Contracts.** A court which has entered a judgment declaring the rights of the parties under contract has the power to retain jurisdiction and grant further relief, which contemplates necessary supervision of such contracts and entry of supplemental judgments and orders from time to time.
28. **Declaratory Judgments.** The declaratory judgment statutes are remedial; their purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations, and they are to be liberally construed and administered.
29. **Statutes: Words and Phrases.** While "or," when used properly, is disjunctive and "and" conjunctive, the words are so frequently interchanged that in construing a civil statute, "or" may be read as "and" where a strict reading would lead to an absurd or unreasonable result and defeat the intent of the statute.
30. **Class Actions.** There is no mechanical test for determining whether in a particular case the class is so numerous that the requirement of numerosity has been satisfied.
31. _____. An action may not be maintained as a class action by a plaintiff on behalf of himself or herself and others unless he or she has the power as a member of the class to satisfy a judgment on behalf of all members of the class.
32. _____. The test of common interest to maintain a class action is whether all the members of the purported class desire the same outcome of the action that their representative desires.
33. _____. Persons having an interest adverse to those of parties purported to be represented cannot maintain a representative or class suit on behalf of the latter.
34. _____. In determining the ability of a plaintiff to represent a class, it must appear that the relief sought is beneficial to the class members and that the plaintiff's interests are consonant with those of the other members of the class.
35. _____. If any party included in a claimed class stands to suffer an economic loss as the result of his or her inclusion, the party initiating the class action will have an interest adverse to those of the parties he or she purports to represent, and, therefore, it can be said the action is not brought for the benefit of all members of the class.
36. **Class Actions: Summary Judgment.** Where the record demonstrates potentially conflicting interests within a class, it is appropriate to grant a motion for summary judgment as to the class aspect of the case.
37. _____: _____. All a court need determine in granting a motion for summary judgment denying the plaintiff the right to proceed in a class action is that the undisputed facts demonstrate the potentiality of conflict of interests between the represented, or some of them, and the interests which the plaintiff asserts.
38. **Class Actions: Demurrer.** While it may in some cases be appropriate to challenge

a cause of action by demurrer, the determination of whether the suit is maintainable as a class action usually should be predicated on more information than the petition itself.

39. **Class Actions: Due Process.** The procedure in a class action must conform to the requirements of due process and fairly ensure the protection of absent parties who are to be bound.
40. **Class Actions: Due Process: Notice.** In particular cases there may be a due process requirement of notice to absent class members even though there is no express statutory requirement.
41. **Class Actions: Due Process: Judgments: Notice.** The due process rights afforded by Neb. Const. art. I, § 3, preclude binding any member of a claimed class who does not receive notice of suit to any judgment rendered therein; one receiving notice is entitled to exercise his or her due process right to opt out of the class.

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

Richard Scott, Bryan R. Watkins, and Mary C. Wickenkamp for appellant.

Vincent Valentino, of Angle, Murphy, Valentino & Campbell, P.C., for appellees County of Adams et al.

Randall L. Goyette and David D. Zwart, of Baylor, Evnen, Curtiss, Grimit & Witt, for appellees County of Burt et al.

Daniel E. Klaus, of Rembolt Ludtke Parker & Berger, for appellee County of Seward.

Don Stenberg, Attorney General, and Fredrick F. Neid for appellee Retirement System for Nebraska Counties.

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

CAPORALE, J.

I. STATEMENT OF CASE

On his own behalf and on behalf of other current and past participants in the defendant-appellee Retirement System for Nebraska Counties (the system), the original plaintiff-appellant, William Fairbanks, then an employee of the defendant-appellee York County, sought a declaration that the employees of the 91 defendant-appellee counties are

entitled, under the provisions of the County Employees Retirement Act, Neb. Rev. Stat. § 23-2301 et seq. (Reissue 1991) (the retirement act), to greater retirement contributions from their respective employer counties than is presently the case. He also sought, insofar as is relevant to this review, declarations requiring the defendant counties to contribute the difference in the level of contributions actually made and the level of contributions allegedly required under the retirement act and, although not naming it as a defendant, requiring the Public Employees Retirement Board (retirement board), which administers the system, to compel the counties to contribute as required by the retirement act.

The defendants all demurred to the petition on the grounds that (1) the district court lacked jurisdiction over the defendants and the subject matter of the action, (2) there was a defect or misjoinder of the parties, (3) several causes of action were improperly joined, and (4) the petition did not state facts sufficient to constitute a cause of action.

The district court sustained the defendants' demurrers and thereafter dismissed Fairbanks' petition. Assigning, in summary, that ruling as error, he appealed to the Nebraska Court of Appeals. While the appeal was pending in that court, York County terminated Fairbanks' employment, and Fairbanks withdrew all his retirement funds. The Court of Appeals thereafter, upon Fairbanks' motion, granted leave to substitute Daniel Hoiengs, an employee of the defendant Cass County, as the plaintiff-appellant.

We subsequently, under the authority granted by Neb. Rev. Stat. § 24-1106(3) (Cum. Supp. 1992), removed the matter to this court in order to regulate the caseloads of the appellate courts. We now reverse, and remand for further proceedings consistent with this opinion.

II. SCOPE OF REVIEW

We begin our review by recalling that the use and determination of a demurrer in actions for declaratory judgment are controlled by the same principles as apply in other cases. *S.I.D. No. 272 v. Marquardt*, 233 Neb. 39, 443 N.W.2d 877 (1989).

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. *DeVaux v. DeVaux, ante* p. 611, 514 N.W.2d 640 (1994); *Wheeler v. Nebraska State Bar Assn.*, 244 Neb. 786, 508 N.W.2d 917 (1993); *Schieffer v. Catholic Archdiocese of Omaha*, 244 Neb. 715, 508 N.W.2d 907 (1993).

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. *Wheeler, supra*; *Schieffer, supra*.

In ruling on a demurrer, the petition is to be construed liberally; if as so construed the petition states a cause of action, a demurrer based on the failure to state a cause of action is to be overruled. See, *Wheeler, supra*; *St. Paul Fire & Marine Ins. Co. v. Touche Ross & Co.*, 244 Neb. 408, 507 N.W.2d 275 (1993).

III. RETIREMENT ACT

The next task is to familiarize ourselves with the retirement act, a necessary step to the understanding of the petition and issues presented by the challenge to the district court's ruling.

The retirement act establishes the system for the purpose of providing a retirement annuity or other benefits for employees of counties having a population of less than 100,000.

The participation of the counties became mandatory effective upon the earlier adoption of the system by the county board or January 1, 1987. § 23-2329. The system includes all county employees devoting 20 or more hours per week to county employment and all elected officers of a county with the exception of judges and persons making contributions to the School Retirement System of the State of Nebraska. § 23-2301(1). The membership of the system is composed of all full-time employees who have been employees for a period of 12 continuous months and part-time employees who are at least 25 years of age, have been employed for a total of 12 months, and have exercised their option to join the retirement system.

§ 23-2306.

The share of the fund created by deductions from an employee's salary is defined as that person's "employee account" and constitutes half of the employee's source of retirement benefits. § 23-2309. Beginning January 1, 1985, 3.2 percent of each participating employee's monthly salary is "picked up" by the county either through a reduction in the cash compensation of the employee or a combination of a reduction in compensation and an offset against a future compensation increase. § 23-2307. These contributions are paid from the same fund source used to pay earnings to the employee. *Id.*

An amount equal to 250 percent of the amounts deducted from the employee's compensation is paid by the county to the primary carrier, § 23-2308, a life insurance or trust company designated by the board as administrator of the system, § 23-2301(12).

The "employer account," which is a member's share of the fund created by county contributions, makes up the second half of the source of an employee's retirement benefits. § 23-2310. The amount of the county's contributions is set out in § 23-2310:

> Prior to January 1, 1981, as of any January 1 a member's employer account shall be equal to his or her account as of the next preceding January 1, increased by two hundred percent of any amounts deducted from the member's compensation since the next preceding January 1 in accordance with section 23-2307. As of January 1, 1982, a member's employer account shall be equal to the account as of January 1, 1981, increased by two hundred percent of the amounts deducted from the member's compensation for the first nine months of the year and two hundred fifty percent for the final three months of the year in accordance with section 23-2307. As of January 1, 1983, and each year thereafter, the member's employer account shall be equal to the account as of the next preceding January 1 increased by two hundred fifty percent of the amounts deducted from the member's compensation since the next preceding January 1 in

> accordance with section 23-2307. . . .
>
> . . . [T]he total additions made to both the employee account and the employer account for any calendar year shall not exceed the lesser of thirty thousand dollars, as adjusted for cost-of-living adjustments announced by the Internal Revenue Service for each calendar year in which the adjustment is announced, or twenty-five percent of the member's compensation for such year. For purposes of this subsection, total additions for a calendar year shall equal the full amount allocated to the employer account for that year plus the lesser of (a) one-half of the member's contributions for that year or (b) the amount of the member's contributions in excess of six percent of his or her compensation for that year.

The retirement value for any employee who retires after attaining the age of 55 or because of disability is the sum of that person's employee account and employer account as of the person's retirement date. §§ 23-2315, 23-2315.01, and 23-2316. An employee who terminates employment prior to age 55 may, upon application, receive either a termination benefit not to exceed the amount of his or her employee account payable in a lump sum, plus a paid-up deferred annuity provided by the vested portion of the employer account, or a paid-up deferred annuity provided by the employee account and the vested portion of the employer account. The employer account fully vests in the employee after the latter's participation for a period of 5 years. Sums remaining in employer accounts not collected by employees who have ended their employment before becoming eligible for retirement are used to meet the expenses incurred by the retirement board in connection with operating the system and to reduce the contributions of the counties to fund future benefits under the retirement act. § 23-2319.

IV. FACTUAL ALLEGATIONS

The operative petition asserts that since January 1, 1983, the defendant counties have failed to make payments to the employer accounts on behalf of employees consistent with the retirement act. Instead, according to the petition, the counties have contributed an amount equal to 150 percent of the amount

contributed by the employee, and not the required 250 percent. The petition further claims that the system has failed to administer and collect payments by the counties as the retirement act requires.

V. SUBSTITUTION OF PLAINTIFF

Before proceeding to an analysis of the issues raised by the appeal from the district court's sustainment of the defendants' demurrers and dismissal of the petition, we turn our attention to the defendants' claim that as Fairbanks' employment with one of the defendant counties has terminated, he is not a proper person to bring this suit. However, inasmuch as Fairbanks is no longer the plaintiff, we need not, and therefore do not, concern ourselves with whether he could have maintained this suit notwithstanding the termination of his employment. Rather, we go to the issue of whether it was proper to permit the substitution of another plaintiff.

The propriety of substituting parties depends on whether the cause of action otherwise remains the same. Thus, where such substitution will introduce a new cause of action into the case, the substitution will not be allowed. See, *West Town Homeowners Assn. v. Schneider*, 215 Neb. 905, 341 N.W.2d 588 (1983); *Collection Associates, Inc. v. Eckel*, 212 Neb. 607, 324 N.W.2d 808 (1982); *Meyer v. Sandhills Beef, Inc.*, 211 Neb. 388, 318 N.W.2d 863 (1982).

In determining whether a new cause of action results from the substitution of parties, the test is whether an attempt is made to state facts giving rise to a wholly distinct and different legal obligation against the defendant, or to change the liability sought to be enforced. See, *Klopstock v. Superior Court*, 17 Cal. 2d 13, 108 P.2d 906 (1941); *Oetzel v. Martin*, 163 Ohio St. 512, 127 N.E.2d 353 (1955) (two tests to be applied: whether same evidence will support both petitions and whether same measure of damages will apply to both). See, also, *St. Paul Fire & Marine Ins. Co. v. Touche Ross & Co.*, 244 Neb. 408, 507 N.W.2d 275 (1993) (cause of action consists of facts which give right to judicial relief against another).

Additionally, in order to substitute one party for another, the party substituted must bear some relation to the original party

or possess an interest in the controversy sufficient to enable that party to maintain the proceeding. See *Nelson v. Sing Oil Co.*, 122 Ga. App. 19, 176 S.E.2d 227 (1970) (substitution of party not authorized by statute providing for adding or disposing of parties).

Where rules of practice governing amendments to pleadings permit the adding or striking out of the name of any party, such amendments have been held to permit the court, in its discretion, to allow the substitution of a new plaintiff for the original plaintiff. See, *Harmelink v. Arvada*, 41 Colo. App. 122, 580 P.2d 841 (1978); *Oetzel v. Martin, supra*; *Pearlman v. Rowell*, 121 R.I. 466, 401 A.2d 19 (1979); *Superscope, Inc. v. Benjamin Co., Inc.*, 276 S.C. 231, 277 S.E.2d 596 (1981); *Jacobson v. Southern Biscuit Co.*, 198 Va. 813, 97 S.E.2d 1 (1957). In our practice, under Neb. Rev. Stat. § 25-852 (Reissue 1989), "[t]he court may, either before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process or proceeding, by adding or striking out the name of any party . . . ." The decision whether to allow or deny an amendment lies within the discretion of the court to which application is made. *Maricle v. Spiegel*, 213 Neb. 223, 329 N.W.2d 80 (1983); *Tilden v. Beckmann*, 203 Neb. 293, 278 N.W.2d 581 (1979); *McCarty v. Morrow*, 173 Neb. 643, 114 N.W.2d 512 (1962). However, the statute is to be liberally construed and amendments permitted when proposed at an opportune time in the furtherance of justice. *Bittner v. Miller*, 226 Neb. 206, 410 N.W.2d 478 (1987); *Building Systems, Inc. v. Medical Center, Ltd.*, 213 Neb. 49, 327 N.W.2d 95 (1982); *Kleinknecht v. McNulty*, 169 Neb. 470, 100 N.W.2d 77 (1959) (it is abuse of discretion to refuse to permit amendment proposed at opportune time in furtherance of justice). Thus, we have held that amendments under this statute may even be made in this court after appeal. *Lippire v. Eckel*, 178 Neb. 643, 134 N.W.2d 802 (1965).

Here, Fairbanks sought to substitute one employee of the defendant counties for another. No other change was sought or made, and the newly named plaintiff bears the same relationship to the dispute as did his predecessor.

Under the circumstances, it cannot be said that the Court of

Appeals abused its discretion in permitting Hoiengs to be substituted as the plaintiff.

VI. ANALYSIS OF ISSUES PRESENTED BY DISTRICT COURT'S RULING

That determination having been made, we consider the issues presented by the challenge to the district court's ruling.

1. Claimed Lack of Jurisdiction

We turn first to the defendants' contention that the district court lacked jurisdiction over their persons and the subject matter of the action.

(a) Over Persons

The defendants first argue that the district court could acquire no jurisdiction over them as they are immune from suit because of their sovereign nature.

For purposes of applying the doctrine of sovereign immunity, a suit against an agency of the state is the same as a suit against the state. *Concerned Citizens v. Department of Environ. Contr.*, 244 Neb. 152, 505 N.W.2d 654 (1993); *Anstine v. State*, 137 Neb. 148, 288 N.W. 525 (1939), *overruled on other grounds, Beatrice Manor v. Department of Health*, 219 Neb. 141, 362 N.W.2d 45 (1985). The retirement act provides that the system holds all cash and other property. § 23-2302. The system possesses the powers and privileges of a corporation, and the Attorney General is specifically designated as its legal adviser. § 23-2314. The close relationship between the system and the State is apparent through the legislative provisions which create and govern all of Nebraska's retirement systems. The retirement board responsible for administration of the system is also charged with responsibility of the State Employees Retirement Act, the School Retirement System, and the Nebraska State Patrol Retirement System. Neb. Rev. Stat. §§ 79-1503 (Reissue 1987) and 81-2019 and 84-1305 (Cum. Supp. 1992). The Auditor of Public Accounts is responsible for making an annual audit of the system and an annual report concerning the condition of the system to the retirement board and to the Clerk of the Legislature. § 23-2313. The Legislature appoints five members of the Legislature to serve on a

committee known as the Nebraska Retirement Systems Committee for the purpose of studying any legislative proposal, bill, or amendment affecting any public retirement system established by the State of Nebraska or any political subdivision thereof. Neb. Rev. Stat. §§ 50-416.01 and 50-417 (Cum. Supp. 1992).

Thus, little argument is required to demonstrate that the system is clothed with the sovereign immunity of the state. Indeed, Hoiengs' brief presents no direct challenge to the system's status as a state agency.

Likewise, unless authorized by statute, neither may a county be sued, for a county is a political subdivision of the state having subordinate powers of sovereignty conferred by the Legislature. *Franek v. Butler County*, 127 Neb. 852, 257 N.W. 235 (1934). As such, it acts purely as an agent of the state. *Rock Cty. v. Spire*, 235 Neb. 434, 455 N.W.2d 763 (1990); *Seward County Board of Commissioners v. City of Seward*, 196 Neb. 266, 242 N.W.2d 849 (1976); *State ex rel. Johnson v. County of Gage*, 154 Neb. 822, 49 N.W.2d 672 (1951). See *Stevenson v. Richardson County, Nebraska*, 9 F.R.D. 437 (D. Neb. 1949) (county is not by its nature corporate entity, but, rather, instrumentality erected by State whereby it administers its sovereign authority).

Having concluded that the system and the counties have sovereign immunity, the question becomes one of determining whether that immunity has been waived.

(i) System

Neb. Const. art. V, § 22, provides that the "state may sue and be sued, and the Legislature shall provide by law in what manner and in what courts suits shall be brought." While the provision is not self-executing, it permits the state to lay its sovereignty aside and consent to be sued on such terms and conditions as the Legislature may prescribe. *Gentry v. State*, 174 Neb. 515, 118 N.W.2d 643 (1962); *Anstine, supra*.

However, statutes authorizing suits against the state are to be strictly construed because such statutes are in derogation of the state's sovereign immunity. *Riley v. State*, 244 Neb. 250, 506 N.W.2d 45 (1993); *Concerned Citizens, supra*; *First Nat. Bank*

of Omaha v. State, 230 Neb. 259, 430 N.W.2d 893 (1988); *Wiseman v. Keller*, 218 Neb. 717, 358 N.W.2d 768 (1984); *Frye v. Sibbitt*, 145 Neb. 600, 17 N.W.2d 617 (1945). Waiver of sovereign immunity will only be found where stated " ' "by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction." ' " *Wiseman*, 218 Neb. at 720, 358 N.W.2d at 770.

As noted in part I, this is a declaratory judgment action brought pursuant to Neb. Rev. Stat. § 25-21,149 et seq. (Reissue 1989). Although the system argues that it is not a person as defined in the declaratory judgment statutes, we have previously held that the term "person," as used in those statutes, is broad enough to include the state or any subdivision thereof. *City of Lincoln v. First Nat. Bank*, 146 Neb. 221, 19 N.W.2d 156 (1945); *State, ex rel. Smrha, v. General American Life Ins. Co.*, 132 Neb. 520, 272 N.W. 555 (1937) (State embraced under expression "any person").

While the declaratory judgment statutes do not waive the state's sovereign immunity, *Concerned Citizens v. Department of Environ. Contr.*, 244 Neb. 152, 505 N.W.2d 654 (1993), such an action may be maintained under various other statutes permitting actions against the state, *Riley, supra*; *Concerned Citizens, supra*; *Offutt Housing Co. v. County of Sarpy*, 160 Neb. 320, 70 N.W.2d 382 (1955), *aff'd* 351 U.S. 253, 76 S. Ct. 814, 100 L. Ed. 1151 (1956).

Just as we must determine the scope of our review in an action for declaratory judgment from the nature of the dispute, *Donaldson v. Farm Bureau Life Ins. Co.*, 232 Neb. 140, 440 N.W.2d 187 (1989), so must we determine whether sovereign immunity lies. Hoiengs' claim arises from his right to retirement benefits by virtue of his employment by a county participating in the system. In *Halpin v. Nebraska State Patrolmen's Retirement System*, 211 Neb. 892, 320 N.W.2d 910 (1982), we found that a change in calculating a state patrolman's pension annuities resulted in an unconstitutional impairment of the patrolman's contract rights. We reasoned that since Nebraska law recognizes that public pensions are deferred compensation, it follows that Nebraska public

employees have reasonable expectations with regard to their pensions rights which are protected by the law of contracts. Significantly, we stated that state retirement systems create contracts between the state and its employees who are members of the system. See, also, *Omer v. Tagg*, 235 Neb. 527, 455 N.W.2d 815 (1990) (promises regarding health insurance made at time of employment involved deferred compensation and constituted contract enforceable against state); *Caruso v. City of Omaha*, 222 Neb. 257, 383 N.W.2d 41 (1986) (accepting that right of public employee to receive benefits under public retirement plan is not gratuity, but, rather, is deferred compensation and is contractual in nature). Hoiengs' retirement rights are therefore contractual in nature.

The Legislature has specifically decreed that the "state may be sued in the district court of the county wherein the capital is situated in any matter founded upon or growing out of a contract, express or implied, originally authorized or subsequently ratified by the Legislature, or founded upon any law of the state." Neb. Rev. Stat. § 25-21,206 (Reissue 1989). Accordingly, the system has waived its sovereign immunity under the provisions of § 25-21,206. See, *Omer, supra*; *VisionQuest, Inc. v. State*, 222 Neb. 228, 383 N.W.2d 22 (1986).

(ii) Counties

There is authority for the proposition that as counties have no independent sovereignty, any immunity from liability and suit they enjoy is nothing more than an extension of a state's immunity; therefore, any waiver by a state of its own immunity waives the immunity of its counties, even without separate statutory enactments. *Bernardine v. City of New York*, 294 N.Y. 361, 62 N.E.2d 604 (1945); *Cox v. Vil. of Greenwich*, 33 A.D.2d 264, 306 N.Y.S.2d 987 (1970). However, we need not decide that issue at this time, for by providing in Neb. Rev. Stat. § 23-135 (Reissue 1991) that "claims against a county shall be filed with the county clerk within ninety days from the time when any materials or labor, which form the basis of the claims, have been furnished or performed," the Legislature has expressly waived the counties' sovereign immunity with respect to contractual disputes.

(b) Over Subject Matter

Next, the defendants assert that even so, the district court lacked jurisdiction over the subject matter of this action.

(i) System

We note first of all that Neb. Rev. Stat. § 81-1170.01 (Cum. Supp. 1992) requires that, with certain exceptions not relevant here, persons having claims against the state shall present the same, with appropriate documentation, to the Director of Administrative Services to be audited and settled within 2 years after the request accrues. In breach of contract actions, such is a mandatory step. *J.L. Healy Constr. Co. v. State*, 236 Neb. 759, 463 N.W.2d 813 (1990). See *Westside Community Schools v. State Department of Education*, 202 Neb. 712, 277 N.W.2d 73 (1979).

In some instances, we have refused to grant declaratory relief and have instead required compliance with claims statutes. E.g., *Millard School Dist. v. State Department of Education*, 202 Neb. 707, 277 N.W.2d 71 (1979); *VisionQuest, Inc., supra.*

In *Millard School Dist.*, after the State Department of Education denied a portion of the local board of education's expenses for special education, the local board filed an action for reimbursement, characterizing its action as one for declaratory judgment. However, noting that declaratory judgment is not appropriate where an equally serviceable remedy exists and pointing out that the dispute essentially presented a claim for money, we held that the statutory claim procedure had to be employed and thus refused declaratory relief. Perhaps even more significantly, we observed that the case did not present the classic declaratory judgment situation wherein one would otherwise be required to act or refrain from acting at one's legal peril, because the local board was required, in any event, to provide special education services to handicapped students; the only question was whether the expenditures of meeting that requirement were reimbursable.

In *VisionQuest, Inc.*, the State, through its Director of Administrative Services, refused to fully reimburse VisionQuest for the cost of its services to two children in need of special educational facilities. VisionQuest filed suit as an appeal

from the director's decision and prayed for the amount owed to it for services rendered and for a declaratory judgment and determination of its rights under the applicable statute. Again, we determined that the petition was simply a claim for money which required VisionQuest to follow the mandatory statutory procedure, which VisionQuest had failed to do in that it had filed its appeal from the director's decision out of time.

But here, the additional contributions would be paid by each county and thus would not be a direct claim upon the treasury of the State. For that reason alone, the State claims procedure is not applicable.

The system argues that nonetheless, as a state agency, a declaratory judgment action against it can only proceed in accordance with the Administrative Procedure Act.

While it is true that the Administrative Procedure Act governs procedures for administrative agencies and provides for judicial review of appeals from the contested rulings of such bodies, the procedures are only applicable to agencies defined in the act as being boards, commissions, departments, officers, divisions, or other administrative offices or units of the state government which are authorized by law to make rules and regulations. See *County of Blaine v. State Board of Equalization & Assessment*, 180 Neb. 471, 143 N.W.2d 880 (1966); Neb. Rev. Stat. §§ 84-901 (Reissue 1987) and 84-917 (Cum. Supp. 1992). Such rules and regulations do not include rules and regulations concerning the internal management of an agency which do not affect private rights, private interests, or procedures available to the public. § 84-901. An administrative agency is a governmental authority, other than a court and other than a legislative body, which affects rights of private parties through either adjudication or rulemaking. *Bowman v. City of York*, 240 Neb. 201, 482 N.W.2d 537 (1992). Nowhere does the retirement act grant the system authority to make rules and regulations which would make it subject to the Administrative Procedure Act. See *Reed v. Parratt*, 207 Neb. 796, 301 N.W.2d 343 (1981) (Administrative Procedure Act does not apply to internal operations).

(ii) Counties

Recognizing the underlying contractual nature of the claims, the counties, relying on § 23-135, contend that the claims Hoiengs asserts not only on his own behalf but on behalf of others must first have been submitted to each county. We have noted the requirement of § 23-135, that claims based on contract be filed with the county, enables the county to acquire information concerning the rights asserted against it, to make proper investigation concerning the merits of claims against it, and to settle those of merit without the expense of litigation. *Zeller Sand & Gravel v. Butler Co.*, 222 Neb. 847, 388 N.W.2d 62 (1986).

In *Zeller Sand & Gravel*, a sand and gravel firm brought an action against Butler County for breach of a requirements contract. In determining whether § 23-135 was applicable to the contract before the court, we first noted that it has long been held that the statute applies to all claims arising from or out of a contract. See, *Jackson v. County of Douglas*, 223 Neb. 65, 388 N.W.2d 64 (1986) (includes claims for additional wages allegedly due for overtime work); *Coverdale & Colpitts v. Dakota County*, 144 Neb. 166, 12 N.W.2d 764 (1944) (includes all claims arising ex contractu whether express or implied). More significantly, we held in *Zeller Sand & Gravel* that § 23-135 applies where a claim is not a mere formal prerequisite to the issuance of a warrant in payment, but, rather, requires quasi-judicial action in the sense that an exercise of discretion is required in ascertaining or fixing the amount to be allowed, or resolution of the claim otherwise involves a determination of factual questions based upon evidence. See *Jackson, supra* (compliance with county claims statute in cases against county involving claims arising out of contract and containing quasi-judicial questions of fact is mandatory). See, also, *Heinzman v. County of Hall*, 213 Neb. 268, 328 N.W.2d 764 (1983) (former director's salary was fixed by statute, thus precluding need for judicial action on part of board of county commissioners); *McCollough v. County of Douglas*, 150 Neb. 389, 34 N.W.2d 654 (1948) (rate of compensation for deputy clerk of district court fixed by statute required only ministerial action, therefore plaintiff not required to file claim with county

clerk).

Concluding that the contract there in question required the county to decide factual questions based on evidence both as to whether the contract had in fact been breached and, if so, as to the amount of damages proximately caused, we held that Zeller's petition failed to state a cause of action because it did not recite that the claim was first presented to the county. *Zeller Sand & Gravel, supra.*

The defendant counties here cite two cases seemingly similar to the case now before us, *Jackson, supra*, and *Thompson v. City of Omaha*, 235 Neb. 346, 455 N.W.2d 538 (1990), in which public employees sued to recover additional compensation. In both cases, the employees' petitions were dismissed for failing to comply with the appropriate county or city claims statute.

But the facts of those cases are inapposite to those now before us. In *Jackson*, the employees contended that they were entitled to recover compensation for a 15-minute period in which they were required to report early for the purpose of conferring with workers on the preceding shift, while in *Thompson*, city employees sought unpaid overtime wages earned but uncompensated for a period of 5 years within the filing date of the petition. Prior to their petition before the district court, the city council in *Thompson* had awarded the employees compensation for overtime earned during the 18-month period immediately preceding the filing of the claim. Because of the nature of the claims in both *Jackson* and *Thompson*, both of which would require factual determinations to be made, resolution was best suited to the city council or board of county commissioners.

In the instant case, however, Hoiengs asks for an interpretation of statutory language relating to the amount counties are required to contribute to the employer account of each county employee. There are no questions of fact which would require a county's determination based upon the evidence presented which would place the matter within the purview of § 23-135; the statute therefore does not apply.

2. Claimed Defect or Misjoinder of Parties

The next question is whether there is, as the defendants

claim, a defect or misjoinder of parties.

(a) Failure to Name Retirement Board

While not raised by the parties, first there is the matter of Hoiengs' failure to name the retirement board as a party defendant. It is clear that the declaratory judgment statutes are applicable only where all interested persons are made parties to the proceedings. *Concerned Citizens v. Department of Environ. Contr.*, 244 Neb. 152, 505 N.W.2d 654 (1993); *Krohn v. Gardner*, 238 Neb. 460, 471 N.W.2d 391 (1991); *Koenig v. Southeast Community College*, 231 Neb. 923, 438 N.W.2d 791 (1989); *Omaha Pub. Power Dist. v. Nuclear Elec. Ins. Ltd.*, 229 Neb. 740, 428 N.W.2d 895 (1988); § 25-21,159. Therefore, joinder of all necessary parties defendant is required. *Haynes v. Anderson*, 163 Neb. 50, 77 N.W.2d 674 (1956).

An indispensable or necessary party to a suit is one who has an interest in the controversy to an extent that such party's absence from the proceedings prevents a court from making a final determination concerning the controversy without affecting such party's interest. See, *Concerned Citizens, supra*; *Shepoka v. Knopik*, 197 Neb. 651, 250 N.W.2d 619 (1977); *City of Omaha v. Danner*, 186 Neb. 701, 185 N.W.2d 869 (1971).

In *Redick v. Peony Park*, 151 Neb. 442, 37 N.W.2d 801 (1949), we held that the presence of necessary parties is a jurisdictional matter and cannot be waived by the parties. It is the duty of the plaintiff to join all persons who have or claim any interest which would be affected by the judgment. To ensure that joinder, the declaratory judgment statutes provide that no declaration shall prejudice the rights of persons not parties to the proceedings and likewise provide that the court may refuse to render a declaratory judgment when to do so would not terminate the uncertainty or controversy giving rise to the proceeding. §§ 25-21,154 and 25-21,159.

The retirement board is responsible for administering the system, § 23-2305, and, among other things, for providing for an equitable allocation of expenses among the various entities it administers. Neb. Rev. Stat. § 84-1503 (Supp. 1991).

However, while the retirement board is responsible for administering the system's funds, its duties do not require it to

establish a county's contributions or to enforce the amount thereof; those matters are set by statute. See § 23-2310. Consequently, the retirement board is not an indispensable party. However, inasmuch as it is not a party, nothing decided in this suit will bind it. See *Fowler v. Brown*, 51 Neb. 414, 71 N.W. 54 (1897) (personal judgment against one not served with process and not appearing in action is void). See, also, *Weiner v. State*, 179 Neb. 297, 137 N.W.2d 852 (1965).

(b) Naming of System and Counties

The propriety of naming the system and the counties as defendants depends not only on whether both have an interest in the subject matter of this case, but whether each also has an interest of such a nature that a final decree cannot be entered without affecting its rights or leaving the controversy in such condition that its final determination may be wholly inconsistent with equity and good conscience as related to some legal right. *Professional Firefighters of Omaha v. City of Omaha*, 243 Neb. 166, 498 N.W.2d 325 (1993). See, also, *Shepoka, supra*.

Under the provisions of the retirement act, the system, as noted in part VI(1)(a), transacts all business and holds all cash and other property. Any benefits to which county employees would be entitled pursuant to increased contributions would come out of the fund. Moreover, the retirement act provides that the system may be sued. § 23-2314. Therefore, any judicially determined right to increased contributions would be binding upon the system. See *Crain v. Mo. State Employees' Retirement System*, 613 S.W.2d 912 (Mo. App. 1981).

As Hoiengs challenges the amount of contributions being made by the counties into the employee retirement accounts, the counties are also interested parties. The obvious result, should Hoiengs be successful in this action, is that county employees would receive additional monies through county contributions. Therefore, the counties' interest is apparent because they pay the contributions from their own funds, and the result of this case will determine the amount of those contributions. See § 23-2307.

It therefore was not inappropriate for Hoiengs to name the

counties and the system as parties defendant.

3. Claimed Misjoinder of Causes

The defendants next take the position that there has been a misjoinder of causes of action, in part because of the different procedures for bringing claims against the county and the system. However, as we came to understand through the analysis in subparts (b)(i) and (ii) of this part VI, the statutes on which the defendants rely in making this contention do not apply.

A cause of action consists of the fact or facts which give one a right to judicial relief against another. *St. Paul Fire & Marine Ins. Co. v. Touche Ross & Co.*, 244 Neb. 408, 507 N.W.2d 275 (1993); *Widga v. Sandell*, 236 Neb. 798, 464 N.W.2d 155 (1991). Whether more than one cause of action is stated depends mainly upon whether more than one primary right or subject of controversy is presented and also upon whether recovery on one ground would bar recovery on the other, whether the same evidence would support the different counts, and whether separate actions could be maintained for separate relief. *Sickler v. City of Broken Bow*, 143 Neb. 542, 10 N.W.2d 462 (1943). Here, Hoiengs has alleged one cause of action relating to a contract arising out of a statute. See Neb. Rev. Stat. § 25-702 (Reissue 1989). See, also, *Stahmer v. Marsh*, 202 Neb. 450, 276 N.W.2d 87 (1979). Thus, there is no misjoinder of causes.

4. Claimed Failure to State Cause of Action

The question as to whether Hoiengs has stated a cause of action has two aspects: (a) whether he did so on his own individual behalf and (b) whether he did so on behalf of a class.

(a) On Individual Behalf

The defendants' contention that Hoiengs has not stated a cause of action on his own individual behalf in turn rests upon three arguments: (i) that the nature of a declaratory judgment action is such that it should not be entertained where there already exist special statutory procedures for making claims against them; (ii) that monetary damages are not available in a declaratory judgment action; and (iii) that in any event, declaratory relief would not end the controversy.

(i) Nature of Declaratory Judgment

Having already determined in subpart (1)(b) of this part VI that the claims procedures do not apply, we need only note that we have previously held that a declaratory judgment action is an appropriate method to obtain judicial construction of a statute. *State Bd. of Ag. v. State Racing Comm.*, 239 Neb. 762, 478 N.W.2d 270 (1992); *State v. Nebraska Assn. of Pub. Employees*, 239 Neb. 653, 477 N.W.2d 577 (1991); *State ex rel. Spire v. Northwestern Bell Tel. Co.*, 233 Neb. 262, 445 N.W.2d 284 (1989); § 25-21,150. Notwithstanding that the retirement act gives rise to contractual rights, it is the interpretation of the act which is the focus of this action. Indeed, we have previously entertained declaratory judgment actions to determine the pension rights of public employees. For example, in *Hooper v. City of Lincoln*, 183 Neb. 591, 163 N.W.2d 117 (1968), a fireman sought declaratory relief to determine his pension rights. We determined that under the facts of the case, declaratory judgment was a proper procedure despite the city's argument that a fireman claiming disability benefits under the pension act must first file a claim against the city pursuant to statute and then, if dissatisfied with its disposition, appeal by petition in error to the district court. See, *Halpin v. Nebraska State Patrolmen's Retirement System*, 211 Neb. 892, 320 N.W.2d 910 (1982); *Retired City Civ. Emp. Club of Omaha v. City of Omaha Emp. Ret. Sys.*, 199 Neb. 507, 260 N.W.2d 472 (1977).

(ii) Monetary Damages

It is true that Hoiengs asks for more than a declaration as to the contributions the retirement act requires of the counties, he also asks that the counties be required to pay the system the difference between the contributions they have made and those they should have made. The fact is, however, that a court may, among other things, grant a money judgment as consequential relief in a declaratory judgment action. *Heimbouch v. Victorio Ins. Serv., Inc.*, 220 Neb. 279, 369 N.W.2d 620 (1985) (court in declaratory judgment action may not only construe contract, but is authorized to enter judgment for amount due thereunder); *Dixon v. O'Connor*, 180 Neb. 427, 143 N.W.2d

364 (1966) (where in declaratory judgment action court found relationship of parties to be that of landlord and tenant, granting of accounting was within equitable jurisdiction of court).

Thus, the fact that Hoiengs asks for relief which may include a money judgment does not mean he has failed to state a cause of action for declaratory relief.

(iii) Continuation of Controversy

Lastly, in this regard, the defendants assert that declaratory relief is not appropriate because the "district court would be involved in the ongoing administration of the [system] for a very long time as members of the class were identified, claims heard and determined on a case by case basis, and arrangements for payments made." Brief for appellee Seward County at 9-10.

In addition to the requirement that a justiciable issue must be presented for declaratory relief, a court should enter a declaratory judgment only where such judgment would terminate or resolve the controversy between the parties. *Omaha Pub. Power Dist. v. Nuclear Elec. Ins. Ltd.*, 229 Neb. 740, 428 N.W.2d 895 (1988); *VisionQuest, Inc. v. State*, 222 Neb. 228, 383 N.W.2d 22 (1986); *Beatrice Manor v. Department of Health*, 219 Neb. 141, 362 N.W.2d 45 (1985); § 25-21,154. The court must make a full and complete declaration, and where it will be necessary to bring another action or proceeding to settle the controversy, declaratory judgment will not be granted. *Graham v. Beauchamp*, 154 Neb. 889, 50 N.W.2d 104 (1951); *Dobson v. Ocean Accident & Guarantee Corporation*, 124 Neb. 652, 247 N.W. 789 (1933).

It is true, as first detailed in part III, that a county employee is not entitled to benefits under the retirement act until he or she has retired after attaining the age of 55 or is disabled, or until after the employee reaches the age of 65 if he or she is terminated; only then are the county contributions which have been made to the employer account paid to the employee. Nonetheless, not only is the amount of contributions to be made by the counties set by statute, the statutes define the persons on whose behalf the contributions are to be made,

§ 23-2306, and set forth as well the amount of employee compensation which forms the basis for contributions, § 23-2330. Thus, the situation is not like that in *Millard School Dist. v. State Department of Education*, 202 Neb. 707, 277 N.W.2d 71 (1979), in which the claim was primarily one for money. Here, the primary focus is on the construction of the retirement act, the prayer for money being only incidental to the interpretation of the act.

Moreover, the fact that the court may need to grant further relief after entering a declaratory judgment does not make a case unsuitable for declaratory relief. As we said in *First Nat. Bank v. Omaha Nat. Bank*, 191 Neb. 249, 214 N.W.2d 483 (1974), the court which has entered a judgment declaring the rights of the parties under contract has the power to retain jurisdiction and grant further relief, which contemplates necessary supervision of such contracts and entry of supplemental judgments and orders from time to time.

The declaratory judgment statutes are remedial; their purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations, and they are to be liberally construed and administered. § 25-21,160. See *Berigan Bros. v. Growers Cattle Credit Corp.*, 182 Neb. 656, 156 N.W.2d 794 (1968).

Hoiengs has therefore pled a declaratory judgment action on his own behalf.

(b) On Behalf of Class

The next question is whether Hoiengs has successfully pled an action on behalf of a class consisting of "current and past" participants in the system.

Class actions are authorized under Neb. Rev. Stat. § 25-319 (Reissue 1989), which provides: "When the question is one of a common or general interest of many persons, or when the parties are very numerous, and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of all."

While "or," when used properly, is disjunctive and "and" conjunctive, the words are so frequently interchanged that in construing a civil statute, "or" may be read as "and" where a

strict reading would lead to an absurd or unreasonable result and defeat the intent of the statute. See, *Rapid Film Service, Inc. v. Bee Line Motor Freight*, 181 Neb. 1, 146 N.W.2d 563 (1966); *Richter v. City of Lincoln*, 136 Neb. 289, 285 N.W. 593 (1939); *Carlsen v. State*, 127 Neb. 11, 254 N.W. 744 (1934).

Surely it would be absurd to say that two persons litigating a question of common interest should, for that reason alone, be afforded class action treatment; it would be equally absurd to say that 50,000 persons litigating questions having no common or general interest should be so treated. Thus, the second "or" in the phrase "common or general interest of many persons, *or* when the parties are very numerous" requires that both of the designated conditions exist. That is, in order to justify class status treatment, there must exist both a question of common or general interest *and* numerous parties so as to make it impracticable to bring all the parties before the court. See *Berkshire & Andersen v. Douglas County Board of Equalization*, 200 Neb. 113, 262 N.W.2d 449 (1978).

There is no mechanical test for determining whether in a particular case the class is so numerous that the requirement of numerosity has been satisfied. *Kelley v. Norfolk & W. Ry. Co.*, 584 F.2d 34 (4th Cir. 1978). Nonetheless, here Hoiengs' allegation that 9,000 employees have been affected by the statute meets the numerosity requirement; the impracticality of joining such a large number of parties is obvious.

However, the question as to whether the commonality requirement has been met is a more complicated matter. In *Archer v. Musick*, 147 Neb. 344, 23 N.W.2d 323 (1946), *opinion vacated on reh'g* 147 Neb. 1018, 25 N.W.2d 908 (1947), we stated that an action may not be maintained as a class action by a plaintiff on behalf of himself or herself and others unless he or she has the power as a member of the class to satisfy a judgment on behalf of all members of the class.

The defendants urge that as Hoiengs could not satisfy a judgment, class action status is inappropriate. In *State ex rel. Sampson v. Kenny*, 185 Neb. 230, 175 N.W.2d 5 (1970), the relators on behalf of all taxpayers similarly situated asked that the court make provisions for paying claims for the refund of taxes illegally collected and disbursed to all taxpayers having

the right to file such claim. We determined that the action could not be brought as a class action because in such a case the " ' "judgment must not only be for each according to the amount due him, but must depend upon whether each as an individual paid voluntarily or involuntarily." ' " *Id.* at 232, 175 N.W.2d at 6. In addition, we pointed to the procedural difficulties and confusion inherent in attempting to judicially control in a class action the ministerial actions of a county treasurer where, by statute, such a refund must be individually determined. See, *Boersma v. Karnes*, 227 Neb. 329, 417 N.W.2d 341 (1988), *appeal dismissed* 488 U.S. 801, 109 S. Ct. 29, 102 L. Ed. 2d 9; *Gates v. Howell*, 211 Neb. 85, 317 N.W.2d 772 (1982); *Riha Farms, Inc. v. County of Sarpy*, 212 Neb. 385, 322 N.W.2d 797 (1982); *Hansen v. County of Lincoln*, 188 Neb. 461, 197 N.W.2d 651 (1972); *State ex rel. Sampson, supra*; Neb. Rev. Stat. § 77-2795 (Reissue 1990).

What distinguishes *State ex rel. Sampson* and similar cases from the case now before us is our reference to the "peculiarly individual requirements of the refund statute" and the policy of the Legislature in normally not refunding taxes paid under a mistake of law unless such request is made pursuant to statute. *State ex rel. Sampson*, 185 Neb. at 233, 175 N.W.2d at 7.

In contrast, observing that class actions rendered unnecessary the proliferation of litigation of individual suits, we permitted a city policeman on behalf of himself and all city policemen and firemen to recover an amount erroneously deducted for pension purposes from their salaries. *Gant v. City of Lincoln*, 193 Neb. 108, 225 N.W.2d 549 (1975). We held that where 400 parties would be entitled to share in the funds, where the amount due each was small, and where questions of law and fact were common to all and predominated over individual interests, the plaintiff, in representing his own interest, necessarily would represent interests of all members of the class.

Unlike cases where, by the very nature of the facts, each of the claimants stood or fell on facts applicable only to that claimant, here, there is at this point nothing unique about Hoiengs' legal claim from other members of the class. All are concerned with the manner in which the retirement act has been

applied to the employees' retirement accounts. The case will turn on the interpretation of the statutes governing county contributions. So far as now appears, the effect on Hoiengs and the others will, in that regard, be basically the same, an increase in the amount of contributions to their employer accounts or no change to their accounts.

Further, although in the instant case the amount of recovery would be different for each employee, judgment would not require varying proof as to the right of each employee to participate in the fund. *Daar v. Yellow Cab Co.*, 67 Cal. 2d 695, 433 P.2d 732, 63 Cal. Rptr. 724 (1967) (percent of rate of overcharge to each member of class was identical and uniform and known to defendant and would not require each individual plaintiff to appear); *Fanucchi v. Coberly-West Co.*, 151 Cal. App. 2d 72, 311 P.2d 33 (1957) (action by 18 cotton growers on behalf of themselves and others similarly situated against ginning company to recover for portion of seed derived from cotton delivered to defendants could be properly maintained as class action where facts necessary to establish liability on part of defendant was exactly the same despite different pro rata recovery by each grower; while recovery of grower would have to correspond with weight of cotton delivered, that is matter of record and amount of each grower's recovery could easily be ascertained by mere mathematical computation).

We thus conclude that Hoiengs has stated a cause of action on behalf of a class. Whether the evidence will develop conflicts between Hoiengs and the others he seeks to represent cannot, of course, be known at this time.

The test of common interest to maintain a class action is whether all the members of the purported class desire the same outcome of the action that their representative desires. *Browne v. Milwaukee Bd. of School Directors*, 69 Wis. 2d 169, 230 N.W.2d 704 (1975). Persons having an interest adverse to those of parties purported to be represented cannot maintain a representative or class suit on behalf of the latter. *Sarratt v. Lincoln Benefit Life Co.*, 212 Neb. 436, 323 N.W.2d 81 (1982); *Evans v. Metropolitan Utilities Dist.*, 185 Neb. 464, 176 N.W.2d 679 (1970). In determining the ability of a plaintiff to represent a class, it must appear that the relief sought is

beneficial to the class members and that the plaintiff's interests are consonant with those of the other members of the class. *Luitweiler et al. v. Northchester Corp.*, 456 Pa. 530, 319 A.2d 899 (1974).

Citing *Blankenship v. Omaha P. P. Dist.*, 195 Neb. 170, 237 N.W.2d 86 (1976), the defendants argue that in this case, employees working in one county but living in another would not want the county in which they lived to contribute the additional amounts to others' retirement funds because of the probable resulting increase in taxes that would be required to pay the additional contributions.

In *Blankenship*, a customer of a utility sought a refund of certain allegedly unlawful late charges on his own behalf and on behalf of those other customers or ratepayers of the utility who had or would in the future be required to pay said charges. We reasoned that if the plaintiff were successful, the utility would have to raise approximately $2,400,000 to make the refunds, and those customers who paid the penalty charge only once or rarely would likely be damaged economically in the long run by the increased rates which would have to be charged to pay the judgment. Thus, we held that the would-be representative could not maintain a class action.

In an earlier case, *Evans, supra*, a ratepayer of a utility brought an action on his own behalf and that of all other ratepayers to compel the return to the district of certain statutory payments to the city. Concluding that not all ratepayers would be benefited because many of them were also taxpayers of the city which would have to raise taxes to pay any judgment, we held that a class action was inappropriate. See, also, *In re 1983-84 County Tax Levy*, 220 Neb. 897, 374 N.W.2d 235 (1985) (residents and taxpayers challenging constitutionality of statute prescribing procedure under which tax levied by one district for providing schools to another district could not maintain class action in view of record showing potentiality of conflict of interest among members of class owning property located in both districts); *Kosowski v. City Betterment Corp.*, 197 Neb. 402, 249 N.W.2d 481 (1977) (where class included members who would stand to suffer if suit were successful in enjoining disbursement of funds).

The general rule extracted from these cases is that if any party included in the claimed class stands to suffer an economic loss as the result of his or her inclusion, the party initiating the class action will have an interest adverse to those of the parties he or she purports to represent, and, therefore, it can be said the action is not brought for the benefit of all members of the class. See *Blankenship, supra.*

Thus, where the record demonstrates potentially conflicting interests within the class, it is appropriate to grant a motion for summary judgment as to the class aspect of the case. *Sarratt, supra*; *Kosowski, supra.* We said in *Blankenship*: "All the court need determine in granting a motion for summary judgment denying the plaintiff the right to proceed in a class action is that the undisputed facts demonstrate the potentiality of conflict of interests between the represented, or some of them, and the interests which the plaintiff asserts." 195 Neb. at 177, 237 N.W.2d at 90.

However, at this point, the asserted conflict of interest between Hoiengs and the members of the claimed class is highly speculative. We have only the argument of the defendants that the class includes members whose taxes would be raised without receiving an offsetting benefit. While we have said that a petition for class status may be challenged by demurrer, *Twin Loups Reclamation & Irr. District v. Blessing*, 202 Neb. 513, 276 N.W.2d 185 (1979), it would be unjust under the allegations in the present petition to presume the presence of a conflict in the absence of evidentiary support. See *Ross v. City of Geneva*, 43 Ill. App. 3d 976, 357 N.E.2d 829 (1976), *aff'd* 71 Ill. 2d 27, 373 N.E.2d 1342 (1978). The determination of whether the suit is maintainable as a class action usually should be predicated on more information than the petition itself. See, *Beckstead v. Superior Court*, 21 Cal. App. 3d 780, 98 Cal. Rptr. 779 (1971); *Lucas v. Pioneer, Inc.*, 256 N.W.2d 167 (Iowa 1977); *Riley v. New Rapids Carpet Center*, 61 N.J. 218, 294 A.2d 7 (1972); *Hicks v. Milwaukee County*, 71 Wis. 2d 401, 238 N.W.2d 509 (1976) (whether class action may be maintained will seldom be answered on the face of the complaint, and demurrer or its equivalent will seldom be an appropriate way to object to a class action).

There remains a further question none of the parties have raised. What members of the class are to be bound by the judgment entered herein?

Although our statute is silent on this issue, we acknowledge that the procedure in a class action must conform to the requirements of due process and fairly ensure the protection of absent parties who are to be bound. *Hansberry v. Lee*, 311 U.S. 32, 61 S. Ct. 115, 85 L. Ed. 22 (1940); *Horst v. Guy*, 211 N.W.2d 723 (N.D. 1973). Thus, in particular cases there may be a due process requirement of notice to absent class members even though there is no express statutory requirement. See, *Eastham v. Public Employees' Retirement Ass'n Bd.*, 89 N.M. 399, 553 P.2d 679 (1976); *Graham v. Bd. of Supervisors*, 25 A.D.2d 250, 269 N.Y.S.2d 477 (1966), *appeal dismissed* 17 N.Y.2d 866, 218 N.E.2d 332, 271 N.Y.S.2d 295.

We are not unmindful that in *Gant v. City of Lincoln*, 193 Neb. 108, 225 N.W.2d 549 (1975), we dispensed with notice, stating that notice was not required in all representative actions. However, therein, it appeared that as the plaintiff had won, there was no way in which the absent class members could be prejudiced by the judgment. Here, we cannot know the ultimate outcome.

One of the primary purposes of notice is so that one may ask to be excluded in order to avoid being bound by a class action judgment and to permit those excluded to litigate their own claims. *Sarasota Oil Co. v. Greyhound Leasing & Financial Corp.*, 483 F.2d 450 (10th Cir. 1973). Providing notice of an opportunity to opt out of the class fulfills due process by safeguarding individual interests and by allowing individuals to avoid being bound by a classwide judgment that otherwise would preclude them from litigating their claims separately. *Waldo v. Lakeshore Estates, Inc.*, 433 F. Supp. 782 (E.D. La. 1977), *appeal dismissed* 579 F.2d 642 (5th Cir. 1978); *In re Four Seasons Securities Laws Litigation*, 502 F.2d 834 (10th Cir. 1974), *cert. denied* 419 U.S. 1034, 95 S. Ct. 516, 42 L. Ed. 2d 309; *In re Nissan Motor Corp. Antitrust Litigation*, 552 F.2d 1088 (5th Cir. 1977); *Redhail v. Zablocki*, 418 F. Supp. 1061 (E.D. Wis. 1976), *aff'd* 434 U.S. 374, 98 S. Ct. 673, 54 L. Ed. 2d 618 (1978).

We are persuaded that the due process rights afforded by Neb. Const. art. I, § 3, preclude binding any member of the claimed class who does not receive notice of this suit to any judgment rendered herein. In like vein, one receiving notice is entitled to exercise his or her due process right to opt out of the class.

VII. JUDGMENT

For the foregoing reasons, we, as first stated in part I, reverse the judgment of the district court and remand the cause for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

WHITE, J., participating on briefs.

TIMOTHY DUGGAN, APPELLANT, V. ALLEN J. BEERMANN, SECRETARY OF STATE, AND NEBRASKANS FOR TERM LIMITS, A PETITION SPONSOR, APPELLEES.

515 N.W.2d 788

Filed May 13, 1994. No. S-92-907.

1. **Equity: Appeal and Error.** In equity actions, an appellate court reviews the factual findings de novo on the record and reaches a conclusion independent of the findings of the trial court.
2. **Appeal and Error.** An appellate court has an obligation to reach its own independent conclusions as to questions of law.
3. **Moot Question.** A case becomes moot when the issues initially presented in litigation cease to exist or the litigants lack a legally cognizable interest in the outcome of litigation.
4. _____. As a general rule, a moot case is subject to summary dismissal.
5. **Injunction.** Equity will not issue an injunction when the act complained of has been committed and the injury has been done.
6. **Constitutional Law.** The Nebraska Constitution may be amended by implication only where the language adopted by the voters conflicts with existing constitutional provisions.
7. _____. The Nebraska Constitution, as amended, must be read as a whole.
8. _____. A constitutional amendment becomes an integral part of the instrument and must be construed and harmonized, if possible, with all other provisions so as to give effect to every section and clause as well as to the whole instrument.

9. _____. A clause in a constitutional amendment will prevail over a provision in the original instrument inconsistent with the amendment only when they relate to the same subject, are adopted for the same purpose, and cannot be enforced without substantial conflict.
10. **Constitutional Law: Initiative and Referendum: Voting.** Neb. Const. art. III, § 2, requires that a petition for the amendment of the Constitution be signed by 10 percent of the registered voters.
11. **Appeal and Error.** A case is not authority for any point not necessary to be passed on to decide the case or not specifically raised as an issue addressed by the court.
12. **Constitutional Law: Voting.** Neb. Const. art. III, § 2, which refers to registered voters, repeals the reference in Neb. Const. art. III, § 4, to those voting in the preceding gubernatorial election.
13. **Constitutional Law: Initiative and Referendum: Voting.** The number of signatures required for placement of an initiative petition on the ballot by the Nebraska Constitution is equal to 10 percent of the number of registered voters on the date the signatures are to be turned in.
14. **Constitutional Law.** A constitution represents the supreme written will of the people regarding the framework for their government.
15. _____. Substantial compliance with the Nebraska Constitution's procedural limitations is required to amend the Constitution although the people have plainly expressed their will that the Constitution be amended.

Appeal from the District Court for Lancaster County: DONALD E. ENDACOTT, Judge. Reversed and remanded with directions.

Alan E. Peterson and Terry R. Wittler, of Cline, Williams, Wright, Johnson & Oldfather, for appellant.

Don Stenberg, Attorney General, L. Jay Bartel, and Charles E. Lowe for appellee Beermann.

William E. Morrow, Jr., of Erickson & Sederstrom, and John G. Kester, Terrence O'Donnell, and Dennis M. Black, of Williams & Connolly, for appellee Nebraskans for Term Limits.

BOSLAUGH, CAPORALE, FAHRNBRUCH, and LANPHIER, JJ., and SIEVERS, Chief Judge, and CONNOLLY and HANNON, Judges.

LANPHIER, J.

Timothy Duggan appeals from the ruling of the Lancaster County District Court denying him injunctive and declaratory relief. Duggan sought to enjoin appellee Secretary of State Allen J. Beermann from placing ballot measure No. 407

(Measure #407), the "term limits initiative," on the November 1992 general election ballot. Duggan also sought to have the measure declared invalid. Duggan contended that the initiative petition, filed with the Secretary of State by appellee Nebraskans for Term Limits, (1) had an insufficient number of signatures; (2) was unconstitutional on its face, adding to the "standing qualifications" for U.S. Representatives and Senators; and (3) contained an invalid object clause. We hold that an insufficient number of signatures were submitted and, accordingly, reverse the judgment of the district court.

BACKGROUND

On January 17, 1992, Nebraskans for Term Limits filed with the Secretary of State the proposed initiative petition. The petition, subsequently approved by the voters, sought to amend the Nebraska Constitution to limit various state officials to a maximum number of consecutive terms in a respective office. It also sought to amend the Nebraska Constitution to limit the number of consecutive elections in which certain candidates for the U.S. House of Representatives or the U.S. Senate would be eligible to file for election or have their names placed on a Nebraska official ballot.

On July 3, 1992, Nebraskans for Term Limits filed with the Secretary of State all the pages of the petition bearing signatures. On August 21, the Secretary of State certified the petition as valid and sufficient and ordered that the initiative question be placed on the general election ballot November 3. On August 31, Duggan, a citizen of and registered voter in the State of Nebraska, initiated this action. The district court rendered its decision dismissing Duggan's action on September 28.

ASSIGNMENTS OF ERROR

Duggan asserts the district court erred in the following respects: (1) in concluding that the number of signatures required for a valid initiative petition to amend the Nebraska Constitution was not to be measured by the number of registered voters as explicitly set forth in Neb. Const. art. III, § 2; (2) in failing to conclude that the criterion previously used based on the number of votes cast for Governor in the

preceding election contained in Neb. Const. art. III, § 4, was repealed by implication by the 1988 amendment of Neb. Const. art. III, § 2; (3) in finding the quantity of signatures sufficient; (4) in concluding that the constitutionality of the proposed amendment was not a justiciable issue; (5) in failing to conclude that Measure #407 is unconstitutional on its face; and (6) in declining to enter a declaratory judgment that the signatures were insufficient under Neb. Const. art. III, § 2, and that the ballot measure is facially unconstitutional.

STANDARD OF REVIEW

In equity actions, an appellate court reviews the factual findings de novo on the record and reaches a conclusion independent of the findings of the trial court. *Latenser v. Intercessors of the Lamb, Inc., ante* p. 337, 513 N.W.2d 281 (1994). An appellate court has an obligation to reach its own independent conclusions as to questions of law. *Goeke v. National Farms, Inc., ante* p. 262, 512 N.W.2d 626 (1994).

MOOTNESS

We will address the Secretary of State's assertion that this case should be dismissed as moot, before addressing Duggan's assigned errors.

A case becomes moot when the issues initially presented in litigation cease to exist or the litigants lack a legally cognizable interest in the outcome of litigation. *Maack v. School Dist. of Lincoln*, 241 Neb. 847, 491 N.W.2d 341 (1992). As a general rule, a moot case is subject to summary dismissal. *State ex rel. Bouc v. School Dist. of City of Lincoln*, 211 Neb. 731, 320 N.W.2d 472 (1982).

As stated above, Duggan brought this action in Lancaster County District Court to enjoin the Secretary of State from placing the term limits initiative on the November 3, 1992, general election ballot. The district court ruled against Duggan and denied the injunction. The Secretary of State placed the measure on the November 3, 1992, ballot. The measure was voted on and approved.

The Secretary of State argues that this case is moot because an injunction cannot prevent what has already occurred, and the measure has already been placed on the ballot. It is true that

equity will not issue an injunction when the act complained of has been committed and the injury has been done. *Koenig v. Southeast Community College*, 231 Neb. 923, 438 N.W.2d 791 (1989). However, in addition to seeking an injunction against the Secretary of State, Duggan requested a judgment from the district court that the number of signatures submitted was deficient as a matter of law and declaring the measure invalid. Although the injunction is moot, as that remedy can no longer provide Duggan with the relief he requested, the requested declaratory judgment as to the number of signatures is not. Thus, that issue at least is not moot.

NUMBER OF SIGNATURES REQUIRED

Duggan first argues that the number of signatures submitted by Nebraskans for Term Limits and approved by the Secretary of State did not meet the requirements of the Nebraska Constitution for placing an initiative petition on a ballot. Duggan submits that since the number was insufficient, the district court should have granted his injunction and should have declared the measure invalid.

Duggan does not contest the quality or number of signatures submitted, but disputes the number legally required. Duggan submits that Neb. Const. art. III, § 2, alone provides for the number of signatures required. The Secretary of State contends that Neb. Const. art. III, §§ 2 and 4, provide for the number of signatures required.

Neb. Const. art. III, § 2, in pertinent part, states:

> The first power reserved by the people is the initiative whereby laws may be enacted and constitutional amendments adopted by the people independently of the Legislature. This power may be invoked by petition wherein the proposed measure shall be set forth at length. If the petition be for the enactment of a law, it shall be signed by seven percent of the registered voters of the state, and if the petition be for the amendment of the Constitution, the petition therefor shall be signed by *ten percent of such registered voters*. In all cases the registered voters signing such petition shall be so distributed as to include five percent of the registered voters of each of

two-fifths of the counties of the state . . . .
(Emphasis supplied.)

Neb. Const. art. III, § 4, in pertinent part, states: "The whole number of *votes cast for Governor at the general election next preceding the filing of an initiative or referendum petition* shall be the basis on which the number of signatures to such petition shall be computed." (Emphasis supplied.) Succinctly, article III, § 2, provides that the number of signatures required is 10 percent of registered voters. Article III, § 4, provides that the number of signatures would be based on the votes of the last gubernatorial election.

According to the Secretary of State, the Nebraska Constitution, in particular article III, §§ 2 and 4, required 58,654 valid signatures, distributed to include 5 percent of the total vote for Governor in the 1990 election from each of at least 38 counties. The Secretary of State certified that those requirements were met by Nebraskans for Term Limits' submission of 62,012 valid signatures.

Duggan would not have the Secretary of State compute the number of required signatures upon the basis of the number of those who voted in the last gubernatorial election, but, rather, upon the number of registered voters on the date upon which the signatures were due.

Duggan argues that the above-quoted sentence of article III, § 4, was repealed by implication in 1988 when article III, § 2, was amended. Prior to the 1988 amendment, article III, § 2, referred to "electors," rather than "registered voters."

The Nebraska Constitution may be amended by implication only where the language adopted by the voters conflicts with existing constitutional provisions. *Cunningham v. Exon*, 207 Neb. 513, 300 N.W.2d 6 (1980). The Nebraska Constitution, as amended, must be read as a whole. *Jaksha v. State*, 241 Neb. 106, 486 N.W.2d 858 (1992). A constitutional amendment becomes an integral part of the instrument and must be construed and harmonized, if possible, with all other provisions so as to give effect to every section and clause as well as to the whole instrument. *Id.* A clause in a constitutional amendment will prevail over a provision in the original instrument inconsistent with the amendment only when they

relate to the same subject, are adopted for the same purpose, and cannot be enforced without substantial conflict. *Cunningham v. Exon, supra.*

Sections 2 and 4 of article III both relate to the same subject, an initiative petition. Both sections have the same purpose, requiring a given number of signatures before placing a petition on the ballot. The point of contention is whether both sections can be enforced without substantial conflict.

The plain language of article III, § 2, as amended by the voters clearly requires that a petition for the amendment of the Constitution be signed by 10 percent of the registered voters. This language is unambiguous. It needs neither explanation nor qualification. Yet article III, § 4, refers to voters in the last gubernatorial election. As discussed above, we have a duty to reconcile article III, § 2, with article III, § 4, if both sections can be enforced without substantial conflict.

The Secretary of State attempts to reconcile § 2 with § 4 based upon the following statement contained in *Omaha Nat. Bank v. Spire*, 223 Neb. 209, 218, 389 N.W.2d 269, 275 (1986): "[A] petition must be signed by *electors* equal in number to at least 7 percent or 10 percent of '[t]he whole number of votes cast for Governor at the general election next preceding the filing of an initiative or referendum petition . . . .' Neb. Const. art. III, § 4." (Emphasis supplied.) Recognizing that we decided *Omaha Nat. Bank* prior to the 1988 amendment of article III, § 2, the Secretary of State suggests that we merely replace the word "electors" with the words "registered voters," as was done by the amendment. The statement would then read: "A petition must be signed by *registered voters* equal in number to at least 7 percent or 10 percent of the whole number of votes cast for Governor at the general election next preceding the filing of an initiative or referendum petition." This attempt at reconciliation is untenable.

Our statement in *Omaha Nat. Bank* was dicta. Interpretation of those sections was unnecessary to the decision. See *Commerce Sav. Scottsbluff v. F.H. Schafer Elev.*, 231 Neb. 288, 436 N.W.2d 151 (1989) (a case is not authority for any point not necessary to be passed on to decide the case or not specifically raised as an issue addressed by the court). Also,

prior to 1988, when article III, § 2, referred to "electors," it was possible to harmonize § 2 with § 4, as *Jaksha v. State, supra*, obliges us to do. Since 1879, when "electors" was first defined under Nebraska statutes, it has had a variety of meanings. See, 1879 Neb. Laws, § 3, p. 240; 1917 Neb. Laws, ch. 30, § 1, p. 95; 1921 Neb. Laws, ch. 92, § 1, p. 323; 1951 Neb. Laws, ch. 99, § 2, p. 270; 1971 Neb. Laws, L.B. 49, § 1; 1972 Neb. Laws, L.B. 661, § 18; 1972 Neb. Laws, L.B. 920, § 1; 1973 Neb. Laws, L.B. 562, § 1; Neb. Rev. Stat. § 32-102 (Reissue 1988). Broadly defined, an "elector" is "[o]ne who elects or has the right of choice." Black's Law Dictionary 519 (6th ed. 1990). Using this broad definition, it is possible to construe the term "electors" to mean those who voted in the last gubernatorial election, thus harmonizing the sections. However, a similar interpretation of "registered voters" is not plausible. "Registered voters" has a specific, definite meaning: "Persons whose names are placed upon the registration books provided by law as the record or memorial of the duly qualified voters of the state or county." *Id.* at 1284. Doubtless those who voted in the last gubernatorial election were "registered voters," and most still are. However, as the Secretary of State has acknowledged, many who did not vote in the last gubernatorial election are also "registered voters."

Finally, the Secretary of State's proposed reading of the two sections, to the effect that a petition must be signed by registered voters equal in number to at least 10 percent of the whole number of votes cast during the last gubernatorial election would change article III, § 2, to such a degree that article III, § 2, and article III, § 4, are clearly in "substantial conflict."

The magnitude of the change rendered to article III, § 2, by the Secretary of State's proposed interpretation is readily apparent. As of April 17, 1992, there were 885,103 registered voters in the State of Nebraska. Although there is no evidence in the record of how many registered voters there were on July 3, 1992, the date the signatures were due, the Secretary of State was of the opinion that the number of registered voters in the State would have increased after April 17, 1992. Given these facts, we can reasonably assume that if the signatures of 10

percent of the registered voters were required, at least 88,510 signatures would have been necessary. As the Secretary of State would have us read the Constitution, only 10 percent of the number of votes in the last gubernatorial election would have been required; the equivalent of 58,654 signatures, nearly 30,000 fewer.

As stated in *Cunningham v. Exon*, 207 Neb. 513, 300 N.W.2d 6 (1980), when constitutional provisions are in conflict, the later amendment controls. Thus, article III, § 2, which refers to registered voters, repeals the reference in article III, § 4, which refers to those voting in the preceding gubernatorial election.

CONSTITUTIONAL AMENDMENTS VOID

The number of signatures required for placement of Measure #407 on the ballot by the Nebraska Constitution was equal to 10 percent of the number of registered voters on the date the signatures were to be turned in, July 3, 1992. Although the exact number required on that date cannot be derived from the record before us, the uncontroverted evidence establishes that the number submitted was insufficient. The number of signatures being insufficient, the Secretary of State's placement of the petition on the ballot was erroneous. Notwithstanding this error, the people of Nebraska have expressed, as evidenced by their vote, that it is their will that the Constitution be amended as called for in the initiative petition. See *State v. Winnett*, 78 Neb. 379, 110 N.W. 1113 (1907). See, also, *Swanson v. State*, 132 Neb. 82, 271 N.W. 264 (1937); *State, ex rel. Hall, v. Cline*, 118 Neb. 150, 224 N.W. 6 (1929).

However, we have recognized that a constitution represents the supreme written will of the people regarding the framework for their government. *Jaksha v. State*, 241 Neb. 106, 486 N.W.2d 858 (1992). Moreover, we have recognized that in adopting the Constitution, the people have imposed upon themselves limitations on their ability to amend this fundamental law. *State v. Winnett, supra*. We are concerned with one of those self-imposed limitations, the requirement that a given number of signatures be obtained before submitting the proposed initiative to the voters.

This court has previously addressed situations in which the

people have plainly expressed their will that the Nebraska Constitution be amended, but in which they have failed to comply with self-imposed constitutional limitations. In those instances, we have required "substantial compliance" with the constitutional limitations. See *State v. Winnett, supra*. See, also, *Swanson v. State, supra*; *State, ex rel. Hall, v. Cline, supra*.

If there was substantial compliance with the requirements of article III, § 2, then we could find in the case at hand that Measure #407 was validly placed on the ballot. However, we cannot say that the submission of at least 30,000 too few signatures constitutes substantial compliance with the provisions of the Nebraska Constitution for an initiative by the people. Therefore, the amendments contained in Measure #407 were not properly placed on the ballot and therefore must be declared void, despite their approval by the voters. This finding obviates the need to address Duggan's remaining assignments of error.

CONCLUSION

The district court erred when it failed to enjoin the Secretary of State from placing Measure #407 on the November 1992 general election ballot, as there were insufficient signatures submitted. There was not substantial compliance with the Nebraska Constitution's procedural requirements for the adoption of amendments by initiative referendum. The proposed amendments contained in Measure #407 are, therefore, void. The judgment of the district court is reversed and the cause remanded for entry of judgment consistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

ANGELA FAITH LARSON, APPELLEE, V. LEONARD VYSKOCIL, APPELLANT.

515 N.W.2d 660

Filed May 13, 1994. No. S-92-1108.

1. **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.
2. **Summary Judgment: Proof.** 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.
3. **Contracts: Intent.** A written contract expressed in unambiguous terms is not subject to interpretation or construction, and the intention of the parties to such contract must be determined from its contents.
4. **Actions: Parties: Judgments.** Indispensable parties to a suit are those who not only have an interest in the subject matter of the controversy, but also have an interest of such a nature that a final decree cannot be made without affecting their interests.

Appeal from the District Court for Douglas County: JOHN E. CLARK, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Kelle J. Westland, of Raynor, Rensch & Pfeiffer, for appellant.

Eugene L. Hillman, of McCormack, Cooney, Mooney, Hillman & Elder, for appellee.

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

WRIGHT, J.

Angela Faith Larson filed an action in the Douglas County District Court seeking to compel her father, Leonard Vyskocil, to transfer to a trust all of his right, title, and interest in and to the Imperial Mall Limited Partnership, or its equivalent in cash. Larson alleged that the transfer was required by the terms of a property settlement agreement approved in the decree of dissolution between Vyskocil and Larson's mother. Vyskocil demurred and affirmatively alleged that Larson had failed to

join all necessary parties to the action. Larson's motion for summary judgment was sustained, and the court ordered Vyskocil to deposit with FirsTier Bank Trust Department, as trustee, the sum of $147,521 to be held in trust in accordance with the trust agreement dated August 29, 1984. Vyskocil appeals.

SCOPE OF REVIEW

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. *Hawkins Constr. Co. v. Reiman Corp., ante* p. 131, 511 N.W.2d 113 (1994); *Dugan v. Jensen*, 244 Neb. 937, 510 N.W.2d 313 (1994). 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. *Healy v. Langdon, ante* p. 1, 511 N.W.2d 498 (1994).

ASSIGNMENTS OF ERROR

Vyskocil assigns as error the court's entry of the summary judgment and its failure to find that Alexander Vyskocil was an indispensable party to the action.

FACTS

The decree of dissolution between Vyskocil and Larson's mother included a property settlement agreement which required them to transfer their interest in the Imperial Mall Limited Partnership to the Omaha National Bank as trustee. The interest was to be held in trust under the trust agreement executed by the parties and attached to the property settlement agreement.

The trust agreement provided that Vyskocil would receive the entire net income from the trust, payable in annual installments, during his lifetime and that upon his death the trust would terminate and the principal together with any accumulations thereon would be paid to Larson and Alexander

in equal shares.

After the decree of dissolution was entered, Vyskocil provided officers of the Omaha National Bank with a copy of the trust agreement. No other documents were requested by the trustee, and Vyskocil believed he had done everything necessary to establish the trust. Vyskocil and his former wife's initial investment in the Imperial Mall Limited Partnership totaled $48,500. Vyskocil said that the partnership interest was just a tax shelter; that he received no income from the partnership for 1984 through 1987; and that there was some income in 1988, but it was covered by depreciation.

In 1989, the limited partnership was sold. Vyskocil did not participate in the decision to sell and did not have the right to do so. After the sale, Vyskocil received a check for $220,182.38, which he believed may have included regular income generated from his interest in the partnership for the tax year 1989. His 1989 federal income tax return reported $181,945.28 under sales and exchanges and $38,237.10 under ordinary gains and losses. A portion of the proceeds from the sale was used to pay taxes, legal fees, and debts. Vyskocil testified that he was not sure of the precise amount of tax liability generated from the sale. The affidavit of a certified public accountant received at the summary judgment hearing stated that the estimated aftertax proceeds on the sale of Vyskocil's interest in the limited partnership totaled $147,521.

From the proceeds, Vyskocil used $48,500 to buy stocks and tax-free bonds to satisfy what he claimed was his obligation to the trust. These stocks and bonds were later sold, and the money was used to purchase a video store. Vyskocil stated he was willing to transfer the stock in the video store to the trustee.

Vyskocil's son, Alexander, was not named as a party to the action, and Vyskocil alleged that Larson had failed to join all necessary parties. On November 6, 1992, the district court for Douglas County sustained Larson's motion for summary judgment, and on November 18, the court ordered Vyskocil to pay to FirsTier Bank as trustee the sum of $147,521.

ANALYSIS

TRUST AGREEMENT

Vyskocil stated that under his interpretation of the trust

agreement, he was required to transfer only $48,500, which was the initial investment in the limited partnership. However, neither the property settlement agreement nor the trust agreement mentions such a figure. Vyskocil admitted that he did not deposit any sum with the trustee. He claims to have invested $48,500 in a video store, but he admitted that he did not consult the trustee regarding any of the transactions. The stock in the video store was placed in the names of his current spouse and his son, Alexander, and all proceeds from the sale of the partnership interest other than the stock in the video store went for Vyskocil's personal uses.

What Vyskocil claims he understood about the partnership interest and what he claims the property settlement agreement required him to do are not material to our decision in this case. A written contract expressed in unambiguous terms is not subject to interpretation or construction, and the intention of the parties to such contract must be determined from its contents. *Properties Inv. Group v. Applied Communications*, 242 Neb. 464, 495 N.W.2d 483 (1993); *Husen v. Husen*, 241 Neb. 10, 487 N.W.2d 269 (1992). The trust agreement requires Vyskocil to transfer the interest in the partnership to the trustee.

The trust agreement made August 29, 1984, provides in part:

> The Grantors, desiring to establish an irrevocable trust, do hereby transfer and assign to the Trustee all of their right, title and interest in and to IMPERIAL MALL LIMITED PARTNERSHIP, a limited partnership organized and existing under the laws of the State of Nebraska, and to all additions to, substitutions for, increases of and non-income proceeds from said limited partnership. Grantors hereby relinquish all interest in said limited partnership and will, at the request of the Trustee, execute all other instruments reasonably required to effectuate this transfer. All property now or hereafter subject to this trust shall constitute the trust estate and shall be held, managed and distributed as provided herein.
>
> The Trustee shall hold, manage, invest, and reinvest the trust property, subject to the provisions of this trust, and shall pay, apply and distribute the income and principal in the following manner:
>
> (a) The entire net income shall be payable in annual

installments to LEONARD G. VYSKOCIL during his lifetime.

(b) Upon the death of LEONARD G. VYSKOCIL this trust shall terminate and the principal, together with any accumulations thereon, shall be paid out and distributed to ANGELA FAITH VYSKOCIL and ALEXANDER VYSKOCIL, the children of the Grantors, in equal shares. Said beneficiaries shall be entitled to receive copies of all Trustee's reports provided to Leonard G. Vyskocil.

The following facts are undisputed: In 1982 or 1983, Vyskocil and his former wife invested $48,500 and acquired a 4- or 5-percent interest in the Imperial Mall Limited Partnership, which owned a shopping center. Vyskocil received no income from the partnership for the tax years 1984 through 1987 and realized some profit during 1988, but he did not receive any income because his share was "eaten up" by depreciation. The sale of the partnership was completed in May 1989. Vyskocil's 1989 tax return showed that $220,182.38 was received from the sale of the partnership interest in trust. Of that amount, $181,945.28 was classified as the sale or exchange of property used in a trade or business, and $38,237.10 was reported as an ordinary gain from the sale of business property. A certified public accountant's report showed that the aftertax value of Vyskocil's interest in the proceeds of the sale was $147,521. Upon execution of the agreement, Vyskocil's interest in the partnership became the trust estate, which was to be managed and distributed according to the terms of the trust. Vyskocil failed to transfer this interest to the trustee, and suit was instituted by one of the contingent beneficiaries to compel him to comply with the trust agreement.

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 therefrom and that the moving party is entitled to judgment as a matter of law. *Hawkins Constr. Co. v. Reiman Corp., ante* p. 131, 511 N.W.2d 113 (1994). We must determine what part of the $220,182.38 from the sale of the partnership is income and what part is principal. During the term of the trust, the entire

net income is payable in annual installments to Vyskocil during his lifetime, and upon his death, "the principal, together with any accumulations thereon," is to be paid to the contingent beneficiaries.

Our determination is aided by Neb. Rev. Stat. § 30-3101 (Reissue 1989):

> Unless otherwise stated, sections 30-3101 to 30-3115 govern the ascertainment of income and principal and the apportionment of receipts and expenditures in trusts and decedents' estates, to the extent not inconsistent with the provisions of a creating instrument. A person making an outright gift or establishing a trust may make provision in the creating instrument for the manner of ascertainment of income and principal and the apportionment of receipts and expenditures or grant discretion to the personal representative or trustee to do so and the provision, where not otherwise contrary to law, controls notwithstanding sections 30-3101 to 30-3115.

The trust does not contain any provisions which are inconsistent with Neb. Rev. Stat. §§ 30-3101 to 30-3115 (Reissue 1989), and to the extent the statutory provisions are not inconsistent with the provisions of the trust, they govern the ascertainment of income and principal of the trust. See § 30-3102(1).

Income is defined as the return in money or other property derived from the use of principal, including, but not limited to, return received as rent, interest, income earned, corporation distributions, accrued increment on bonds, receipts from a business, receipts from disposition of natural resources, receipts from other principal subject to depletion, or proceeds of insurance. § 30-3103(1). Principal is defined as "property other than income, including, but not limited to . . . [c]onsideration received by the trustee on the sale or other transfer of principal . . . ." § 30-3103(2)(a).

Section 30-3109(2)(b) provides that except to the extent the limited partnership indicates that some part of a distribution is not a return of capital, a distribution from a limited partnership is principal to the extent of the distribution. The distribution was made pursuant to a liquidation of all the trust's interest in

the limited partnership. The $147,521 was principal which belonged to the trust.

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. *Healy v. Langdon, ante* p. 1, 511 N.W.2d 498 (1994). Vyskocil has not presented any facts which show that the $147,521 was not principal belonging to the trust.

NECESSARY PARTY

One of the contingent beneficiaries, Alexander Vyskocil, was not made a party to this action. The record indicates that Alexander was a minor at the time the action was commenced. Indispensable parties to a suit are those who not only have an interest in the subject matter of the controversy, but also have an interest of such a nature that a final decree cannot be made without affecting their interests. *Helter v. Williamson*, 239 Neb. 741, 478 N.W.2d 6 (1991); *Koch v. Koch*, 226 Neb. 305, 411 N.W.2d 319 (1987). Vyskocil testified he would transfer to the trust the video store stock which was held in the names of his current spouse and Alexander. The evidence indicates the stock was purchased with trust assets.

Vyskocil cannot represent his minor son, Alexander, because of a conflict of interest. Vyskocil has disposed of the assets of the trust, and Alexander's interest in the trust conflicts with Vyskocil's interest. In *Koch*, we held that the minor children, as beneficiaries to the trust, were necessary parties to the disposition of their interest in the real estate and that the father could not represent them because there appeared to be a clear conflict of interest. Neb. Rev. Stat. § 30-2222(2)(ii) (Reissue 1989) provides in part: "If there is no conflict of interest and no conservator or guardian has been appointed, a parent may represent his minor child."

Workman v. Workman, 167 Neb. 857, 95 N.W.2d 186 (1959), was an action by the wife and adult daughter against the wife's husband, his parents, and others for an alleged conspiracy to appropriate property which had allegedly been transferred to a trust for the benefit of the children of the wife and her husband.

The mother of the minor children had filed an application to make the minor children plaintiffs. That issue was not decided in the trial court because the case was disposed of by summary judgment while the application was pending. We stated: " 'If such proceedings are instituted and it appears to the court that the infant is unrepresented by anyone fully charged with the power and duty of protecting his interests, it is the duty of the court to appoint a guardian ad litem for the minor.' " *Id.* at 868-69, 95 N.W.2d at 193.

In *Workman*, the beneficiaries of the trust made by the Workmans were their children, three of whom were minors. We held that the minors were necessary parties to the litigation as a condition of a full and final determination of the controversy alleged in the case. We made this determination in spite of the fact that the rights of the adult daughter and the subject matter of the litigation were identical with the rights of the minors, and the adult daughter had filed a pleading in the case.

In *Jones v. Hudson*, 93 Neb. 561, 141 N.W. 141 (1913), we stated that a court of equity, if cognizant of the necessary facts, should on its own motion protect the rights of minors when involved in litigation to which they are not parties. In the present case, we find that in order to have a complete determination of the controversy, Alexander should be made a party to this action.

The decision of the district court is affirmed insofar as it affects the interest of Leonard Vyskocil, and the cause is remanded for further proceedings as to the interest of Alexander Vyskocil. If Alexander is still a minor, we direct the district court to appoint a disinterested guardian ad litem to represent his interest in this action.

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

STATE OF NEBRASKA, APPELLEE, V. ERWIN CHARLES SIMANTS, APPELLANT.

517 N.W.2d 361

Filed May 13, 1994. No. S-93-684.

1. **Mental Health: Final Orders: Proof: Appeal and Error.** An appellate court will not interfere on appeal with a final order of the district court in a mental health commitment proceeding unless, as a matter of law, the order is not supported by clear and convincing proof.
2. **Mental Health: Due Process.** It is clear that commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection.
3. **Due Process.** Due process is flexible and calls for such procedural protections as the particular situation demands.
4. **Mental Competency: Trial.** The question of competency to stand trial is one of fact to be determined by the court, and the means employed in resolving the question are discretionary with the court.
5. **Criminal Law: Insanity.** An insanity acquittee is held pursuant to civil commitment growing out of a criminal action.
6. **Criminal Law: Mental Health.** The purpose of the acquitted persons statutes is to protect the public from mentally ill dangerous persons who have demonstrated their dangerous proclivities by committing criminal acts for which they are not punished because of insanity.
7. **Mental Health: Proof: Evidence.** In order for a past act of violence to have any evidentiary value in a mental health hearing, it must form some foundation for a prediction of future dangerousness and be, therefore, probative of that issue.

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

Robert P. Lindemeier, of Lincoln County Public Defender's Office, for appellant.

Don Stenberg, Attorney General, and Marilyn B. Hutchinson for appellee.

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

HASTINGS, C.J.

This is an appeal by Erwin Charles Simants from an order entered by the district court following the annual review of his commitment to the Lincoln Regional Center (LRC).

This court will not interfere on appeal with a final order of the district court in a mental health commitment proceeding

unless, as a matter of law, the order is not supported by clear and convincing proof. *State v. Hayden*, 233 Neb. 211, 444 N.W.2d 317 (1989); *State v. Simants*, 213 Neb. 638, 330 N.W.2d 910 (1983).

On October 17, 1979, after trial, the defendant was found not guilty by reason of insanity on six counts of murder in the first degree. On October 26, he was committed by the Lincoln County Mental Health Board to LRC for care and treatment. See *id.* On May 27, 1993, the district court conducted an annual review hearing in regard to the defendant's status, pursuant to Neb. Rev. Stat. § 29-3703 (Reissue 1989), which provides:

> (1) The court which tried a person who is found not responsible by reason of insanity shall annually and may upon its own motion or upon motion of the person or the prosecuting attorney, review the records of such person and conduct an evidentiary hearing on the status of the person.
>
> (2) If as a result of such hearing the court finds that such person is no longer dangerous to himself, herself, or others by reason of mental illness or defect, and will not be so dangerous in the foreseeable future, the court shall order such person unconditionally released from further confinement. If the court does not so find, the court shall order such person returned to an appropriate facility under an appropriate treatment plan and conditions of confinement. The court may place the person in a less restrictive setting only if it finds that such placement is consistent with the safety of the public.

Prior to the hearing, on May 5, 1993, the Lincoln County Attorney, on behalf of the State, filed a motion for an independent evaluation of the defendant by expert witness Dr. Jack Anderson. The defendant filed an objection to the motion on the grounds that the evaluation was in violation of his right to due process; that it was in the form of a "second opinion," for which there is no authority under Neb. Rev. Stat. § 29-3701 et seq. (Reissue 1989); that the motion did not conform to the rules of civil procedure; that it did not set out good cause; and that it would cause delay and unduly burden the court. Following a hearing, the court granted the State's motion and

ordered LRC to allow Dr. Anderson, the Lincoln County Attorney, and the Lincoln County public defender access to examine all files pertaining to the matter.

At the annual review hearing, the court received the status report and treatment plan prepared by Dr. Louis C. Martin, chief of service of the security unit of LRC. The report stated that the defendant continues to be mentally ill and potentially dangerous and that his mental illness at this point consists of a diagnosis of "Axis I - A) Chronic Alcohol Abuse, and Dependence, severe; B) Pedophilia; C) Major Depression, resolved; Axis II - Antisocial Personality Disorder." However, Dr. Martin's report requested that the court consider increasing the amount of freedom allowed to the defendant, from code 2 status, which requires one-to-one supervision by a staff member, to code 3 status, which would allow him to be taken from the grounds of LRC in supervised groups for therapeutic purposes. These outings would include, among others, trips to the circus, basketball games, swimming at available facilities, and attending picnics or movies in the Lincoln community. Ordinarily, the groups would include three to four patients with two staff members.

The depositions of Drs. Martin and Anderson were also received. On advice of counsel, the defendant refused to be interviewed by Dr. Anderson. However, based on his previous contacts with the defendant and his review of LRC records, Dr. Anderson testified that his diagnosis of the defendant was "chronic undifferentiated schizophrenia" and that the defendant was still "a very fragile person and could experience psychotic episodes very easily."

Col. Ronald Tussing of the Nebraska State Patrol, Chief Allen Curtis of the Lincoln Police Department, and Sheriff Thomas Casady of the Lancaster County sheriff's office all testified in opposition to changing the defendant's status to code 3. They also testified in regard to concerns about LRC compliance with notification procedures which are required whenever the defendant leaves LRC grounds.

Following the hearing, the district court found that there was clear and convincing evidence that the defendant "is and continues to be mentally ill and is dangerous to others by reason

of his mental illness, and that he will continue to be dangerous in the foreseeable future as demonstrated by the overt acts of October 18, 1975." The court further found that the recommendation of LRC for a change of status to code 3 should be denied and that there was probable cause to believe that LRC had not complied with the previous court order. Pending further hearing, the court revoked the defendant's privilege to make outings from the grounds of LRC. The court ordered that the next review hearing would be held on June 1, 1994, and granted the State leave to obtain an independent psychiatric or psychological evaluation of the defendant prior to the next hearing; a reciprocal right was granted to the defendant at the State's expense.

Following the defendant's motion for a new trial, the court allowed both parties to withdraw their rests and to adduce additional evidence at a hearing on July 8, 1993, concerning the reinstatement of the defendant's status to a modified code 2. As a result of this hearing, the court again found clear and convincing evidence that the defendant is and continues to be mentally ill and dangerous to others. The court denied LRC's recommendation for a change of status to code 3, but further found that provisions could be made within code 2 status to allow therapeutic activity without jeopardizing security and public safety. The court's order includes a detailed protocol to be followed by LRC staff in arranging for the defendant's outings off LRC grounds.

The defendant appeals, asserting that the district court erred in (1) violating his right to due process by allowing the State's motion for independent evaluation; (2) considering evidence derived from the independent evaluation; (3) finding that there was clear and convincing evidence that he is mentally ill and dangerous; (4) finding that he will continue to be dangerous in the foreseeable future by reason of the overt acts of October 19, 1975; and (5) finding that the recommendation of LRC for a change of status should be denied.

The defendant first contends that the district court violated his right to due process when it ordered an independent evaluation without factual basis or statutory authority and erred in considering any evidence obtained through the

independent evaluation.

" 'It is clear that commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection.' " *Foucha v. Louisiana*, ____ U.S. ____, 112 S. Ct. 1780, 1785, 118 L. Ed. 2d 437 (1992).

" '[D]ue process is flexible and calls for such procedural protections as the particular situation demands.' " *Jones v. United States*, 463 U.S. 354, 367-68, 103 S. Ct. 3043, 77 L. Ed. 2d 694 (1983).

Due process in review hearings, pursuant to § 29-3703, is guaranteed under § 29-3704. The rights ensured by § 29-3703 include adherence by the court to the Nebraska Evidence Rules and the right of the appellant to confront and cross-examine adverse witnesses. *State v. Hayden*, 237 Neb. 286, 466 N.W.2d 66 (1991).

The defendant here does not contend that the court erred in failing to adhere to the Nebraska Evidence Rules or in denying him the right to confront and cross-examine adverse witnesses. However, citing *State v. Rhodes*, 191 Neb. 131, 214 N.W.2d 259 (1974), and *Ake v. Oklahoma*, 470 U.S. 68, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985), he apparently contends that if one objective examination is all that is constitutionally required to be provided to a defendant, one examination is all that should be *allowed* to the State.

In *Rhodes*, we found that where a state-employed psychiatrist was qualified to make an examination to determine an indigent defendant's competency to stand trial, the defendant was not entitled to a further examination by a psychiatrist of his own choice. However, we also stated that "[t]he question of competency to stand trial is one of fact to be determined by the court, and the means employed in resolving the question are discretionary with the court." 191 Neb. at 133, 214 N.W.2d at 262.

In *Ake*, the Supreme Court held that when a defendant demonstrates to the trial court that his sanity at the time of the offense is to be a significant factor at trial, the State must, *at a minimum*, assure that the defendant has access to a competent psychiatrist who will conduct an examination and assist in preparation of the defense. The Court went on to state:

> This is not to say, of course, that the indigent defendant has a constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own. Our concern is that the indigent defendant have access to a competent psychiatrist for the purpose we have discussed, and as in the case of the provision of counsel *we leave to the States the decision on how to implement this right.*

(Emphasis supplied.) 470 U.S. at 83.

Neither *Rhodes* nor *Ake* would preclude a district court from allowing the performance of an independent evaluation if, in its discretion, the court found this to be necessary. While there is no explicit provision for independent evaluation under § 29-3703, that section calls for an "evidentiary hearing" by the court which tried the acquittee. The means for determining the acquittee's sanity, as in determining a defendant's competency to stand trial, should be discretionary with the court.

In *Tulloch v. State*, 237 Neb. 138, 465 N.W.2d 448 (1991), the appellants argued that the acquitted persons statutes violated equal protection because they do not expressly provide for a free, independent evaluation for indigents, as does the civil commitment act. See Neb. Rev. Stat. § 83-1052 (Reissue 1987). Section 29-3701, addressing the initial commitment of an insanity acquittee, provides for evaluation and development of a treatment plan following the probable cause hearing required by that section. Under § 29-3701(6), an acquittee who desires a separate evaluation may file a motion with the court requesting an evaluation by one *or more* qualified experts of his or her choice. We noted in *Tulloch* that the statute does not guarantee a free, independent evaluation for indigents, but found it clear that "such an evaluation may be obtained upon the individual's motion." 237 Neb. at 142, 465 N.W.2d at 452.

Although the defendant argues that the State could obtain "opinion after opinion until they find the hired gun to say what they want," brief for appellant at 9, that contingency is not at issue in the instant case. Here, the district court granted the State's motion for one independent evaluation, while noting that over the past several years a reciprocal right had been granted to both the State and the defendant to obtain private evaluation if either party was dissatisfied with the evaluation by

the Department of Public Institutions. The district court did not abuse its discretion in granting the State's motion for one independent evaluation, while allowing the defendant to secure his own independent evaluation if he so desired.

In *Tulloch*, we interpreted § 29-3703 to mean that the burden is on the State to prove by clear and convincing evidence that the insanity acquittee remains dangerous. The defendant apparently suggests that the State should be satisfied with, if not bound by, LRC's diagnosis and report. However, § 29-3703 provides that the court may review the records *and* conduct an evidentiary hearing. The State should be allowed to submit additional evidence since the court, as trier of fact, is not required to take the opinion of an expert as binding. See *State v. Hayden*, 233 Neb. 211, 444 N.W.2d 317 (1989). The record reflects that during the course of the defendant's commitment to LRC he has been under the care of several different psychiatrists, who have rendered diverse diagnoses. As stated in *Ake v. Oklahoma*, 470 U.S. 68, 81, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985): "Psychiatry is not . . . an exact science, and psychiatrists disagree widely and frequently on what constitutes mental illness, on the appropriate diagnosis to be attached to given behavior and symptoms, on cure and treatment, and on likelihood of future dangerousness." If necessary, the factfinder must resolve differences in opinion within the psychiatric profession on the basis of all the evidence offered by each party. See *id.*

The defendant was present at the review hearing held on May 27, 1993, but not at the May 10 hearing on the State's motion for independent evaluation, and asserts that he did not receive notice of that hearing. The record reflects that defendant's counsel was notified and present at the hearing, but that counsel had been unable to contact the defendant. However, the record further reflects that the defendant was present at a June 1992 review hearing, at which time the court set the 1993 review hearing for May 27 and ordered that "the State is granted leave to obtain an independent psychiatric or psychological evaluation of the defendant prior to the next annual review hearing. A reciprocal right is given to the defendant at the State's expense." There is nothing in the record to indicate that

the order was appealed. Thus, the defendant apparently had almost 1 year's notice of the fact that an independent evaluation was to be performed. However, even if there was any error in the manner of notice, it did not prejudice the defendant, since he refused to submit to an interview with Dr. Anderson.

Although the defendant further contends that he has not put his mental health at issue, since he has fully cooperated with the treatment plan of LRC, that position is untenable. The defendant's mental health *is* the issue; he put his sanity at issue by pleading not guilty by reason of insanity at trial, and there is clear statutory authority to evaluate his mental health unless and until he is found no longer to be mentally ill and dangerous.

Citing *Estelle v. Smith*, 451 U.S. 454, 101 S. Ct. 1866, 68 L. Ed. 2d 359 (1981), the defendant argues that allowing an independent evaluation violates his Fifth Amendment right not to be compelled to give testimony against himself. In *Estelle*, a doctor who had conducted a pretrial competency examination was allowed to testify for the State at the defendant's sentencing hearing, although the defendant had not introduced any psychiatric evidence. The Supreme Court held that where the defendant had not been warned that he had the right to remain silent and that his statements could be used against him at the sentencing proceeding, the admission of the psychiatrist's damaging testimony on the crucial issue of future dangerousness violated his Fifth Amendment privilege against compelled self-incrimination.

In the instant case, the defendant relied on psychiatric testimony to establish his insanity at the time of trial. Although he asserts that the Supreme Court has found that a defendant cannot be compelled to give testimony against himself to enhance a criminal punishment, here punishment is not at issue. An insanity acquittee is held " 'pursuant to *civil commitment* growing out of a criminal action . . . .' " *Tulloch v. State*, 237 Neb. 138, 143, 465 N.W.2d 448, 452 (1991). "The purpose of the acquitted persons statutes is 'to protect the public from mentally ill dangerous persons who have demonstrated their dangerous proclivities by committing criminal acts for which they are not punished because of insanity. . . .' " *Id.* at 144, 465 N.W.2d at 453, quoting *State v. Simants*, 213 Neb. 638, 330

N.W.2d 910 (1983). See, also, *Jones v. United States*, 463 U.S. 354, 103 S. Ct. 3043, 77 L. Ed. 2d 694 (1983) (the purpose of commitment following an insanity acquittal is to treat the individual's mental illness and protect him and society from his potential dangerousness; as insanity acquittee is not convicted, he may not be punished); *People v. Beard*, 173 Cal. App. 3d 1113, 219 Cal. Rptr. 225 (1985) (court-ordered psychiatric examinations of patient originally committed after being found not guilty by reason of insanity did not violate patient's privilege against self-incrimination where, prior to interviews, patient was informed of nature of interview and that he need not respond to questions which he found objectionable, patient exercised that option, and there was no indication in the record that any of the questions sought to elicit information that could even remotely subject the patient to criminal prosecution); *Sheridan, petitioner*, 412 Mass. 599, 591 N.E.2d 193 (1992) (petitioner's state and federal rights against self-incrimination are not implicated by patient's compelled appearance at examination held pursuant to statutory scheme upon his petition for discharge from commitment as sexually dangerous person; such proceedings are not criminal prosecutions and nothing which patient reveals during court-ordered examinations may be used against him in a criminal proceeding; mere appearance before another is not communicative or testimonial in nature and neither state nor federal constitutional right against self-incrimination prevents a third party from simply observing a person); *Heflin v. State*, 640 S.W.2d 58 (Tex. Crim. App. 1982) (by pleading and attempting to prove his insanity through the introduction of the testimony of expert psychological witnesses who had observed, interviewed, and tested him with his cooperation, appellant waived his Fifth Amendment privilege against self-incrimination).

Finally, the defendant contends that the court erred in finding that there was clear and convincing evidence that he is still mentally ill and dangerous and in finding that his status should not be changed to code 3. He argues that even if Dr. Anderson's testimony is considered, the evidence does not meet the standard of clear and convincing proof.

Dr. Anderson had interviewed the defendant and testified as a defense witness at his first trial in January 1976, stating that he diagnosed the defendant as schizophrenic. Although the defendant refused to be interviewed in 1993, Dr. Anderson testified by deposition at the review hearing that his opinions at that time were based on his personal experience with the defendant, his own knowledge and training in psychiatry, and a review of the defendant's history and records. See § 29-3706 (all records in the original proceeding or review hearings shall be made a part of the official record in the underlying case). Dr. Anderson's deposition testimony indicates a 1993 diagnosis of "chronic undifferentiated schizophrenia in remission." Dr. Anderson stated that symptoms of schizophrenia in remission are reflected in references in LRC records to the defendant's "flatness of affect." In describing that symptom, Dr. Anderson stated:

> Mr. Simants shows emotion. It is just that in contrast to people who are not schizophrenic and who have no psychiatric illness his affectual responses are relatively flattened. He does not have that — he does not have effectual [sic] or emotional responses. And I doubt if that would be changed by any therapy.

Dr. Anderson further testified that one of the factors keeping the defendant's schizophrenia in remission was the constant reality feedback that he gets, and that without the reality feedback, he would probably start having hallucinatory experiences again. Dr. Anderson stated: "I am sincerely convinced that this man is a very present danger in his current condition despite his lack of symptomatology in the structured setting and any loosening or relaxation of his supervision I think should be preceded by a very good investigation of his sexual conflict."

Dr. Martin, chief of service of the security unit of LRC, testified that he had been the defendant's attending physician for approximately 6 months and had "probably half a dozen" individual sessions with him. Dr. Martin did not diagnose schizophrenia in the defendant, but he did find the defendant to be mentally ill and potentially dangerous, and he diagnosed pedophilia; alcoholism and other substance abuse; major

depression, resolved; and antisocial personality disorder. Dr. Martin stated the opinion that the defendant was suffering from pedophilia at the time of the commission of his crime and agreed that pedophilia is not something that "comes and goes." Dr. Martin noted that when the defendant was examined on admission to the hospital, he was in denial about sexual preoccupation with children. However, in speaking with Dr. Martin, the defendant had indicated his recollection that over several months prior to the crime, he had been fantasizing about sexual activity with children. Dr. Martin stated that the defendant had made a great deal of progress in that area, so that he would say that "inside the *highly structured environment of the hospital, which is a very highly controlled environment*, to be sure, that it's not a symptomatic disorder." (Emphasis supplied.)

Although Drs. Anderson and Martin rendered different diagnoses, both indicated that the defendant continues to be mentally ill and that the highly controlled and structured setting of LRC was significant to the lack of symptomatology. Thus, while we find that the district court did not err in allowing an independent evaluation, even if Dr. Anderson's testimony was not considered, there is sufficient evidence in the record to support the district court's findings.

The district court found that the defendant would continue to be dangerous in the foreseeable future as demonstrated by the overt acts of October 19, 1975. We stated in *State v. Hayden*, 233 Neb. 211, 221, 444 N.W.2d 317, 324 (1989), that " '[i]n order for a past act to have any evidentiary value it must form some foundation for a prediction of future dangerousness and be therefore probative of that issue.' "

Here, the district court received testimony in regard to the defendant's status and took judicial notice of the bill of exceptions of the defendant's first trial, presentence investigation reports, mental health examinations, and other exhibits. These records indicate that the use of alcohol was a factor in the crime which occurred in 1975 and that one or more of the children who were murdered were also sexually assaulted. As noted above, the defendant's current diagnosis includes alcohol abuse and pedophilia. Thus, the overt acts of

1975 are sufficiently correlative of the current diagnosis to be predictive of future dangerousness. Although Dr. Martin's report suggests that the defendant's treatment should be "somewhat less restrictive," it further states that "[t]he Security Unit of the Lincoln Regional Center continues to remain the least restrictive treatment setting consistent with his treatment needs and the safety of the public."

The court also received testimony in regard to the record of escapes from LRC and public safety concerns arising from notification issues. In its order, the court recognized the therapeutic value of outings from LRC while balancing public safety concerns in ordering a modified code 2 status which allows the defendant to leave LRC grounds once each week for therapeutic activities, with one-to-one supervision.

There is no error in the judgment of the district court, and it is affirmed.

AFFIRMED.

TONY BERUMEN, APPELLANT, V. THOMAS CASADY, SHERIFF OF LANCASTER COUNTY, NEBRASKA, APPELLEE.

515 N.W.2d 816

Filed May 20, 1994. No. S-92-209.

1. **Actions: Habeas Corpus: Collateral Attack.** An action for habeas corpus constitutes a collateral attack on a judgment.
2. **Actions: Habeas Corpus: Collateral Attack: Appeal and Error.** As only a void judgment is subject to attack in a habeas corpus action, an appellate court is limited in such a case to reviewing a question of law, namely, is the judgment in question void?
3. **Appeal and Error.** Regarding a question of law, an appellate court has an obligation to reach a conclusion independent of that reached by the court below.
4. **Habeas Corpus.** A writ of habeas corpus is a proper remedy only upon a showing that the judgment, sentence, and commitment are void.
5. **Sentences.** In a criminal case, the judgment is the sentence.
6. _____. One of the circumstances which renders a sentence void is that the court lacked a legal basis to impose it.
7. **Drunk Driving: Prior Convictions: Sentences: Right to Counsel: Waiver: Proof.** The law authorizes a court to use a prior driving while intoxicated conviction to

enhance a sentence in the subsequent driving while intoxicated offense then before the court only if the State has proved either that the enhancing conviction was counseled or that the defendant waived counsel.

8. **Prior Convictions: Right to Counsel: Waiver.** It cannot be assumed from a silent record that a defendant either had or waived counsel.
9. **Constitutional Law: Drunk Driving: Prior Convictions: Right to Counsel: Waiver: Collateral Attack.** A collateral attack may be made by one in custody on an enhanced driving while intoxicated sentence imposed in the absence of proof that the defendant had or waived counsel in the enhancing conviction, for such an enhanced sentence is constitutionally invalid and thus void.

Petition for further review from the Nebraska Court of Appeals, CONNOLLY, IRWIN, and WRIGHT, Judges, on appeal thereto from the District Court for Lancaster County, BERNARD J. MCGINN, Judge. Judgment of Court of Appeals reversed, and cause remanded with direction.

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

Gary E. Lacey, Lancaster County Attorney, and James P. Rocke for appellee.

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

CAPORALE, J.

In this habeas corpus action, the district court denied the petitioner-appellant, Tony Berumen, a writ commanding the sheriff of Lancaster County, Nebraska, the respondent-appellee, Thomas Casady, to discharge Berumen from custody. Berumen then appealed to the Nebraska Court of Appeals, asserting that the district court erred in, among other things, failing to find that the judgment under which he was incarcerated was void. The Court of Appeals affirmed the judgment of the district court, whereupon Berumen successfully petitioned for further review by this court. See *Berumen v. Casady*, 93 NCA No. 49, case No. A-92-209 (not designated for permanent publication). We reverse the judgment of the Court of Appeals and remand the cause to that court with the direction that it reverse the judgment of the district court and direct that the writ be issued.

According to Neb. Rev. Stat. § 29-2823 (Reissue 1989), a habeas corpus action "may be reviewed as provided by law for

appeal in civil cases," which language brings such an appeal within the procedural requirements of Neb. Rev. Stat. § 25-1912 et seq. (Reissue 1989 & Cum. Supp. 1992) and its predecessors. *Neudeck v. Buettow*, 166 Neb. 649, 90 N.W.2d 254 (1958). See, *State ex rel. Miller v. Cavett*, 163 Neb. 584, 80 N.W.2d 692 (1957); *In re Application of Tail, Tail v. Olson*, 144 Neb. 820, 14 N.W.2d 840 (1944).

We have stated that where a judgment is attacked in a way other than a proceeding in the original action to have it vacated, reversed, or modified, or other than a proceeding in equity for its enforcement, the attack is a collateral one, and that only a void judgment is subject to such an attack. *Mayfield v. Hartmann*, 221 Neb. 122, 375 N.W.2d 146 (1985).

As is documented later in this opinion, an action for habeas corpus constitutes a collateral attack on a judgment. Thus, inasmuch as only a void judgment is subject to attack in a habeas corpus action, we are limited in such a case to reviewing a question of law, namely, is the judgment in question void? Regarding a question of law, an appellate court has an obligation to reach a conclusion independent of that reached by the court below. *Mackiewicz v. J.J. & Associates, ante* p. 568, 514 N.W.2d 613 (1994).

Berumen was arrested on September 17, 1981, and charged with third-offense driving while intoxicated, in violation of Neb. Rev. Stat. § 39-669.07 (Cum. Supp. 1980). He ultimately pled guilty to second-offense driving while intoxicated.

The penalties imposed by § 39-669.07 depended upon the number of a defendant's prior driving while intoxicated convictions. One convicted of a second offense was guilty of a Class III misdemeanor, § 39-669.07(2), which permitted incarceration for a period of up to 3 months, Neb. Rev. Stat. § 28-106 (Reissue 1979).

Following the district court's acceptance of Berumen's plea, the prosecutor stated: "The State would also show, Your Honor, that . . . Berumen was convicted of driving under the influence of alcoholic liquor . . . on September first, 1979." Although the State offered nothing further with regard to the prior conviction, the district court sentenced Berumen as a second offender and required that he be incarcerated for 3

months. For reasons which are not material to this appeal, Berumen did not begin to serve his sentence until shortly before he instituted this proceeding; although he has served the maximum period of incarceration permitted for a first-offense driving while intoxicated conviction, he has not yet served the entire 3-month period imposed.

Consistent with the rule that only a void judgment is subject to a collateral attack, a writ of habeas corpus is a proper remedy only upon a showing that the judgment, sentence, and commitment are void. *Anderson v. Gunter*, 235 Neb. 560, 456 N.W.2d 286 (1990); *Rust v. Gunter*, 228 Neb. 141, 421 N.W.2d 458 (1988); *Kerns v. Grammer*, 227 Neb. 165, 416 N.W.2d 253 (1987); *Anderson and Hochstein v. Gunter*, 226 Neb. 724, 414 N.W.2d 281 (1987); *Hrbek v. Shortridge*, 223 Neb. 785, 394 N.W.2d 285 (1986); *Mingus v. Fairbanks*, 211 Neb. 81, 317 N.W.2d 770 (1982). In *Sileven v. Tesch*, 212 Neb. 880, 884, 326 N.W.2d 850, 853 (1982), we wrote:

> It has long been the rule in this jurisdiction that habeas corpus is a collateral proceeding and as such cannot be used as a substitute for an appeal or proceedings in error. [Citations omitted.]
>
> Furthermore, in *Piercy v. Parratt*, 202 Neb. 102, 105-06, 273 N.W.2d 689, 691 (1979), we said: "We have consistently held that to release a person from a sentence of imprisonment by habeas corpus it must appear that the sentence was absolutely void. Habeas corpus will not lie to discharge a person from a sentence of penal servitude where the court imposing the sentence had jurisdiction of the offense and the person of the defendant, and the sentence was within the power of the court to impose, unless the sentence has been fully served and the prisoner is being illegally held. [Citations omitted.]"

Consistent with the fact that in a criminal case the judgment is the sentence, *State v. Long*, 205 Neb. 252, 286 N.W.2d 772 (1980), Berumen claims the judgment arising out of the 1981 arrest is void because the State failed to establish that the 1979 conviction used to enhance his sentence as a two-time offender was counseled or, in the alternative, that he had waived counsel.

One of the circumstances which renders a sentence void is

that the court lacked a legal basis to impose it. For example, in *Mingus v. Fairbanks, supra*, we held that the trial court could not find the defendant guilty of the uncharged offense of debauching a minor, notwithstanding defendant's plea of not guilty to pandering, as the former offense was not a lesser offense included with the pandering charge. In so ruling, we quoted with approval from *In re McVey*, 50 Neb. 481, 70 N.W. 51 (1897), which was cited with approval in *State v. McClarity*, 180 Neb. 246, 142 N.W.2d 152 (1966), as follows:

> In *McVey*, the appellant was charged with the crime of burglary. The jury acquitted the appellant on the charge of burglary, but found him guilty of breaking and entering in the daytime. In discharging appellant from custody, we said at 483-84, 70 N.W. at 52: "The only further question presented is whether the sentence of the court was merely erroneous or whether it was illegal in such a sense as to be void. It may be said that the modern doctrine or idea is that a court must possess jurisdiction not only of the person and subject-matter, but to impose the sentence which is adjudged. If the latter is lacking the sentence is not merely voidable but void. (Black, Judgments, sec. 258; citing, among others, *Ex parte Lange*, 18 Wall. [U.S.], [1]63[, 21 L. Ed. 872 (1874)]; *Ex parte Milligan*, 4 Wall. [U.S.], 131[, 18 L. Ed. 281 (1866)]; *Ex parte Wilson*, 114 U.S., 417[, 5 S. Ct. 935, 29 L. Ed. 89 (1885)]; *Ex parte Kearny*, 55 Cal., 212; *In re Petty*, 22 Kan., 477. See, also, *Ex parte Cox*, 32 Pac. Rep. [Ida.], 197; *Ex parte Yarbrough*, 110 U.S., 651[, 4 S. Ct. 152, 28 L. Ed. 274 (1884)].) In the case at bar, the jury having, by its verdict, determined the prisoner not guilty as charged, although it further adjudged him guilty of another crime, the trial court had no jurisdiction to sentence him; hence its attempt in that direction was illegal in such sense that it was void, and *habeas corpus* the appropriate remedy. (*In re Betts*, 36 Neb., 282[, 54 N.W. 524 (1893)]; *In re Hav[e]lik*, 45 Neb., 747[, 64 N.W. 234 (1895)].) It follows that the prisoner must be discharged."

Mingus v. Fairbanks, 211 Neb. at 84-85, 317 N.W.2d at 772. The *McVey* analysis makes clear that in the context used in that

opinion, the reference to jurisdiction referred not to the court's authority to entertain the proceeding, but to the existence of a legal basis upon which to impose the sentence exacted.

By now there can be no question that the law authorizes a court to use a prior driving while intoxicated conviction to enhance the sentence in the subsequent driving while intoxicated offense then before the court only if the State has proved either that the enhancing conviction was counseled or that the defendant waived counsel. *State v. Ristau, ante* p. 52, 511 N.W.2d 83 (1994). And it is also well settled that it cannot be assumed from a silent record that a defendant either had or waived counsel. See, *Baldasar v. Illinois*, 446 U.S. 222, 100 S. Ct. 1585, 64 L. Ed. 2d 169 (1980); *State v. Smyth*, 217 Neb. 153, 347 N.W.2d 859 (1984). Moreover, a collateral attack may be made on an enhanced driving while intoxicated sentence imposed in the absence of proof that the defendant had or waived counsel in the enhancing conviction, for such an enhanced sentence is constitutionally invalid and thus void. *State v. Wiltshire*, 241 Neb. 817, 491 N.W.2d 324 (1992).

Thus, for one who is in custody, habeas corpus is a proper means of collaterally challenging the validity of an enhanced driving while intoxicated sentence.

While it is true that the petitioner in a habeas corpus proceeding has the burden of proving that the sentence is void, *Dovel v. Adams*, 207 Neb. 766, 301 N.W.2d 102 (1981), Berumen met that burden by putting into evidence the bill of exceptions of the enhancement proceedings, which demonstrates that the sentence was void because the State failed to establish that he had or waived counsel at the time of the 1979 conviction.

We thus, as stated in the first paragraph of this opinion, reverse the judgment of the Court of Appeals and remand the cause to that court with the direction that it reverse the judgment of the district court and direct that the writ be issued.

REVERSED AND REMANDED WITH DIRECTION.

BOSLAUGH, J., participating on briefs.

WRIGHT, J., not participating.

IN RE ESTATE OF LESLIE E. STANTON, DECEASED. COUNTY OF DOUGLAS, NEBRASKA, A POLITICAL SUBDIVISION, APPELLANT, V. WILLIAM N. PARKS, PERSONAL REPRESENTATIVE OF THE ESTATE OF LESLIE E. STANTON, DECEASED, APPELLEE.

516 N.W.2d 586

Filed May 20, 1994. No. S-92-490.

1. **Decedents' Estates: Taxation: Appeal and Error.** Neb. Rev. Stat. § 77-2023 (Reissue 1990) provides that appeals "may be taken from the determination of the [inheritance] tax due made by the county court to the district court as provided in sections 25-2728 to 25-2738."
2. **Decedents' Estates.** Neb. Rev. Stat. § 30-2209(35) (Reissue 1989) provides that a proceeding under the Nebraska Probate Code includes actions at law and suits in equity, but does not include a determination of inheritance tax under chapter 77, article 20.
3. **Wills: Parent and Child: Taxation.** For the purpose of determining whether a devisee under a will is a person to whom the deceased for not less than 10 years prior to death stood in the acknowledged relation of a parent, under Neb. Rev. Stat. § 77-2004 (Reissue 1990), it is not necessary that there be a written acknowledgment.
4. **Wills: Taxation: Proof.** For Nebraska inheritance tax purposes, in determining the relationship between a testator and persons taking under a will, statements in the will are not conclusive on either the taxing authority or the devisee, and the relationship may be proven by the preponderance of admissible evidence on the point.
5. **Extrajudicial Statements: Words and Phrases.** A self-serving declaration is one made by a party in his own interest at some time and place out of court, and does not include testimony which he gives as a witness at the trial.

Appeal from the District Court for Douglas County, STEPHEN A. DAVIS, Judge, on appeal thereto from the County Court for Douglas County, JANE H. PROCHASKA, Judge. Judgment of District Court affirmed.

James S. Jansen, Douglas County Attorney, and Denise A. Hill for appellant.

Joseph B. Reedy for appellee.

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

GRANT, J., Retired.

The will of Leslie E. Stanton was admitted to probate in the county court for Douglas County, Nebraska. Under the will,

the residue of decedent's estate was left to appellee, William N. Parks, after the satisfaction of six specific devises. On November 21, 1991, an "Order Determining and Assessing Inheritance Tax" was entered by the county court. In that order, the court found that Stanton "stood in the acknowledged relation of a parent to William Parks and the rate of tax on any portion received by William N. Parks from the estate of Leslie E. Stanton shall be determined under Nebraska Revised Statute 77-2004."

Neb. Rev. Stat. § 77-2004 (Reissue 1990) provides,

> [i]n the case of . . . any person to whom the deceased for not less than ten years prior to death stood in the acknowledged relation of a parent . . . the rate of tax shall be one percent of the clear market value of the property in excess of ten thousand dollars.

The County of Douglas contends that Parks is not the acknowledged son of the decedent and that his inheritance should be taxed on his basis as a great-nephew, pursuant to Neb. Rev. Stat. § 77-2005 (Reissue 1990). Section 77-2005 provides that property passing to a relative such as a great-nephew shall be taxed at "six percent of the clear market value of the property received by each person in excess of two thousand dollars . . . and on all the excess over sixty thousand dollars, the rate of tax shall be nine percent." The net value of the share of Parks in the estate, for inheritance tax purposes, was approximately $250,000. Of that amount, $230,000 was in the form of certificates of deposit jointly owned by the decedent and Parks.

Douglas County appealed the order of the county court to the district court, where the order was affirmed. Douglas County then appealed to the Court of Appeals, and we, under the authority of Neb. Rev. Stat. § 24-1106(3) (Cum. Supp. 1992), removed the case to this court in order to regulate the caseloads of the appellate courts.

On appeal, Douglas County assigns as error the actions of the district court in (1) "determining that the evidence regarding the will was admissible" and (2) "ruling that there was evidence at trial showing that William N. Parks was an acknowledged son." We affirm.

Neb. Rev. Stat. § 77-2023 (Reissue 1990) provides that appeals "may be taken from the determination of the [inheritance] tax due made by the county court to the district court as provided in sections 25-2728 to 25-2738." Neb. Rev. Stat. § 25-2733 (Reissue 1989) provides that the district court shall review the case for error appearing on the record in the county court. Neb. Rev. Stat. § 25-1911 (Cum. Supp. 1992) provides that judgments or final orders of the district court will be reviewed for error appearing on the record. It should be noted that § 30-2209(35) (Reissue 1989) provides that a proceeding under the Nebraska Probate Code includes actions at law and suits in equity, "but does not include a determination of inheritance tax under Chapter 77, article 20."

The record made in the county court shows that in 1948, Parks was 16 years old and was an orphan in the State of Mississippi. His natural father died before he was born, and his mother was 18 years old when he was born and "gave him away." He had lived with 8 or 10 different families; aunts, uncles, and a grandfather. The decedent and his wife went to Mississippi and returned with Parks to Omaha.

Parks testified that after he came to Omaha with the Stantons, that was his "first father and mother image that was my own. No one else around but us three." Parks further testified: "He taught me everything I know. And I treated him like a father. He treated me like a son. And my kids — he was the only grandfather our four children have."

Parks further testified that the decedent, beginning in 1950, began introducing Parks as "his boy" to friends in the Fraternal Order of Eagles and to family members. After 1950, decedent always referred to Parks as his son or his boy, as long as he could speak, up to the time he died. The decedent suffered from Lou Gehrig's disease and spent the last 2 years of his life in a nursing care center, where he died at the age of 86. Parks testified that the decedent always referred to Parks as his boy and that the decedent

> was always looking for his boy to come and see him at the care center. Any time he had troubles — medical problems the nurses didn't like, he was referred to me at the care center. They looked to me as a son. I signed all the things

> for his operations and all the medicines, and they respected me in that capacity.

Parks testified that he lived in the Stanton home until he was married in 1951, when he was 19. He testified that he joined the U.S. Air Force shortly after he was 19 and served for 26 years until he retired in 1978. When he went into the service in 1952, his wife moved back to the decedent's home and "all the time I was in the military until I owned my house in 1965, his [decedent's] home was my home. Permanent — that was my permanent address for all those years."

During his Air Force service, Parks spent time overseas, including Vietnam, and during these times, the decedent wrote to him once a week and "took care of my wife and kids while I was gone."

Introduced in evidence was a birthday card entitled "For you, Son On Your Birthday" and signed "Les." Parks testified he had received this card from the decedent "within the last four or five years." Also received in evidence was a letter to Parks from the Stantons in 1967. This letter was addressed "Dear Son" and ended, "Write when you can. Your old Mom and Pop the Stantons."

Appellant first contends that the trial court erred in determining that the evidence concerning the will was admissible and asserts that no evidence beyond the four corners of the will was admissible. The basis of appellant's objection to the evidence in question is the contention that "William Parks is asking the court to change the will to read that decedent had an acknowledged son." Brief for appellant at 6. Appellant argues that the decedent's will states that the decedent is a widower with no children and that "[n]owhere in the will does the decedent refer to William N. Parks as a son." *Id.* Appellant then states that the will is unambiguous, quoting *In re Estate of Walker*, 224 Neb. 812, 818-19, 402 N.W.2d 251, 256 (1987): "When language in a will is clear and unambiguous, construction of a will is unnecessary and impermissible."

Appellant's statement is correct, but has little to do with the problem before us. The will of the decedent is clear and unambiguous. The will sets out six specific devises and provides that the remainder of the estate is devised to Parks, with the

usual contingent provisions in the case of the death of Parks before the death of the testator. The will is clear, and there is no need to construe it. The problem before the trial court was to determine the proper inheritance tax to be paid to the State of Nebraska, and to make that determination, it is necessary to determine the relationship between the decedent and the persons taking under the will. The county court was not making a determination of heirship and was not construing the will. There is no merit in appellant's contention that "William Parks is asking the court to change the will to read that the decedent had an acknowledged son." Brief for appellant at 6. Parks asked the county court to determine that, for inheritance tax purposes, he was "a person to whom the deceased for not less than ten years prior to death stood in the acknowledged relation of a parent," as provided in § 77-2004. As noted above, the determination of inheritance tax is not a proceeding under the Nebraska Probate Code. § 30-2209(35).

Appellant contends that the will controls the inheritance tax determination, even though, in this case, almost all of the property received by Parks was received as that of a joint tenant with the decedent in many certificates of deposit.

Appellant itself, in calculating inheritance taxes, has considered evidence that could only be obtained from sources outside the will. Appellant contends that the inheritance tax rate for Parks should be "as a great nephew pursuant to §77-2005." Brief for appellant at 5. The will in question does not set out any relationship between Parks and the decedent. Similarly, the court apparently considered evidence outside the will in determining the inheritance taxes for the individual devisees. The will set out five individual devises of $3,000 to five named individuals—four of them apparently the children of Parks. The fifth individual was "Clyde Culp of Lexington, Tennessee." Each of the Parks children was required to pay a tax of $60, apparently under § 77-2005 (providing for the tax on transfers to "remote relatives")—6 percent of the inheritance over $2,000. Culp had no tax due, because, apparently, he received his devise under § 77-2004 (transfer to "immediate relatives"), which provides for an exemption of $10,000 from the tax. There is no statement in the will as to the relationship of

these individuals, nor is there any evidence in that regard in the record before us. Evidence outside the will must have been considered in setting the different taxes.

Extrinsic evidence was the basis of our decision in *In re Estate of Dowell*, 149 Neb. 599, 31 N.W.2d 745 (1948). In that case, the evidence showed that Luella Stalder's mother died when the child was 3 years old, and the child was taken into her paternal uncle Dowell's home, where she lived and "treated the Dowells as her parents" until she married at age 28. *Id.* at 600, 31 N.W.2d at 746. The opinion then states, "The relationship continued until the time of the death of Hattie L. Dowell [the wife of the paternal uncle]." *Id.* It is clear that evidence extrinsic to the will was the basis of the decision, when we affirmed the action determining that Luella Stalder was entitled to the exemption.

Appellant also contends that *In re Estate of Dowell* also "indicates" that the phrase "stood in the acknowledged relation of a parent," in § 77-2004, requires that there must be a written acknowledgment of the relationship. That is not correct. There was no written acknowledgment in the facts set out in the *In re Estate of Dowell* opinion.

In *In re Estate of Dowell*, the opinion sets out an analysis of § 77-2004, as it existed in 1948, and which is substantially the same as the current statute. It is stated:

> The foregoing provision [§ 77-2004] contemplates that persons falling within three classes are to be considered within the parental relation for the purposes of the inheritance tax law. The first is the actual relationship of parent and child, the second is the relationship created by adoption proceedings, and the third embraces any person to whom the deceased for not less than ten years prior to death stood in the acknowledged relation of a parent. It is the latter provision only that claims our attention in the present case.

149 Neb. at 601, 31 N.W.2d at 746.

We then stated when § 77-2004 (1943) and Neb. Rev. Stat. § 30-109 (1943) (which statute provided that a child born out of wedlock was an heir of a person who acknowledged, in writing, that he was the father of such child) were construed together,

such children "would fall in the first classification, rather than the third." 149 Neb. at 602, 31 N.W.2d at 746. We hold that no written form of acknowledgment is required to establish a decedent's "acknowledged relation of a parent" within the ambit of inheritance tax determinations. Such a tax determination is the subject of this case. For the purpose of determining whether a devisee under a will is a "person to whom the deceased for not less than ten years prior to death stood in the acknowledged relation of a parent," under § 77-2004, it is not necessary that there be a written acknowledgment.

For Nebraska inheritance tax purposes, in determining the relationship between a testator and persons taking under a will, statements in the will are not conclusive on either the taxing authority or the devisee, and the relationship may be proven by the preponderance of admissible evidence on the point. Appellant's first assignment of error is without merit.

Appellant's second assignment of error is that the trial court erred in ruling that there was evidence at trial showing that Parks was an acknowledged son. Appellant contends only that the evidence offered is self-serving and subject to Neb. Rev. Stat. § 27-403 (Reissue 1989).

As to the contention that the evidence offered by the appellee was "self-serving" and was "offered by witnesses who have a financial interest in the outcome of the Court's decision," brief for appellant at 7-8, we note that there were only two witnesses at the trial, Parks and the lawyer who drew the will of the decedent.

As to the lawyer, there is absolutely no evidence that the lawyer had any "financial interest" in the case. As to the testimony of Parks, his testimony was like that of a great many parties, in that his testimony supported his position. If believed, his evidence tended to show that, for inheritance tax purposes, he stood in the relationship of an acknowledged son to the decedent.

We agree with the statement set out in *Jones v. State*, 175 Neb. 711, 717-18, 123 N.W.2d 633, 638 (1963):

> The trial court concluded in part that there was no competent evidence adduced of the neglect testified to for

> the reason that the evidence was all self-serving. We are at a loss to understand the court's reasoning. We must assume the court was confusing the testimony with a self-serving declaration, which is a statement made out of court which is offered as evidence in the trial. There were no self-serving declarations involved herein. It is true that all of the witnesses were either the appellants, relatives of one of the appellants, or friends of the appellants, but they all testified to the facts as they saw them, and were examined and cross-examined by the attorneys participating and by the court itself. . . .
>
> As we said in Powerine Co. v. Grimm Stamp & Badge Co., 127 Neb. 165, 254 N. W. 722: "A self-serving declaration is one made by a party in his own interest at some time and place out of court, and does not include testimony which he gives as witness at the trial."

If appellant's position were adopted, no plaintiff or defendant could testify to much of anything in a case in which they were involved. The trial court did not err in overruling appellant's objections that Parks' testimony was "self-serving."

Similarly, appellant's contention that Parks' evidence should have been excluded under § 27-403 is without merit. That section provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

We have examined the evidence offered by Parks, and we fail to see how Parks' testimony as to the manner he met, lived with, and interacted with the decedent could in any way be considered to constitute a danger of unfair prejudice or be considered as confusing the issues. As stated in *Lincoln Grain v. Coopers & Lybrand*, 216 Neb. 433, 439, 345 N.W.2d 300, 306 (1984),

> Most, if not all, items which one party to an action offers in evidence are calculated to be prejudicial to the opposing party; therefore, it is only "unfair prejudice" with which we are concerned. In the context of § 27-403 such prejudice means a tendency to suggest a decision on an improper basis.

Appellant's contention in that regard is without merit.

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

AFFIRMED.

EDWARD W. LARSEN ET AL., APPELLEES, V. FIRST BANK, FORMERLY KNOWN AS FIRST WESTSIDE BANK, A NEBRASKA BANKING CORPORATION, APPELLANT.

515 N.W.2d 804

Filed May 20, 1994. No. S-92-1010.

1. **Demurrer: Plea in Abatement.** Although Neb. Rev. Stat. § 25-806 (Reissue 1989) permits a defendant to demur when it appears on the face of a petition that there is another action pending between the same parties for the same cause, the statute does not preclude the filing of a common-law plea in abatement to bring to the attention of the court some fact or circumstance which is not disclosed on the face of the record, but which will defeat the particular action without absolutely and forever precluding or excluding a right of recovery in the plaintiff.
2. **Plea in Abatement.** While a plea in abatement prevents unnecessary or vexatious litigation and thereby furthers the theory of civil procedure by avoiding multiple suits, it is nonetheless considered dilatory and technical and as a rule is not favored by the courts; it will therefore generally not be sustained unless the party interposing it clearly shows that he or she is within its purpose.
3. _____. In order to prevail on a plea in abatement, the cases must be the same, in the sense that the same rights are asserted and the same relief is sought which is founded on the same facts and on the same essential basis; in addition, the parties must be the same or such as represent the same interest.
4. **Records: Appeal and Error.** It is incumbent upon the appellant to present a record which supports the errors assigned; absent such a record, the decision of the lower court will generally be affirmed.
5. **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. 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.
6. **Contracts: Appeal and Error.** The construction of a contract is a matter of law,

in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determinations made by the court below.

7. **Pleadings.** In order to require a reply, a defendant alleging an affirmative defense must do so with factual specificity, rather than in conclusory legal terms.
8. **Contracts: Consideration.** Sufficient consideration for a promise exists if there is any benefit to the promisor or any detriment to the promisee; the benefit rendered need not be to the party contracting, but may be to anyone else at the contracting party's procurement or request.
9. **Contracts: Intent.** If it appears by express stipulation or by reasonable intendment that the rights and interests of unnamed parties were contemplated and provision was being made for them, those not named as parties to a contract are third-party beneficiaries of it.
10. **Uniform Commercial Code: Negotiable Instruments.** A promissory note which is not a negotiable instrument may nonetheless be an instrument within the purview of article 9 of the Uniform Commercial Code.
11. **Uniform Commercial Code: Security Interests.** The only way one can perfect a security interest in an instrument is by taking possession of the document. Neb. U.C.C. § 9-304(1) (Reissue 1992).
12. **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. 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.
13. **Breach of Contract: Damages.** In a breach of contract case, the ultimate objective of a damages award is to put the injured party in the same position the injured party would have occupied if the contract had been performed, that is, to make the injured party whole.

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

Ruth Anne Evans for appellant.

Raymond R. Aranza, of Marks & Clare, for appellees.

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

CAPORALE, J.

I. STATEMENT OF CASE

This is the second appearance of this matter in this court, the

first having resulted in a dismissal for the lack of a final order, as reported in *Larsen v. Ralston Bank*, 236 Neb. 880, 464 N.W.2d 329 (1991) (*Larsen I*). Herein, the plaintiffs-appellees, Edward W. Larsen, Carmelita A. Larsen, Candice Marie Larsen Ishii, Dennis E. Larsen, and Linda Marie Larsen, allege that the defendant-appellant, First Bank, formerly known as First Westside Bank, converted a certain note in which the aforenamed Larsens had a security interest by breaching an agreement to protect said interest. The district court granted the Larsens a partial summary judgment, holding First Bank liable, and subsequently sustained the Larsens' motion for a directed verdict made at the close of all the evidence at the trial on the issue of damages. First Bank appealed to the Nebraska Court of Appeals, assigning as errors, in summary, the district court's (1) failing to sustain its plea in abatement, (2) granting the Larsens a summary judgment on the issue of liability, and (3) directing a verdict in favor of the Larsens in the sum of $34,900.19. In order to regulate the caseloads of the appellate courts, we, on our own motion, removed the case to this court and now affirm the judgment of the district court.

II. FACTS

There are two facets to the relevant facts in this matter, (1) the transactional aspects and (2) those dealing with procedural matters.

1. Transactional Aspects

The Larsens held 50 percent of the common stock in Roger L. Hass, Inc., a dissolved Nebraska corporation, in which the other 50 percent of the stock was held by Roger Hass. In 1982, the Hass corporation sold substantially all of its assets to Financial Service Company, which, in addition to paying $50,000 in cash, executed a promissory note payable to the order of the Hass corporation in the sum of $159,052.50. The note incorporated the provisions of an agreement between Financial Service and Roger Hass and recited that said agreement provided for the cancellation and satisfaction of the note without payment, should certain events come to pass.

Although the Larsens, as owners of half of the Hass corporation's stock, were entitled to half of the $50,000, Roger

Hass kept it all. He later, on August 16, 1982, assigned "all [his] right, title, and interest" in the Financial Service note to First Bank as security for an unrelated personal loan.

On January 10, 1983, Roger Hass executed three promissory notes payable to the Larsens in the amounts of $25,000, $13,564, and $5,481.51. The $25,000 note represented the Larsens' share of the cash Financial Service had paid toward the purchase of the assets of the Hass corporation. The other two notes were related to amounts Roger Hass owed the Larsens on other dealings.

In order to secure his notes to the Larsens, Roger Hass, in April 1983, executed in their favor a junior assignment of his 50-percent "beneficial interest" in the proceeds from the Financial Service promissory note "subject to a previous pledge dated August 16, 1982, by [the Hass corporation] to [First Bank]." Also executed was an agreement entitled "Junior Pledge Agreement for Security," which recites that it was entered into by "the Common SHAREHOLDERS OF [the Hass corporation] and [First Bank]." The document bears First Bank's signature and was signed twice by Roger Hass, once in his individual capacity and once as the president of the Hass corporation. The signature "Edward Larsen" appears in only one place under the word "ATTEST" and over the word "Secretary." However, a certificate executed by a notary public recites that "Edward W. Larsen," secretary of the Hass corporation, acknowledged that the instrument constituted the "voluntary act and deed" of the corporation and of "Edward W. Larsen, as an individual."

After reciting Roger Hass' obligations to the Larsens, the existence of his notes to the Larsens, and the respective interests of the Larsens and Roger Hass in the Hass corporation prior to the sale of its assets, the junior pledge agreement recognizes the Larsens' second lien on Roger Hass' 50-percent interest in the proceeds of the Financial Service note which was specifically made junior to Roger Hass' pledge to First Bank. It further declares it to be the intention and understanding of the parties that all the proceeds received from Financial Service be distributed pro rata to the shareholders pursuant to their respective percentages of stock ownership. First Bank agreed

that as a condition precedent to the effectiveness of the pledge given by the Hass corporation on August 16, 1982, the Larsens' 50-percent interest would not be encumbered or set off against any prior debts it was owed by the Hass corporation or Roger Hass personally and that it would not jeopardize the second lien the Larsens held on Roger Hass' beneficial interest in the note.

Although the record does not contain any assignment to First Bank of the Hass corporation's interest in the Financial Service note, both the junior pledge agreement and Roger Hass' junior assignment of his beneficial interest in the Financial Service note to the Larsens recite that the Hass corporation made such an assignment.

Undaunted by his existing debt, Roger Hass, in February 1985, executed two promissory notes to Ralston Bank for a total of $12,500, which were secured by a deed of trust on his home. Sometime prior to April 23, 1986, Roger Hass sold his home and asked Ralston Bank to release the deed of trust, offering to assign his interest in the Financial Service promissory note as collateral. An officer of Ralston Bank contacted First Bank and was assured, notwithstanding the existence of the above-described junior pledge agreement, that if the First Bank debt were paid, there would be no prior liens or claims on Roger Hass' 50-percent interest in the proceeds of the Financial Service note.

On April 23, 1986, Roger Hass executed a $46,865.70 promissory note payable to Ralston Bank and an assignment of his interest in the Financial Service note. Of the proceeds, $13,583.22 was used to refinance Roger Hass' prior notes to Ralston Bank; the remaining $33,273.48 was paid to First Bank in discharge of its lien on Roger Hass' interest in the Financial Service note. The next day, at which time Roger Hass was $46,035.17 in debt to the Larsens, First Bank released its assignment of the Financial Service note and delivered the note to Ralston Bank. After obtaining possession of the note, Ralston Bank, using the note as security, lent Roger Hass an additional $12,969.35. At some point, as the consequence of proceedings had in *Larsen I*, Roger Hass' 50-percent beneficial interest in the payments from the Financial Service promissory note produced a payment of $54,164.22 to Ralston Bank.

The Larsens learned of Roger Hass' assignment of the Financial Service note to Ralston Bank sometime after the event, at which time the Larsens demanded that First Bank either deliver possession of the Financial Service promissory note to them or pay them its fair market value. Receiving neither, nor any funds from Roger Hass' 50-percent beneficial interest in the proceeds of the note, the Larsens, notwithstanding the existence of *Larsen I*, instituted this suit.

2. Procedural Aspects

Although the Larsens' petition herein makes no reference to the then pendency of *Larsen I* in this court, First Bank, before answering, filed a plea in abatement which called attention to that fact. Asserting that *Larsen I* involved "the same subject matter, a similar cause of action and . . . similar relief" as this case, the plea claimed that a decision in favor of First Bank in *Larsen I* would dispose of the present matter and thus asked that this case be abated and dismissed without prejudice, at the Larsens' cost.

Following a hearing of some nature not disclosed by the record, the district court found that *Larsen I* "would not settle the issues in dispute in this matter" and denied the plea.

Thereafter, First Bank filed an answer which, in addition to denying the material allegations in the Larsens' petition, asserted a variety of defenses, which are detailed in part III(2)(a) below. The Larsens did not reply to First Bank's answer.

III. ANALYSIS

Having reviewed the transactional background and procedural setting of the case, we turn our attention to the summarized assignments of error.

1. Plea in Abatement

In the first such assignment of error, First Bank challenges the district court's judgment by claiming that the plea in abatement should have been sustained.

Although Neb. Rev. Stat. § 25-806 (Reissue 1989) permits a defendant to demur when it appears on the face of a petition that "there is another action pending between the same parties

for the same cause," we have concluded that the statute does not preclude the filing of a common-law plea in abatement to bring to the attention of the court some fact or circumstance which is not disclosed on the face of the record, but which will defeat the particular action without absolutely and forever precluding or excluding a right of recovery in the plaintiff. *Kash v. McDermott & Miller*, 221 Neb. 297, 376 N.W.2d 558 (1985). While such a plea prevents unnecessary or vexatious litigation and thereby furthers the theory of civil procedure by avoiding multiple suits, see, *State ex rel. Pederson v. Howell*, 239 Neb. 51, 474 N.W.2d 22 (1991), and *Farmers State Bank v. Germer*, 231 Neb. 572, 437 N.W.2d 463 (1989), it is nonetheless considered dilatory and technical and as a rule is not favored by the courts. It will therefore generally not be sustained unless the party interposing it clearly shows that he or she is within its purpose. See, *Kash v. McDermott & Miller, supra*; *National Bank of Commerce T. & S. Assn. v. Shull*, 195 Neb. 590, 239 N.W.2d 505 (1976).

In order to prevail on such a plea, the cases must be the same, in the sense that the same rights are asserted and the same relief is sought which is founded on the same facts and on the same essential basis; in addition, the parties must be the same or such as represent the same interest. See, *State ex rel. Pederson v. Howell, supra*; *Kash v. McDermott & Miller, supra*; *National Bank of Commerce T. & S. Assn. v. Shull, supra*; *Richardson v. Opelt*, 60 Neb. 180, 82 N.W. 377 (1900).

The difficulty is that the record does not reveal what evidence, if any, the district court had before it when considering the plea. Given our rule, Neb. Ct. R. of Prac. 4A(1)a (rev. 1992), that on appeal the transcript shall contain the "pleadings upon which the case was tried, *as designated by the appellant*" (emphasis supplied), and given the fact that in *Larsen I* we were only asked to review a partial summary judgment granted in favor of First Bank, we do not even know the total status of *Larsen I* in the district court at that time.

As we have recently reaffirmed, it is incumbent upon the appellant to present a record which supports the errors assigned; absent such a record, the decision of the lower court will generally be affirmed. *Latenser v. Intercessors of the*

Lamb, Inc., ante p. 337, 513 N.W.2d 281 (1994). In the absence of a record, we cannot say the district court erred in denying the plea in abatement.

2. SUMMARY JUDGMENT ON LIABILITY

We thus move on to the second summarized assignment of error, in connection with which First Bank claims that the district court erred in granting the Larsens a partial summary judgment on the issue of liability (a) because by failing to file a reply, the Larsens admitted the defenses First Bank asserted, and (b) because, in any event, the Larsens failed to perfect their security interest in the Financial Service note.

Those claims are to be tested by the rule that 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. 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. *Larson v. Vyskocil, ante* p. 917, 515 N.W.2d 660 (1994); *Franksen v. Crossroads Joint Venture, ante* p. 863, 515 N.W.2d 794 (1994); *Schmidt v. Omaha Pub. Power Dist., ante* p. 776, 515 N.W.2d 756 (1994). As the analysis which follows will demonstrate, the liability issues are essentially contract issues. The construction of a contract is a matter of law, in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determinations made by the court below. *Baker's Supermarkets v. Feldman*, 243 Neb. 684, 502 N.W.2d 428 (1993).

(a) Failure to Reply

In its answer First Bank alleged, in summary, that (i) there was a failure of consideration for the junior pledge agreement; (ii) the Financial Service note is a general intangible; and (iii) the Larsens' losses were due to their own failure to file a financing statement and thereby perfect their security interest in the note

and the failure of Financial Service, which had notice of the Larsens' interest, to take steps to protect them. Citing Neb. Rev. Stat. § 25-842 (Reissue 1989), First Bank asserts that by their failure to file a reply, the Larsens are precluded from denying those "affirmative defenses"; that the defenses must thus be taken as true; and that as a consequence, First Bank is entitled to judgment.

Neb. Rev. Stat. § 25-811 (Reissue 1989) dictates that an answer contain a general or specific denial of each material allegation of the petition which the defendant controverts and "a statement of any new matter constituting a defense . . . ." Section 25-842 provides, in relevant part: "Every material allegation of . . . new matter in the answer not controverted by the reply, shall, for the purposes of the action, be taken as true." According to Neb. Rev. Stat. § 25-843 (Reissue 1989), a "material allegation in a pleading is one essential to the claim or defense which could not be stricken from the pleading without leaving it insufficient."

In considering the manner of pleading new matter in an answer, we wrote in *Cass Constr. Co. v. Brennan*, 222 Neb. 69, 72-73, 382 N.W.2d 313, 316-17 (1986):

> If a party intends to plead accord and satisfaction as a defense, the answer must contain allegations showing such intent, and the facts relied upon to establish the defense must be pled. [Citations omitted.] An answer sufficiently pleads accord and satisfaction when it contains or presents all of the elements of an accord and satisfaction, even if it does not use the terms accord and satisfaction and even if it could have been more technically or artfully drawn. [Citation omitted.] At a minimum, the defense of accord and satisfaction requires nothing more be pled than the 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.

Upholding the denial of a motion to amend an answer, we, in *Timmerman v. Hertz*, 195 Neb. 237, 238 N.W.2d 220 (1976), observed that an amendment should be well pled and that simply stating that there was an implied term in the contract

which the plaintiff had breached merely pled a legal conclusion which was insufficient to raise an issue of fact. And in *Lease Northwest v. Davis*, 224 Neb. 617, 400 N.W.2d 220 (1987), we held that pleading negligence or "wrongful failure" on the part of a guarantee did not sufficiently plead modification of the guaranty. In *Newman Grove Creamery Co. v. Deaver*, 208 Neb. 178, 302 N.W.2d 697 (1981), we observed that under our system of code pleading, a plaintiff is required to plead facts, not the theory of recovery, and that the pleading of legal conclusions is insufficient to raise an issue of fact. Nonetheless, reasoning that the pleading served to put the defendant on notice, we held that the conclusory assertion of duress as a defense to an action on a promissory note was adequate. It must be borne in mind, however, that in *Newman Grove Creamery Co.*, we were not concerned with whether the answer was such that in the absence of a reply, duress was to be deemed admitted.

The foregoing holdings are therefore in accordance with the requirement that a petition set forth sufficient facts to state a cause of action rather than merely state legal conclusions. *Security Inv. Co. v. State*, 231 Neb. 536, 437 N.W.2d 439 (1989); *Mangan v. Landen*, 219 Neb. 643, 365 N.W.2d 453 (1985); *Moore v. Puget Sound Plywood*, 214 Neb. 14, 332 N.W.2d 212 (1983). See, generally, Neb. Rev. Stat. §§ 25-804 and 25-807 (Reissue 1989).

Unfortunately, however, in *Baylor v. Tyrrell*, 177 Neb. 812, 131 N.W.2d 393 (1964), we, in dicta, improvidently suggested that just pleading the facts without stating the conclusion would not be sufficient to raise the issue of contributory negligence.

To avoid continued confusion, that improvident language is now disapproved, and we reaffirm that in order to require a reply, a defendant alleging an affirmative defense must do so with factual specificity, rather than in conclusory legal terms. See *P. & R. C. & I. Co. v. Tamaqua Sch. Dist.*, 304 Pa. 489, 156 A. 75 (1931) (allegations in answer not denied by reply not deemed admitted where new matter relied on by defendant involved statement of legal grounds for defense rather than factual pleading). See, also, *Moore v. Prud. Ins. Co. of Amer.*, 342 Pa. 570, 21 A.2d 42 (1941); *Wilson & Gardner Co. v. Wilson*, 334 Pa. 289, 5 A.2d 575 (1939); *Arch v. Slovene Nat.*

Bene. Society, 156 Pa. Super. 64, 39 A.2d 290 (1944).

With that rule in mind, we direct our attention to the claims of defense asserted by First Bank.

(i) Failure of Consideration

There is no question that the claimed failure of consideration is an affirmative defense which First Bank was obligated to plead or else forgo it as a basis of defense. See *Spittler v. Nicola*, 239 Neb. 972, 479 N.W.2d 803 (1992). However, First Bank pled the defense in conclusory form, stating only that the junior pledge agreement is "void and unenforceable as to [First Bank] for the reason that it is not supported by any consideration." While in the absence of a motion for a more definite statement, such pleading is sufficient to raise lack of consideration as an issue, see *Newman Grove Creamery Co. v. Deaver, supra*, it is not, as we have seen, sufficient to stand admitted notwithstanding the Larsens' failure to file a reply.

(ii) General Intangible Claim

First Bank next alleged that the "promissory note, a copy of which is attached to [the Larsens'] petition is a 'general intangible' as that term is defined [by statute]. No financing statement relating to the pledge of said note was filed at any time prior to April 23, 1986."

As the analysis which follows in part III(2)(b) below demonstrates, the nature of the Financial Service note is crucial, for if the note must be treated as a general intangible, the Larsens did not perfect their security interest in it, and First Bank might well be entitled to judgment as a matter of law.

The second sentence of this asserted defense is factually specific. However, the facts set forth are not in dispute; therefore, unless the first sentence is to be deemed admitted, thereby precluding a decision on the merits that the nature of the note is such that the Larsens did perfect their security interest in it, the asserted defense does not adversely affect the Larsens' cause.

The first sentence does not recite the factual basis on which the conclusion rests. It merely states the legal conclusion that the note is a general intangible. The sentence thus does not constitute a material allegation of new matter which, if not

controverted by a reply, must be deemed admitted. See § 25-842. Therefore, even if the two sentences together present an affirmative defense, a matter we do not decide, the Larsens' failure to reply did not admit it.

(iii) Failure of Larsens and Financial Service to Act

We assume without analysis that by failing to reply, the Larsens admitted that they did not file a financing statement and that Financial Service did not act to protect them. Indeed, there was no dispute between the parties in that regard. The question is whether the admission mandates a judgment for First Bank. As the succeeding analysis demonstrates, it does not.

(b) Perfection of Security Interest

We begin this phase of our analysis by considering First Bank's claim that there was no consideration for the junior pledge agreement on which the Larsens' cause is founded.

Sufficient consideration for a promise exists if there is any benefit to the promisor or any detriment to the promisee, and the benefit rendered need not be to the party contracting, but may be to anyone else at the contracting party's procurement or request. *Spittler v. Nicola, supra*; *Bock v. Bank of Bellevue*, 230 Neb. 908, 434 N.W.2d 310 (1989).

It need only be noted that under the junior pledge agreement, First Bank, in exchange for being permitted to continue to hold the Financial Service note, agreed to serve as a bailee for the benefit of the Larsens. The fact that First Bank was permitted to retain possession of the Financial Service note and thereby protect its security interest in it alone constitutes sufficient consideration for First Bank's promise to not jeopardize the Larsens' interest in the note.

While it is true that not all the Larsens signed the junior pledge agreement (for that matter, it is not clear that Edward Larsen did so in his individual behalf), we have held that if it appears by express stipulation or by reasonable intendment that the rights and interests of unnamed parties were contemplated and provision was being made for them, those not named as parties to a contract are third-party beneficiaries of it. *Alder v. First Nat. Bank & Trust Co.*, 241 Neb. 873, 491 N.W.2d 686

(1992); *Lauritzen v. Davis*, 214 Neb. 547, 335 N.W.2d 520 (1983); *Dworak v. Michals*, 211 Neb. 716, 320 N.W.2d 485 (1982). The text of the junior pledge agreement makes clear that one of its purposes was to protect the Larsens' interest in the Financial Service note. Thus, their rights and interests were indeed contemplated and provided for. As a consequence, there can be no doubt that the Larsens are third-party beneficiaries of the junior pledge agreement.

That having been determined, we turn to First Bank's contention that the district court erred in failing to find that the Financial Service note, by virtue of having incorporated another agreement providing that the note could be canceled or satisfied without payment upon the happening of certain events, constituted a general intangible in which a security interest could only be perfected by the filing of a financing statement. As a consequence, according to First Bank, any loss suffered by the Larsens is a direct result of their failure to file a financing statement.

The question as to whether the Larsens perfected a security interest in the Financial Service note is controlled by article 9 of the Nebraska version of the Uniform Commercial Code. With an exception not relevant to our analysis, the article at the time of the execution of the junior pledge agreement applied, as it does now, "to any transaction (regardless of its form) which is intended to create a security interest in . . . documents, instruments, general intangibles, chattel paper [and] to security interests created by contract including pledge, assignment . . . intended as security." Neb. U.C.C. § 9-102 (Reissues 1980 & 1992).

First Bank is correct in its assertion that incorporation into the note of the agreement between Financial Service and Roger Hass described in part II above makes the note something other than an unconditional promise to pay and thus makes it something other than a "negotiable instrument," as defined in Neb. U.C.C. § 3-104 (Reissues 1980 & 1992). See *Aetna Cas. & Surety Co. v. Nielsen*, 217 Neb. 297, 348 N.W.2d 851 (1984), *overruled on other grounds, First Nat. Bank v. Bolzer*, 221 Neb. 415, 377 N.W.2d 533 (1985) (holding that guaranty agreement which lacked independent unconditional promise to

pay was not negotiable instrument).

However, that does not mean that the Financial Service note was or is a "general intangible," as First Bank claims. A general intangible was at the relevant time and continues to be defined as "any personal property (including things in action) other than goods, accounts, chattel paper, documents, instruments, and money." Neb. U.C.C. § 9-106 (Reissues 1980 & 1992).

A document which is not a "negotiable instrument" might then and may now nonetheless qualify as an "instrument" which, unless the context of article 9 otherwise requires, then included and continues to include "a negotiable instrument . . . or any other writing which evidences a right to the payment of money and is not itself a security agreement or lease and is of a type which is in ordinary course of business transferred by delivery with any necessary indorsement or assignment." Neb. U.C.C. § 9-105(1)(i) (Reissues 1980 & 1992).

Nonetheless, citing *Home Fed. Sav. & Loan Assn. v. McDermott & Miller*, 234 Neb. 11, 449 N.W.2d 12 (1989), First Bank argues that we have previously held that rights to payment under a written contract for the sale of a business which is pledged as collateral pursuant to a security agreement are general intangibles. *Home Fed. Sav. & Loan Assn.* indeed held as First Bank represents. However, in that case there was no separate note as there is here; all that was at issue was the rights arising under an installment sales agreement.

First Bank also directs our attention to *Crichton v. Himlie Properties*, 105 Wash. 2d 191, 713 P.2d 108 (1986), which was cited in *Home Fed. Sav. & Loan Assn.*, and several cases from other jurisdictions which hold that a seller's rights under a contract for the conveyance of real estate are general intangibles. *In re Holiday Intervals, Inc.*, 931 F.2d 500 (8th Cir. 1991); *In re Himlie Properties, Inc.*, 36 B.R. 32 (W.D. Wash. 1983); *In re S.O.A.W. Enterprises, Inc.*, 32 B.R. 279 (W.D. Tex. 1983); *Cascade Security Bank v. Butler*, 88 Wash. 2d 777, 567 P.2d 631 (1977). But those cases focus upon various factors, including the executory nature of a contract for the conveyance of the real estate, the lack of a separate distinct promissory note, and the fact that an instrument cannot contain a security agreement which an installment contract for the sale of land

usually does. For these various reasons, the courts deciding the foregoing cases in essence held that the documents involved were not instruments because they were not of a type which are "in ordinary course of business transferred by delivery." § 9-105(1)(i). Those decisions thus give us no guidance in resolving the issue before us.

There are, however, a number of cases not involving installment or executory contracts for the sale of real estate which hold that a promissory note not qualifying as a negotiable instrument was nonetheless an instrument within the purview of article 9. E.g., *In re Kelly Group, Inc.*, 159 B.R. 472 (W.D. Va. 1993); *In re Coral Petroleum, Inc.*, 50 B.R. 830 (S.D. Tex. 1985); *Army Nat'l Bank v. Equity Developers, Inc.*, 245 Kan. 3, 774 P.2d 919 (1989); *Berkowitz v. Chavo Intl.*, 74 N.Y.2d 144, 542 N.E.2d 1086, 544 N.Y.S.2d 569 (1989), *reargument denied* 74 N.Y.2d 893, 547 N.E.2d 105, 547 N.Y.S.2d 850. But see *Union Investment v. Midland-Guardian Co.*, 30 Ohio App. 3d 59, 506 N.E.2d 271 (1986) (without discussion or analysis holds nonnegotiable promissory note to be general intangible).

We conclude that a separate promissory note which is not a negotiable instrument may nonetheless be an instrument and hold, as the district court implicitly did, that the Financial Service note is an instrument and not a general intangible.

The distinction is an important one, for to perfect a security interest in a general intangible, one was at the relevant time, and still is, required to file a financing statement. Neb. U.C.C. §§ 9-106 and 9-302 (Reissues 1980 & 1992). However, with certain exceptions not involved here, the only way one could then, or can now, perfect a security interest in an instrument is by taking possession of the document. Neb. U.C.C. § 9-304(1) (Reissues 1980 & 1992). Additionally, so far as is relevant, Neb. U.C.C. § 9-305 (Reissues 1980 & 1992) provided and provides: "A security interest in . . . instruments . . . may be perfected by the secured party's taking possession of the collateral. If such collateral . . . is held by a bailee, the secured party is deemed to have possession from the time the bailee receives notification of the secured party's interest."

The net effect of §§ 9-304 and 9-305, then, is to permit a

bailee to take possession of an instrument for the benefit of a secured party. Here, First Bank perfected its superior security interest in the Financial Service note by taking possession of it on its own behalf and then agreed that as a condition precedent to the effectiveness of the prior pledge given it by the Hass corporation, it would not jeopardize the junior lien held by the Larsens. It thereby committed itself to possess the note not only on its own behalf, but as a bailee for the benefit of the Larsens. That agreement necessarily required that once First Bank had recovered its debt, it would deliver the Financial Service note to the Larsens or come to some other arrangement with them. First Bank simply ignored the existence of its agreement with the Larsens and breached it by giving possession of the note to Ralston Bank without any regard for the Larsens' security interest in it.

Accordingly, there is no merit to the second summarized assignment of error.

3. Directed Verdict

In the third and last summarized assignment of error, First Bank claims that if the evidence establishes any damages at all, it sets them at $13,583.22, the amount Ralston Bank lent Roger Hass on April 24, 1986, above and beyond the sum used to refinance his obligation to First Bank.

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. 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. *Rohde v. Farmers Alliance Mut. Ins. Co.*, 244 Neb. 863, 509 N.W.2d 618 (1994); *Wilson v. Misko*, 244 Neb. 526, 508 N.W.2d 238 (1993); *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).

This also is an appropriate place to recall that in a breach of contract case, the ultimate objective of a damages award is to put the injured party in the same position the injured party would have occupied if the contract had been performed, that is, to make the injured party whole. *Ed Miller & Sons, Inc. v. Earl*, 243 Neb. 708, 502 N.W.2d 444 (1993). See, also, *Properties Inv. Group v. JBA, Inc.*, 242 Neb. 439, 495 N.W.2d 624 (1993); *Wells Fargo Alarm Serv. v. Nox-Crete Chem.*, 229 Neb. 43, 424 N.W.2d 885 (1988); *Stansbery v. Schroeder*, 226 Neb. 492, 412 N.W.2d 447 (1987).

First Bank's position, that the damages are limited to the cash amount Ralston Bank loaned Roger Hass on April 24, 1986, overlooks that but for First Bank's breach of the junior pledge agreement resulting in delivery of the Financial Service note to Ralston Bank, Ralston Bank would not have had possession of the note, which is what it relied on in advancing further credit to Roger Hass.

The district court's calculation properly took into account the principal and interest due on the Financial Service note as of the date it was transferred to Ralston Bank, the value of Roger Hass' beneficial interest in it, and the amount paid to First Bank.

There is, therefore, no more merit to this last summarized assignment of error than there was in the previous two.

IV. JUDGMENT

As a consequence, the judgment of the district court is, as first noted in part I, affirmed.

AFFIRMED.

WHITE, J., not participating.

LORI A. SCHOEMAKER, APPELLANT, V. METROPOLITAN UTILITIES DISTRICT AND DENNIS M. JOHNSON, APPELLEES.

515 N.W.2d 675

Filed May 20, 1994. No. S-92-1023.

1. **Summary Judgment.** 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. **Political Subdivisions Tort Claims Act: Waiver: Immunity.** The Political Subdivisions Tort Claims Act reflects a limited waiver of governmental immunity and prescribes the procedure for maintenance of a suit against a political subdivision.
3. **Political Subdivisions Tort Claims Act: Notice.** Noncompliance with the notice requirement of the Political Subdivisions Tort Claims Act is a defense to a plaintiff's action.
4. **Political Subdivisions Tort Claims Act: Pleadings: Notice: Proof.** If a political subdivision, by an appropriately specific allegation in a demurrer or answer, raises the issue of a plaintiff's failure to comply with the notice requirement of Neb. Rev. Stat. § 13-905 (Reissue 1987) of the Political Subdivisions Tort Claims Act, the plaintiff then has the burden to show compliance with the notice requirement.
5. **Political Subdivisions Tort Claims Act: Pleadings: Notice.** A general denial in a political subdivision's answer does not raise the issue of noncompliance, which must be raised as an affirmative defense specifically expressing the plaintiff's noncompliance with the notice requirement of Neb. Rev. Stat. § 13-905 (Reissue 1987) of the Political Subdivisions Tort Claims Act.
6. **Political Subdivisions Tort Claims Act: Notice: Time.** For substantial compliance with the written notice requirements of the Political Subdivisions Tort Claims Act, within 1 year from the act or omission on which the claim is based, the written notice of claim must be filed with an individual or office designated in the act as the authorized recipient for notice of claim against a political subdivision.
7. **Waiver: Proof.** Ordinarily, to establish waiver of a legal right, there must be a clear, unequivocal, and decisive act of a party showing such a purpose, or acts amounting to an estoppel on his or her part.
8. **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.

Appeal from the District Court for Douglas County: JOSEPH S. TROIA, Judge. Affirmed.

Dean J. Jungers, of Hascall, Jungers, Garvey & Delaney, for appellant.

Ronald E. Bucher for appellees.

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

HASTINGS, C.J.

Lori A. Schoemaker appeals the order of the district court, which, in her claim against the Metropolitan Utilities District, found that she had failed to satisfy the requirements of the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. § 13-901 et seq. (Reissue 1987), and sustained the defendants' motion for summary judgment. We affirm.

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. *Hillie v. Mutual of Omaha Ins. Co., ante* p. 219, 512 N.W.2d 358 (1994); *VonSeggern v. Willman*, 244 Neb. 565, 508 N.W.2d 261 (1993).

As alleged in the petition, Schoemaker and defendant Dennis M. Johnson were involved in an automobile collision on August 22, 1989. At the time of the collision, Johnson was allegedly engaged in the course of his employment with defendant Metropolitan Utilities District (MUD) and was operating a motor vehicle owned by MUD.

MUD's claims adjuster, Delores Kocourek, was notified of the accident by employees and went to the scene to investigate. Schoemaker had already left the scene; however, the MUD driver and safety director and the police were still there. Kocourek spoke with them and gathered as much information as she could. She attempted to contact Schoemaker later that day, but was unable to do so. Kocourek stated that she believed that Schoemaker's father contacted the MUD safety director the next day. Kocourek was also able to contact Schoemaker that day, August 23. Schoemaker's father called Kocourek on August 24 and again on August 28; automobile repairs and Schoemaker's injuries were discussed. On September 11, Kocourek sent a letter to Schoemaker in which she requested that Schoemaker contact the MUD office as soon as the automobile repairs were completed so that arrangements could be made to issue a check. The letter also asked that Schoemaker

sign a medical authorization form.

Kocourek's records indicated that Schoemaker's father made contact with Don Blocker, the MUD claims investigator, on September 12. Kocourek testified that when Blocker talked to Schoemaker's father, "that's when he said that he had hired an attorney and that's when we broke off all of our contacts with them." Kocourek's records indicated that Blocker spoke with Schoemaker's attorney on September 12 as well.

Kocourek received a letter dated October 25, 1990, from Schoemaker's attorney advising her of special damages. This letter was the first correspondence which Kocourek received from either Schoemaker or her attorney. In a letter to Schoemaker's attorney dated November 13, 1990, Kocourek acknowledged the October 25 correspondence and asked for further information before the claim could be considered. Schoemaker's attorney faxed some bills to Kocourek after November 13. The next contact was from Schoemaker's attorney to Kocourek on July 16, 1991, when, according to Kocourek, the attorney stated that he "wanted to get something going on the claim." The last contacts and requests for documentation between Kocourek and Schoemaker's attorney apparently took place in August 1991. This action was filed on August 21, 1991.

In their answer, the defendants denied that Schoemaker's claim had been acknowledged on September 11, 1989. The defendants were granted leave to file an amended answer on June 19, 1992. In the amended answer, they alleged that Schoemaker had failed to comply with the notice requirements of § 13-905 and that the action was barred by the statute of limitations found in §§ 13-919(1) and 13-920(1) and (3). The defendants' motion for summary judgment was sustained by the district court on October 27, 1992. Schoemaker asserts that the court erred in finding that she had not complied with § 13-905 and in finding that the defendants had not acknowledged or waived the requirements of § 13-901 et seq.

"The Political Subdivisions Tort Claims Act reflects a limited waiver of governmental immunity and prescribes the procedure for maintenance of a suit against a political subdivision." *Chicago Lumber Co. v. School Dist. No. 71*, 227

Neb. 355, 366, 417 N.W.2d 757, 764 (1988). Section 13-905 of the act states:

> All tort claims under sections 13-901 to 13-926, 16-727, 16-728, 23-175, 39-809, and 79-489 shall be filed with the clerk, secretary, or other official whose duty it is to maintain the official records of the political subdivision, or the governing body of a political subdivision may provide that such claims may be filed with the duly constituted law department of such subdivision. It shall be the duty of the official with whom the claim is filed to present the claim to the governing body. *All such claims shall be in writing* and shall set forth the time and place of the occurrence giving rise to the claim and such other facts pertinent to the claim as are known to the claimant.

(Emphasis supplied.) Section 13-919(1) provides, in pertinent part, that "[e]very claim against a political subdivision permitted under [the Political Subdivisions Tort Claims Act] shall be forever barred unless within *one year* after such claim accrued, *the claim is made in writing* to the governing body." (Emphasis supplied.)

In *Miles v. Box Butte County*, 241 Neb. 588, 598, 489 N.W.2d 829, 837 (1992), we stated:

> Noncompliance with the notice requirement is a defense to a plaintiff's action. If a political subdivision, by an appropriately specific allegation in a demurrer or answer, raises the issue of a plaintiff's failure to comply with the notice requirement of § 13-905, the plaintiff then has the burden to show compliance with the notice requirement. *Millman v. County of Butler*, 235 Neb. 915, 458 N.W.2d 207 (1990). However, a general denial in the political subdivision's answer does not raise the issue of noncompliance, which must be raised as an affirmative defense specifically expressing the plaintiff's noncompliance with the notice requirement of § 13-905 of the Political Subdivisions Tort Claims Act. *Id.*

Schoemaker asserts that the defendants' answer did not raise any question concerning compliance with § 13-905. However, as noted above, the district court granted the defendants leave to file an amended answer, in which they did allege that the

plaintiff had failed to comply with the notice requirements of § 13-905 and that the action was barred by the statute of limitations found in §§ 13-919(1) and 13-920(1) and (3). Thus, Schoemaker had the burden to show compliance with the notice requirement.

Although Schoemaker acknowledges that she did not file a written claim within 1 year, she contends that the combination of the oral claim, in conjunction with the written acknowledgment of the claim in the September 11, 1989, letter of Kocourek, constituted compliance with the requirements of § 13-901 et seq., as set forth in *West Omaha Inv. v. S.I.D. No. 48*, 227 Neb. 785, 420 N.W.2d 291 (1988), and *Chicago Lumber Co. v. School Dist. No. 71, supra*.

In *West Omaha Inv.*, we noted that the act does not mandate that a claim contain the amount of damages or loss, but that it must contain only the " 'time and place of the occurrence giving rise to the claim and such other facts pertinent to the claim as are known to the claimant.' " *Id.* at 790, 420 N.W.2d at 295. We found that while the plaintiff's letter to the defendant did not specify an exact dollar amount, it did state that property loss had occurred and that the defendant was responsible. The plaintiff's letter also stated that "claim is made" against the defendant and was, therefore, not merely notice of the "possibility of a claim."

In *Chicago Lumber Co.*, we held that notice requirements for a claim filed pursuant to the act are to be liberally construed so that one with a meritorious claim may not be denied relief as the result of some technical noncompliance, stating: "[S]ubstantial compliance with the statutory provisions pertaining to a claim's content supplies the requisite and sufficient notice to a political subdivision in accordance with [§ 13-905], when the lack of compliance has caused no prejudice to the political subdivision." 227 Neb. at 369, 417 N.W.2d at 766. In that case, we found that a letter from the plaintiff's attorney to the defendant, which letter did not specify an exact time and place of occurrence, was nevertheless sufficient to satisfy the notice requirements of the act, where the defendant was familiar with the circumstances of the claim.

Schoemaker apparently relies on the "substantial

compliance" doctrine, as set forth in *Chicago Lumber Co.*, in arguing that the *defendant's* letter of September 11, 1989, is sufficient written notice of a claim. However, as explained above, both *West Omaha Inv.* and *Chicago Lumber Co.* discussed substantial compliance in regard to the content of a written claim by the plaintiff, not the *absence* of a written claim by the plaintiff.

In *Chicago Lumber Co.*, we noted that the purpose of the written claim requirement of § 23-2404 (now § 13-905) is to notify a political subdivision concerning possible liability for its relatively recent act or omission, providing an opportunity for the political subdivision to investigate and obtain information about its allegedly tortious conduct, and enabling the political subdivision to decide whether to pay the claimant's demand or defend the litigation predicated on the claim made. Schoemaker argues that the failure to file a written claim did not cause the defendant any prejudice in its investigation or handling of the claim, since the defendant had access to the scene of the accident shortly after the accident.

In *Willis v. City of Lincoln*, 232 Neb. 533, 441 N.W.2d 846 (1989), the plaintiff also sought to extend the "substantial compliance" doctrine, as it related to the content of a written claim, to include notice of a claim which had not been sent to or received by a person or entity designated by the act. The plaintiff was allegedly injured while being placed aboard a Lincoln Transportation System (LTS) "Handi-Van" by the driver. The driver filled out a two-page accident report on the day of the accident. Approximately 8 months later, the plaintiff's attorney sent a letter to LTS, requesting that its insurance representative "get in touch" relative to the plaintiff's injuries. While expressing no opinion on whether the letter contained a "claim" in compliance with § 13-905, we held:

> [F]or substantial compliance with the written notice requirements of the Political Subdivisions Tort Claims Act, within 1 year from the act or omission on which the claim is based, the *written notice* of claim must be filed with an individual or office designated in the act as the authorized recipient for notice of claim against a political subdivision.

(Emphasis supplied.) 232 Neb. at 539, 441 N.W.2d at 850. In *Willis*, the LTS operations and maintenance superintendent, and the city risk manager, were both aware of the accident shortly after it occurred, due to the driver's written report. Eight months later, the superintendent apparently received the attorney's letter and called the city risk manager to give him the file number assigned to the plaintiff's accident. However, neither the city clerk nor the city's law department received a copy of the letter within the year after the accident. Although the driver notified LTS of the accident on the day that it occurred, and there was correspondence between the plaintiff's attorney and LTS, we found that the plaintiff's notice of claim, which was not received by an individual or entity designated as an authorized recipient by § 13-905, did not substantially comply with the notice requirements of the act.

Here, as in *Willis*, employees of the political subdivision had knowledge of the accident and of the possibility of a claim. In her letter of September 11, 1989, Kocourek did indicate her awareness of the time and place of the accident. Kocourek's records reflect that MUD learned on September 12 that Schoemaker had hired an attorney and that MUD subsequently broke off further contacts with Schoemaker and her father. The next contact reflected in the record in regard to a claim is the letter dated October 25, 1990, from Schoemaker's attorney to Kocourek. This letter does not satisfy the requirements of § 13-919(1), since it was not received within 1 year after the claim accrued, nor was notice ever given to an authorized "other official" as required by § 13-905.

Section 13-905 requires notice to a designated individual or entity of a political subdivision in the form of a written claim. It would defeat the purpose of § 13-905 if mere knowledge of an act or omission, by a nondesignated party, was sufficient to satisfy the requirements of that section.

Schoemaker further argues that the defendants waived the requirement of a written claim by virtue of the contents of the letter of September 11, 1989; Kocourek's continued investigation of the accident; and the failure of the defendants to raise the issue of compliance in their first answer. Kocourek testified that her job involved gathering information and

getting the files together, but that the general counsel or the general manager made the actual decision in regard to a claim. She stated: "I will discuss the settlement and then I will take whatever recommendation or whatever has been discussed back in to the general counsel for his approval. I don't have the authority to settle a case." While Kocourek apparently did not alone possess the authority to settle the claim, her letter does imply that a settlement would be made upon the receipt of further information and a signed property damage release. However, since the settlement appears to be predicated on the receipt of these items, it is not an unequivocal assurance of payment. Kocourek also testified that she did not advise Schoemaker, Schoemaker's father, or Schoemaker's attorney that it was unnecessary to file a written claim and that she did not know of anyone else who advised them that it was unnecessary. In *Five Points Bank v. Scoular-Bishop Grain Co.*, 217 Neb. 677, 681, 350 N.W.2d 549, 552 (1984), we stated that "ordinarily, to establish waiver of a legal right there must be a clear, unequivocal, and decisive act of a party showing such a purpose, or acts amounting to an estoppel on his part."

In *Willis v. City of Lincoln*, 232 Neb. 533, 441 N.W.2d 846 (1989), the plaintiff argued that the city should be estopped from raising the issue of his failure to comply with the notice requirements of the act. In *Willis*, we found that the plaintiff's reliance could not be based on conduct or statements which occur after the alleged reliance. In this case, Schoemaker cannot rely, as an element of estoppel or waiver, on Kocourek's actions in communicating with Schoemaker's attorney after the statute of limitations had expired. In *Willis*, we further noted that the Political Subdivisions Tort Claims Act contains a clear procedure for filing a tort claim against a municipality, which information was ostensibly possessed by the plaintiff's lawyer, and that, as in the instant case, no one had informed the plaintiff or his attorney that the filing of a claim was unnecessary.

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. *Hillie v. Mutual of Omaha Ins. Co., ante* p. 219, 512 N.W.2d 358 (1994); *Plambeck v. Union Pacific RR. Co.*, 244 Neb. 780, 509 N.W.2d 17 (1993).

The record reflects that Schoemaker has failed to establish compliance with the notice requirements of § 13-905 and that the defendants did not unequivocally waive the notice requirements of that section; summary judgment was therefore properly granted and is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOSEPH A. MARCHESE, APPELLANT.

515 N.W.2d 670

Filed May 20, 1994. No. S-93-123.

1. **Postconviction.** In a proceeding under the Nebraska Postconviction Act, Neb. Rev. Stat. § 29-3001 et seq. (Reissue 1989 & Cum. Supp. 1992), the movant must allege facts which, if proved, constitute a denial or violation of his or her rights under the federal or Nebraska Constitution, causing the judgment against the movant to be void or voidable.
2. **Constitutional Law: Right to Counsel: Effectiveness of Counsel.** The Sixth Amendment to the U.S. Constitution guarantees every criminal defendant the right to effective assistance of counsel.
3. _____: _____: _____. The Sixth Amendment right to the effective assistance of counsel entitles the accused to the undivided loyalty of an attorney, free from any conflict of interest.
4. **Constitutional Law: Effectiveness of Counsel.** The fact of multiple representation alone is not a per se violation of the Sixth Amendment.
5. **Attorney and Client: Conflict of Interest.** The fact that an attorney has other clients, including one who would be a State witness and testify at trial, is not sufficient in and of itself to constitute a conflict of interest.
6. **Criminal Law: Conflict of Interest.** The mere possibility of a lawyer's conflict of interest is insufficient to impugn a criminal conviction.
7. **Conflict of Interest: Words and Phrases.** A conflict of interest exists when a defense attorney is placed in a situation inherently conducive to divided loyalties.
8. **Attorney and Client: Conflict of Interest: Words and Phrases.** The phrase "conflict of interest" denotes a situation in which regard for one duty tends to

lead to disregard of another, where a lawyer's representation of one client is rendered less effective by reason of his or her representation of another client, or where it becomes a lawyer's duty on behalf of one client to contend for that which his duty to another client would require him or her to oppose.

9. _____: _____: _____. A conflict of interest exists whenever one defendant stands to gain significantly by counsel's adducing probative evidence or advancing plausible arguments that are damaging to the cause of a codefendant whom counsel is also representing.
10. **Constitutional Law: Effectiveness of Counsel: Conflict of Interest: Proof.** To establish a violation of the Sixth Amendment, a defendant who raises no objection at trial must demonstrate that his or her lawyer actively represented conflicting interests and that the actual conflict of interest adversely affected the lawyer's performance.
11. **Effectiveness of Counsel: Conflict of Interest: Proof.** While a defendant who shows that a conflict of interest actually affected the adequacy of his or her representation need not demonstrate prejudice, such conflict of interest must be shown to have resulted in counsel's conduct detrimental to the defense.
12. **Effectiveness of Counsel: Conflict of Interest.** An asserted conflict of interest must be actual, rather than speculative or hypothetical, before a conviction can be overturned on the ground of ineffective assistance of counsel.
13. **Postconviction.** An evidentiary hearing on a motion for postconviction relief 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.

Appeal from the District Court for Douglas County: JOSEPH S. TROIA, Judge. Reversed and remanded for further proceedings.

Kelly S. Breen, Assistant Douglas County Public Defender, and, on brief, Joseph A. Marchese for appellant.

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

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

CAPORALE, J.

We, on our own motion, removed this postconviction relief action from the Nebraska Court of Appeals to this court in order to regulate the caseloads of the two tribunals. The defendant-appellant, Joseph A. Marchese, having been convicted of second degree arson in violation of Neb. Rev. Stat. § 28-503 (Reissue 1989), asserts that the postconviction court

erred in failing to grant him an evidentiary hearing in order that he might show, among other things, that his plea of guilty was the result of the ineffective assistance of his attorney. We reverse the judgment of the district court and remand the cause for further proceedings consistent with this opinion.

Marchese's conviction arose out of his anger with his then paramour and later wife, which anger made him decide to put two of the wife's dresses on the kitchen stove and deliberately set them on fire. In the process, the apartment building sustained between $3,000 and $5,000 worth of damage.

At the time Marchese pled, his attorney was also representing the wife on the charge of aiding and abetting Marchese to resist arrest on the subject arson charge, as well as representing her on several other criminal matters and in an action to dissolve her marriage to Marchese.

In a proceeding under the Nebraska Postconviction Act, Neb. Rev. Stat. § 29-3001 et seq. (Reissue 1989 & Cum. Supp. 1992), the movant must allege facts which, if proved, constitute a denial or violation of his or her rights under the federal or Nebraska Constitution, causing the judgment against the movant to be void or voidable. *State v. Lyman*, 241 Neb. 911, 492 N.W.2d 16 (1992); *State v. Carter*, 241 Neb. 645, 489 N.W.2d 846 (1992); *State v. Moss*, 240 Neb. 21, 480 N.W.2d 198 (1992); *State v. Schneckloth*, 235 Neb. 853, 458 N.W.2d 185 (1990), *denial of habeas corpus affirmed sub nom. Schneckloth v. Dahm*, 994 F.2d 843 (8th Cir. 1993).

The Sixth Amendment to the U.S. Constitution guarantees every criminal defendant the right to effective assistance of counsel. *State v. Williams*, 224 Neb. 114, 396 N.W.2d 114 (1986); *State v. Pearson*, 220 Neb. 183, 368 N.W.2d 804 (1985). This right entitles the accused to the undivided loyalty of an attorney, free from any conflict of interest. *State v. Schneckloth, supra*; *State v. Williams, supra*; *State v. Turner*, 218 Neb. 125, 354 N.W.2d 617 (1984). The U.S. Supreme Court has long recognized that this right may be impaired when one attorney represents multiple codefendants. *Cuyler v. Sullivan*, 446 U.S. 335, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980); *Holloway v. Arkansas*, 435 U.S. 475, 98 S. Ct. 1173, 55 L. Ed. 2d 426 (1978); *Glasser v. United States*, 315 U.S. 60, 62 S. Ct.

457, 86 L. Ed. 680 (1942), *reh'g denied* 315 U.S. 827, 62 S. Ct. 637, 86 L. Ed. 1222.

However, the fact of multiple representation alone is not a per se violation of the Sixth Amendment. *State v. Englehart*, 231 Neb. 579, 437 N.W.2d 468 (1989); *State v. Pope*, 213 Neb. 645, 330 N.W.2d 747 (1983). Nor is the fact that an attorney has other clients, including one who would be a State witness and testify at trial, sufficient in and of itself to constitute a conflict of interest. *State v. Pope*, 211 Neb. 425, 318 N.W.2d 883 (1982). Similarly, the mere possibility of a lawyer's conflict of interest is insufficient to impugn a criminal conviction. *Cuyler v. Sullivan, supra*; *State v. Englehart, supra*; *State v. Turner, supra*.

In *State v. Turner, supra*, we described a conflict of interest as a situation which

> places a defense attorney in a situation inherently conducive to divided loyalties. . . . The phrase "conflict of interest" denotes a situation in which regard for one duty tends to lead to disregard of another . . . where a lawyer's representation of one client is rendered less effective by reason of his representation of another client . . . or where it becomes a lawyer's duty on behalf of one client to contend for that which his duty to another client would require him to oppose . . . . A conflict of interest exists "whenever one defendant stands to gain significantly by counsel adducing probative evidence or advancing plausible arguments that are damaging to the cause of a codefendant whom counsel is also representing."

218 Neb. at 131, 354 N.W.2d at 621-22.

To establish a violation of the Sixth Amendment, a defendant who raises no objection at trial must demonstrate that his or her lawyer actively represented conflicting interests and that the actual conflict of interest adversely affected the lawyer's performance. *State v. Carter*, 236 Neb. 656, 463 N.W.2d 332 (1990); *State v. Schneckloth, supra*; *State v. Englehart, supra*; *State v. Williams, supra*.

While a defendant who shows that a conflict of interest actually affected the adequacy of his or her representation need not demonstrate prejudice, *State v. Carter*, 236 Neb. 656, 463

N.W.2d 332 (1990), and *State v. Schneckloth, supra*, such conflict of interest must be shown to have resulted in counsel's conduct detrimental to the defense. *State v. Wiley*, 232 Neb. 642, 441 N.W.2d 629 (1989); *State v. Williams, supra*. Moreover, the asserted conflict of interest must be actual, rather than speculative or hypothetical, before a conviction can be overturned on the ground of ineffective assistance of counsel. *State v. Carter*, 236 Neb. 656, 463 N.W.2d 332 (1990); *State v. Turner, supra*.

The basis of Marchese's claim is that because his attorney represented the wife as described earlier, his plea was coerced. More specifically, Marchese alleges that because, according to his attorney, the wife would have been called as a State witness and that he was not informed by his then attorney of the potential conflict that would arise from his counsel's cross-examination of the wife if the matter proceeded to trial, his plea was not freely given.

Whether the wife could or would have actually testified is unimportant if Marchese had been told by his attorney that she would do so. Obviously, if the case went to trial, the wife's anticipated testimony that Marchese set her dresses on fire could be damaging to Marchese if he himself chose not to testify.

Equally bothersome is the fact that Marchese's attorney chose to overlook that he was professionally charged to assist Marchese in his case and yet had a concurrent obligation to professionally assist Marchese's wife.

This is not a situation where there is clearly no possibility of antagonistic defenses and the court is assured that the interests of the witness and the defendant both represented by the same attorney are not conflicting. See *People v. Kloiber*, 95 Ill. App. 3d 1061, 420 N.E.2d 870 (1981). Rather, in the absence of an evidentiary hearing, we cannot know if the representation of both clients was antagonistic to one another or if the advice given to Marchese was tainted in fact by the attorney's conflict in representing Marchese and the wife.

It is not hard to perceive, however, that Marchese's attorney, when discussing his client's options prior to Marchese's entering his plea, would have been placed in a compromising position.

The attorney would be faced at trial with, on the one hand, attempting to destroy the wife's credibility while not using anything gained from the attorney-client relationship in attempting to do so and, on the other hand, treating her with the loyalty due a client.

While it is true we have suggested that in making a determination of whether a conflict of interest adversely affected a lawyer's performance we may consider whether the defendant objected to the joint representation, we have also discussed the trial court's responsibility to take such measures as may be appropriate to protect each defendant's right to counsel in cases involving joint and multiple representation of criminal defendants. We have stressed as well that the trial court should inquire in great detail regarding a defendant's understanding of his attorney's possible conflict of interest and potential perils, bearing in mind that most defendants are rarely sophisticated enough to evaluate potential conflicts which may arise from joint and multiple representation. *State v. Turner*, 218 Neb. 125, 354 N.W.2d 617 (1984).

In *Cuyler v. Sullivan*, 446 U.S. 335, 348, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980), the U.S. Supreme Court said: "Since a possible conflict inheres in almost every instance of multiple representation, a defendant who objects to multiple representation must have the opportunity to show that potential conflicts impermissibly imperil his right to a fair trial." In light of *Cuyler*, this court has held that a hearing must take place when the requisite " 'special circumstances' " putting the trial court on notice of a possible conflict of interest arise. *State v. Hudson and Maeberry*, 208 Neb. 649, 655, 305 N.W.2d 359, 363 (1981). Such special circumstances arose in *Hudson and Maeberry* where the trial court, aware of a divergence between respective roles played by the defendants in the alleged crime requiring an aider and abettor instruction, should have conducted inquiry into the possible conflict of the defendants' interests.

Moreover, in *State v. Williams*, 218 Neb. 618, 358 N.W.2d 195 (1984), we required the trial court to hold an evidentiary hearing because the defendant had alleged several questions regarding a possible conflict of interest. See, also, *State v.*

Svoboda, 199 Neb. 452, 259 N.W.2d 609 (1977) (where defendant in motion for postconviction relief alleged misrepresentation and ineffective assistance of counsel, allegations, if true, constituted denial or infringement of defendant's constitutional rights, and thus district court should have granted evidentiary hearing).

An evidentiary hearing on a motion for postconviction relief 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. Bowen*, 244 Neb. 204, 505 N.W.2d 682 (1993); *State v. Victor*, 242 Neb. 306, 494 N.W.2d 565 (1993), *aff'd* ____ U.S. ____, 114 S. Ct. 1239, 127 L. Ed. 2d 583 (1994).

Marchese's claim that his plea was involuntary because he received ineffective assistance of counsel resulting from his attorney's conflict of interest raises a factual dispute requiring the court to grant an evidentiary hearing. See *State v. Waterman*, 215 Neb. 768, 340 N.W.2d 438 (1983) (evidentiary hearing must be granted on petition for postconviction relief when facts alleged will justify relief, if true, or when factual dispute arises as to whether constitutional right is being denied).

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

BOSLAUGH, J., participating on briefs.

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